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**ICC & ICL Programme
Discussion Paper Series**

Provisional release, release at advanced stages of proceedings, and final release at international criminal courts and tribunals

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About the Programme

The International Bar Association (IBA) commenced its International Criminal Court (ICC) Programme in 2005.

The Programme monitors issues related to fairness and equality of arms at the ICC and other Hague-based war crimes tribunals, and encourages the legal community to engage with the work of these courts. The IBA's work includes the thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues that could potentially affect the rights of defendants, impartiality of proceedings and development of international justice.

The IBA's ICC and International Criminal Law (ICL) Programme acts as an interface between the courts and global legal community. As such, special focus is placed on monitoring emerging issues of particular relevance to lawyers, and collaborating with key partners on specific activities to increase the engagement of the legal community on ICC and ICL issues.

Programme information is disseminated through regular reports, expert discussions, workshops and expert legal analysis on issues relevant to our mandate.

Methodology

The IBA's monitoring work and research is complemented by consultations with key legal professionals, including court officials, academics and legal researchers, non-governmental organisations, individual counsel and diplomatic representatives.

This paper forms part of the ICC & ICL Programme's Discussion Paper series, and presents the Programme's analysis on an ICL theme or topic relevant to the mandate. It reflects the IBA's monitoring of developments and jurisprudence up to 1 August 2019.

The Discussion Paper was researched, written and reviewed by the legal staff of the IBA's ICC & ICL Programme: Judy Mionki, Programme Researcher, and Kate Orlovsky, Programme Director.

IBA interns Rafael Gomez Campo, Florencia Gavagna, Esther Grant and Aditi Pradhan provided invaluable research assistance. The paper was further reviewed by senior-level IBA officials, including IBA Executive Director Dr Mark Ellis and senior lawyers with relevant expertise.

The IBA expresses its gratitude to all persons who graciously participated in consultations for this Discussion Paper.

List of acronyms and abbreviations

ASP	Assembly of States Parties
CAR	Central African Republic
Commission	European Commission of Human Rights
Court	International Criminal Court
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IBA	International Bar Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL	International criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILDC	International Law in Domestic Courts
IRMCT	International Residual Mechanism for Criminal Tribunals
KSC	Kosovo Specialist Chambers
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations
UNDU	United Nations Detention Unit
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VWU	Victim and Witnesses Unit

Introduction

Fair trial considerations and international criminal courts and tribunals

The concept of a fair trial in international criminal law (ICL) dates as far back as the Nuremberg Tribunal, when the International Law Commission, mandated to formulate the principles of international law, recognised in the Tribunal's Charter that '[a]ny person charged with a crime under international law has the right to a fair trial on the facts and law'.¹ The European Commission of Human Rights has stated that even those imprisoned for 'crimes against the most elementary rights of man' retain 'the guarantee of the rights and freedoms defined in the Convention for the Protection of Human Rights and Fundamental Freedoms'.²

The International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR, respectively) adopted these basic rights of the accused and incorporated them in their statutes. The report of the Secretary-General containing the statute of the ICTY stated that '[i]t is axiomatic that the international tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights [ICCPR]'.³ The result is that the rights of the accused included in the ICTY Statute are an almost verbatim reproduction of Article 14(3) of the ICCPR.⁴

In the discussions for establishing the International Criminal Court (ICC), there was 'virtual unanimity' among delegations at the Rome Conference for the court to adhere to human rights standards in exercising its functions.⁵ Article 21 of the Rome Statute establishes a hierarchy of applicable law for the judges of the ICC to apply when adjudicating cases. It also represents the first codification of the sources of ICL.⁶ Article 21(3) specifically directs the ICC to be consistent with internationally recognised human rights standards in its application and interpretation of the law. In addition to this, the Rome Statute has comprehensive provisions that address the rights of the accused, consistent with internationally recognised human rights. These include Article 66 on the

1 *Report of the International Law Commission to the General Assembly*, Yearbook of the International Law Commission, 1950, vol II, p 375 (Principle V).

2 *Ilse Koch v Federal Republic of Germany*, 8 March 1962, Application No 1270/61, as cited in *Jentsch v Germany*, Application No 2604/65, Report of the Commission, 6 October 1970, p 8.

3 United Nations Security Council (UNSC), *Report of the Secretary-General Pursuant to Para 2 of the Security Council Resolution 808* (1993), para 106.

4 This is found in Art 21(3) of the ICTY Statute, Art 20(4) of the ICTR Statute and Art 19 of the IRMCT Statute.

5 Margaret M deGuzman, 'Article 21: Applicable law' in Otto Triffterer and Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 947.

6 *Ibid*, 935.

right to be presumed innocent and Article 67, which includes the right to be tried without undue delay, as well other rights of the accused modelled on Article 14(3) of the ICCPR.⁷

ICC jurisprudence underscores the importance of interpreting the Rome Statute consistent with human rights standards. The ICC Appeals Chamber has emphasised that ‘[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights’.⁸ Further, the ICC Trial Chamber has held that ‘jurisprudence of the European Court of Human Rights (“European Court”) and the European Commission of Human Rights (“Commission”) is of relevance’.⁹ The ICTR Appeals Chamber had come to the same conclusion regarding human rights jurisprudence, noting:

‘The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authorities which may be of assistance in applying and interpreting the Tribunal’s applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.’¹⁰

Human rights perspectives on detention and release at international criminal courts and tribunals

In light of the explicit relevance of human rights standards to international criminal courts, human rights jurisprudence may provide relevant guidance in relation to the fundamental rights of the accused.

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- 7 See discussion in William A Schabas and Yvonne McDermott, ‘Article 67: Rights of the accused’ in Otto Triffterer and Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 1652–1653. Rome Statute, Art 67 reads in full:
1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
 - (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence;
 - (c) To be tried without undue delay;
 - (d) Subject to Art 63, para 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
 - (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
 - (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - (h) To make an unsworn oral or written statement in his or her defence; and
 - (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
 2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.’
- 8 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-772(AO 4), Judgment on the Appeal of Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, para 37.
- 9 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-51, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, 31 January 2011, para 9. See also ICTR, Prosecutor v *Jean-Bosco Barayagwiza*, where the ICTR Appeals Chamber spoke of the European Court of Human Rights (ECtHR) jurisprudence as a ‘persuasive authority which may be of assistance in applying and interpreting the Tribunal’s applicable law’. Case ICTR-97-19, Decision, 3 November 1999, para 40.
- 10 ICTR, Prosecutor v *Jean-Bosco Barayagwiza*, Case ICTR-97-19-AR72, Decision, 3 November 1999, para 40.

This discussion paper pays particular attention to rights found in various international human rights instruments¹¹ that are relevant to the law and practice of international criminal tribunals, including the rights to liberty, to be presumed innocent and to be tried without undue delay.

According to human rights jurisprudence, the right to liberty is not an absolute right, but there must be strong justification for continued detention. The European Court in *Schiesser v Switzerland* held that release must be determined on the review of all the circumstances, with reference to legal criteria, to justify detention or to order release.¹² In *Shamayev and others v Georgia and Russia*, the Court held that circumstances in which individuals may be lawfully deprived of their liberty ‘must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom’.¹³ In *Ilijkov v Bulgaria*, the European Court found that

‘[a]ny system of mandatory detention on remand is *per se* incompatible with article 5 & 3 of the convention... where the law provides for a presumption in respect of factors relevant to the grounds for continued detention... the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated’.¹⁴

This right then acts as security against unlawful arrest and detention.¹⁵

The European Court is clear on its deference for the presumption of innocence and the right to be tried without undue delay. It held that with due regard to, *inter alia*, the principle of presumption of innocence, the detention of an accused person pending trial should not exceed a reasonable time.¹⁶ Further, it has held:

‘The persistence of reasonable suspicion that the person arrested has committed an offence is a *condition sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty.’¹⁷

Human rights standards have been explicitly referenced by international criminal tribunals and the ICC with respect to the length of detention. In *Aleksovski*, the ICTY Trial Chamber spoke of the ‘strictly exceptional, non-binding and subsidiary character of detention prior to sentencing’ provided for in the ICCPR, stating that:

‘recourse to this measure 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.’¹⁸

11 See, eg, Arts 9 and 14 of the ICCPR; Arts 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

12 *Schiesser v Switzerland* App No 7710/76 (ECtHR, 4 December 1979) para 31.

13 *Shamayev and others v Georgia and Russia* App No 36378/02 (ECtHR, 12 April 2005) para 396. See also *Quinn v France* App No 18580/91 (ECtHR, 22 March 1995) para 42.

14 *Ilijkov v Bulgaria* App No 33977/96 (ECtHR, 26 July 2001) para 84. See also *Idalov v Russia* App No 5826/03 (ECtHR, 22 May 2012) para 140.

15 *Kurt v Turkey* App No 24276/94 (ECtHR, 25 May 1998) para 122.

16 *Mansur v Turkey* App No 16026/90 (ECtHR, 8 June 1995) para 52.

17 *Ibid.*

18 ICTY, Prosecutor v *Zlatko Aleksovski*, Case IT-95-14/1-T, Decision denying a request for provisional release, 23 January 1998, p 4. See also, ICTY, Prosecutor v *Enver Hadžihasanović et al*, Case IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanovic, 19 December 2001, para 7; ICTY, Prosecutor v *Darko Mrdja*, Decision on Darko Mrdja’s Request for Provisional Release, Case IT-02-59-PT, 15 April 2002, para 29.

At the ICC, in *Bemba*, the Single Judge highlighted that ‘one should bear in mind the fundamental principle that deprivation of liberty should be an exception and not a rule. This conclusion also finds support in the jurisprudence of this Court and that of the European Court of Human Rights.’¹⁹ This principle has been reiterated in various other decisions before the court.²⁰ In *Ntaganda*, Judge Ušacka in her dissenting opinion stated that

‘in addition to the right to be presumed innocent until proven guilty, the human right to personal liberty, the right to not be detained for an unreasonable period of time and the right to challenge the lawfulness of detention are of particular importance in the context of decision granting or denying the release of a person being prosecuted’.²¹

And more recently, in *Gbagbo*, the Appeals Chamber reiterated the Trial Chamber’s position that ‘the measure of detention is and must remain exceptional’.²²

The central question on the applicability of internationally recognised human rights to international justice mechanisms is whether the particular context in which they operate ‘warrants a re-interpretation of the existing corpus of human rights law’.²³ Göran Sluiter cautions against this approach, noting, ‘the harmful tendency that this so-called re-interpretation of the human rights corpus in light of the unique character and circumstances of international criminal tribunals practically by definition results in reduced protection, and always favours the interests of prosecution and/or victims over those of the accused’.²⁴

The practice of international criminal courts and tribunals thus raises a number of questions about how consistently human rights standards are applied. Human rights frameworks provide that detention should be the exception, not the norm, and any system of mandatory detention is *per se* incompatible with the statutes of the international courts. It should then follow that a defendant should be able to obtain pre-conviction release unless cogent reasons exist for denying release. However, as this discussion paper shows, pre-conviction release is not common and has become subject to a number of other considerations and factors. These considerations and factors include the gravity of the crimes, the increased motivation for absconding arising from the possibility of lengthy sentences, and the risk of witness interference and obstruction of justice, as well as the risk of continued commission of crimes. This is compounded by the lack of a police force and reliance on states to execute arrest warrants, detain suspects and monitor compliance with conditions on release.

As Judge Robinson noted, ‘[i]t is to be expected that adjustments may have to be made at the international level in the application of norms which are more usually applied at the municipal

19 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-321, Decision on Application for Interim Release, 16 December 2006, para 31; Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-403, Decision on Application for Interim Release, 14 April 2009, para 36.

20 See ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-330, Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, 18 March 2008, pp 6–7; ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-426, Decision on the Conditions of the Pre-Trial Detention of Germain Katanga, 21 April 2008, p 6; ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-163, Decision on the ‘Defence Request for Interim Release’, 19 May 2011, para 33; ICC, Prosecutor v *Bosco Ntaganda*, ICC-01/04-02/06-284, Second Decision on Bosco Ntaganda’s Interim Release, 17 March 2014, para 24.

21 ICC, Prosecutor v *Bosco Ntaganda*, ICC-01/04-02/06-271-Anx1, Dissenting opinion of Judge Ušacka, Judgment on the appeal of Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled ‘Decision on the Defence’s Application for Interim Release’, 5 March 2014, para 4.

22 ICC, Prosecutor v *Laurent Gbagbo*, ICC-02/11-01/15 OA14, Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81 (3) (c) (i) of the Statute, 1 February 2019, para 50.

23 Göran Sluiter, ‘Human Rights Protection in the ICC Pre-trial phase’ in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 459, 460–461.

24 *Ibid.*, 461.

level'.²⁵ However, 'care must be taken lest these adjustments go so far that their effect is to nullify the rights of an accused person under customary international law'.²⁶ In outlining the leading and most recent jurisprudence on release, this discussion paper seeks to identify areas that could be strengthened in order to ensure that the rights of the accused are respected.

The central importance of state cooperation

The legal frameworks of international criminal courts and tribunals, including the ICTY, ICTR and ICC, create state obligations to cooperate with these courts.²⁷ A specific set of cooperation needs, namely, witness relocation, interim and final release of persons, and enforcement of sentences, require states to temporarily or permanently allow individuals to be imprisoned or released in the state. At the ICC, such cooperation needs are addressed through 'framework' agreements concluded on a voluntary basis between states and the ICC, with additional discussions and negotiations on a case-by-case basis when specific cooperation needs arise. Other tribunals, including the ICTY and ICTR, and their successor, the International Residual Mechanism for Criminal Tribunals (IRMCT), also require voluntary cooperation for such functions, and address them through separately concluded agreements with states. The voluntary nature of this form of cooperation sets up a potential tension, in that low levels of state cooperation for provisional, conditional and final release can keep individuals *de facto* detained, contrary to their individual and statutory rights.

As noted in this discussion paper, state cooperation is a factor that may be considered by judges in determining provisional release and conditions on release. Rule 65(B) of the ICTR and ICTY's Rules of Procedure and Evidence (RPE) gives trial chambers the power to grant provisional release at any stage of the proceedings prior to the rendering of the final judgment. However, release can only be granted after, *inter alia*, giving the host country and the country to which the accused seeks to be released the opportunity to be heard. If released, an accused would be under the jurisdiction of the receiving state and the tribunals would rely on that state to ensure the accused's return to the tribunal. The former Yugoslav states were forthcoming with their guarantees, which led to provisional release being granted at the ICTY. However, it has been suggested that provisional release was not granted at the ICTR largely due to the absence of any state guarantees.²⁸ In *Ndindiliyimana*, for example, the Trial Chamber denied provisional release due to the lack of state guarantees.²⁹

At the ICC, Rule 119(3) of the RPE and Regulation 51 of the Regulations of the ICC both require the pre-trial chamber to seek observations from states prior to granting provisional release. In *Bemba*, the

25 ICTY, Prosecutor v *Momčilo Krajišnik*, Case IT-00-39&40-PT, Dissenting Opinion of Judge Robinson, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para 10.

26 *Ibid.* See also the need to balance the quest for justice and the fundamental rights of the accused in ICTY, Prosecutor v *Fatmir Limaj et al*, Case IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, paras 8–13; ICTY, Prosecutor v *Enver Hadžihasanović et al*, Case IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, 19 December 2001, para 7.

27 See UNSC Res 827 (1993) S/RES/827, para 4; UNSC Res 955 (1994) S/RES/955, para 2. See also Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (Rome Statute) Part 9; ICC Rules of Procedure and Evidence, (ICC RPE) c 11; ICC Regulations of the Court, ICC-BD/01-01-04 (26 May 2004) (Regulations of the Court) c 7.

28 Karel de Meester and others, 'Investigation, Coercive Measures, Arrest, and Surrender' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013) 171, 124–125. Of note, however, is that the IRMCT has granted provisional release to the accused in the contempt case of Prosecutor v *Maximilien Turinabo et al*, without specific guarantees from the Government of Rwanda. See, eg, IRMCT, Prosecutor v *Maximilien Turinabo et al*, Case MICT-18-116-PT, Decision on Maximilien Turinabo's Motion for Provisional Release, 29 March 2019; IRMCT, Prosecutor v *Maximilien Turinabo et al*, Case MICT-18-116-PT, Decision on Registrar's Submission in Relation to Decision on Provisional Release of Marie Rose Fatuma, 15 August 2019.

29 ICTR, Prosecutor v *Augustin Ndindiliyimana et al*, Case ICTR-2000-56-1, Decision on Augustin Ndindiliyimana's Emergency Motion for Temporary Provisional Release, 11 November 2003.

Appeals Chamber held that it is necessary to identify a state willing to accept the person concerned, as well as enforce related conditions. Invoking Rule 119(3), the Appeals Chamber concluded, that ‘a state willing and able to accept the person concerned ought to be identified prior to a decision on conditional release’.³⁰ Essentially, a state guarantee, when deemed credible, would hold considerable weight in an application for provisional release as it is seen as a factor mitigating the risk of flight.

A state guarantee is equally important at advanced stages of proceedings. The legal frameworks of the ICTY, ICTR and ICC provide, as a general rule, that an acquitted person shall be released immediately.³¹ However, a number of factors are considered when assessing the need for further detention. This includes the risk that an accused may abscond during the appeal proceedings. A state guarantee then acts as a factor mitigating this risk, and in particular, a state willing to enforce conditions on release. In 2019, developments in the *Gbagbo and Blé Goudé* case highlighted that without sufficient cooperation, there remain real challenges for upholding the rights of persons tried at the ICC, and logistical problems for the court and the Netherlands as the Host State of the ICC. Following Trial Chamber I’s acquittal of Mr Gbagbo and Mr Blé Goudé in a ‘no case to answer’ proceeding at the end of the prosecution case, conditional release was ordered for both pending appeal. However, only Mr Gbagbo was able to be released to Belgium,³² and Mr Blé Goudé remained under the supervision of the ICC in the Netherlands, without a state ready to accept him.³³

While the ICC and its Assembly of States Parties (ASP) have continued to call for increased voluntary cooperation for the interim release and relocation of acquitted persons, the number of such cooperation agreements remains extremely low, with only two states having signed framework agreements for provisional release (Belgium and Argentina) and only one (Argentina) having signed an agreement on final release.³⁴

Bringing individuals before international criminal courts and tribunals has long-term implications, even if they are not eventually convicted. As articulated by Joris van Wijk and Barbora Holá:

‘The vast majority of individuals tried by [international criminal tribunals] are detained during trial in a country in which the respective court is located. After an acquittal, returning to the country of origin may not be an option as long as it is ruled by their former adversaries with a questionable human rights track record. The serious nature of the alleged crimes allows third countries’ governments to exclude them from refugee protection on the basis of Article 1(f) of the Refugee Convention. In addition, having been accused of committing international crimes in itself carries a stigma. The widely publicized international trials and at times the continuous

30 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-631-Red, 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, para 106.

31 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, UN Doc IT/32 (adopted 11 February 1994) (ICTYRPE) and International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Rules of Procedure and Evidence, UN Doc ITR/3 (adopted 29 June 1995, revised 13 May 2015) (ICTR RPE) Rule 99; Rome Statute, Art 81(3)(c).

32 ‘Ivory Coast ex-president Gbagbo “released under conditions in Belgium”’ *France24* (5 February 2019).

33 Vincent Duhem, ‘Côte d’Ivoire: Charles Blé Goudé n’a pas encore trouvé de pays d’accueil’ *JeuneAfrique* (21 January 2019).

34 ICC Assembly of State Parties, ‘Strengthening the International Criminal Court and the Assembly of States Parties’ (14 December 2007) Resolution ICC-ASP/6/Res.2, para 59; ‘IBA Hague Office welcomes the first International Criminal Court agreement on the release of persons after acquittal’ (International Bar Association, 17 July 2018) www.ibanet.org/Article/NewDetail.aspx?ArticleUid=b01f4797-b032-4ce3-a2c4-151176418fbd accessed 21 August 2019.

negative propaganda make the acquitted persons notorious individuals (allegedly) involved in gross human rights violations. Governments of third countries are hesitant to openly host such individuals. This would arguably not win votes from their electorates and could potentially worsen the relationship with the country of origin of the acquitted persons and cause negative reactions from the locally-based victims' groups. Although not found guilty, many persons acquitted by the [international criminal tribunals] can, as a consequence, be considered as "international pariahs".³⁵

To date, the most prominent of these situations has been that of persons who have been acquitted or completed their sentences from the ICTR, and who remain in a safe house in Tanzania, in the custody and at the cost of the IRMCT. These individuals are no longer guaranteed legal representation at the cost of the tribunal, have no official legal status in Tanzania and have limited freedom of movement, no legal ability to work and no financial means to facilitate family contact.³⁶ The President of the IRMCT recently informed the United Nations Security Council (UNSC) that the situation, and in particular the inability to come to any agreement for a state to take these individuals, had reached the level of 'a humanitarian crisis that profoundly affects the fundamental rights' of these individuals.³⁷

The determination of how states cooperate with international courts is based on a number of factors, including the relevant provisions of domestic law, and the context and details of the specific case. Individual situations may also engage questions of refugee and asylum law. Article 1F of the 1951 Convention Relating to the Status of Refugees states that the provisions of the convention 'shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes'.³⁸

This threshold of 'serious reasons to consider' is considerably lower than the standard of proof required in criminal proceedings, that is, 'beyond reasonable doubt'. Consequently, an indictment by an international criminal court or tribunal alone is enough to trigger the exclusion clause found in Article 1F, notwithstanding that some indictments result in acquittal. Another barrier to voluntary cooperation can be found in domestic legislation. For example, Canada's policy, supported by its War Crimes Program, to, *inter alia*, 'deny safe haven to suspected perpetrators of war crimes, crimes against humanity or genocide'.³⁹ As such, the questions that arise can be complex. While there have been initiatives to increase understanding and share technical information, as well as suggestions for tools to improve cooperation on a domestic level, more information could be gathered specifically relating to cooperation and release.⁴⁰

35 Joris van Wijk and Barbora Holá, 'Acquittals in International Criminal Justice: Pyrrhic Victories?' (2017) 30(1) *Leiden Journal of International Law* 243, 251.

36 See 'Acquitted' (*Center for International Criminal Justice: When Justice is Done*, 2019) <http://whenjusticeisdone.org/index.php/32-acquitted> accessed 5 August 2019.

37 UNSC, Letter dated 20 May 2019 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, (S/2019/417) 20 May 2019, paras 104–106.

38 A total of 145 countries are States Parties to the Refugee Convention.

39 'War Crimes Program' (Canadian Department of Justice, 24 October 2016) www.justice.gc.ca/eng/cj-pp/wc-cdg/prog.html accessed 4 July 2019.

40 See ICC Assembly of State Parties (see n 34 above); see also Gérard Dive and Julie de Hults, 'A State's Experience of Cooperation with the International Criminal Court: The Case of Belgium' in Olympia Bekou and Daley J Birkett (eds), *Cooperation and the International Criminal Court* (Brill-Nijhoff 2016) 269, 290–294.

Further, there are other residual functions that courts may have to exercise together with states following conviction, acquittal, and during and after enforcement of sentence. For example, trials in domestic jurisdictions following approval by an international court will require significant attention. This has been demonstrated in *Katanga*, where questions about fair trial rights and the extent to which the ICC can be involved in domestic trials have been raised.⁴¹ In addition, a number of cases at the ICTY, ICTR and ICC have raised issues regarding compensation for persons who have been tried and acquitted, and in other limited contexts. Most recently at the ICC, the *Bemba* case has raised questions surrounding the issue of compensation following acquittal, and has also highlighted issues with courts and states seizing and freezing assets of individuals charged by international courts and tribunals.⁴² Many of these issues require further examination and resolution.

This discussion paper examines selected cases at the ICTR, ICTY and ICC to explore the theory and practice of these courts in relation to provisional release, release at advanced stages of proceedings⁴³ and final release. In particular, the paper examines these courts' legal frameworks and the context within which release may occur. Chapter 1 looks at the legal frameworks pertaining to provisional release pending trial and during trial, including the various contexts within which provisional release may be granted, and other factors considered in provisional release determinations. Chapter 2 addresses release during advanced stages of proceedings within the contexts of a conviction and an acquittal. Chapter 3 examines final release, including early release and the practice of setting conditions on early release, as well as post-sentence and post-acquittal issues. Finally, Chapter 4 focuses on future considerations, with particular attention to the ICC, as the only permanent international criminal court.

41 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3679, Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016, para 26; ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3821-Red, Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to article 108(1) of the Rome Statute"', 26 June 2019, paras 27–54.

42 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3673-Red2, Second Public Redacted Version of 'Mr. Bemba's claim for compensation and damages', 19 March 2019.

43 For the purposes of this report, 'advanced stages of proceedings' refers to: the end of the prosecution case; during appeal; awaiting transfer to enforcement state; and after an acquittal. See further c 2.

Chapter 1: Provisional release (pre-trial and trial)

Provisional release is a corollary of the presumption of innocence and the right to liberty. These are provisions well embedded in human rights instruments, as well as in the jurisprudence developed thereunder. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) explicitly states that '[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement'. Indeed, presumption of innocence may manifest itself in the right of an accused to apply for provisional release pending trial, 'subject to exceptional circumstances in which preventative detention may be ordered'.⁴⁴

The statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR, respectively) contain no provisions for interim release. Some reasons have been advanced for this omission, primarily relating to the gravity of the crimes charged.⁴⁵ The eventual adoption of Rule 65 on interim release by the ICTY and ICTR addressed what had been a marked concern for various commentators.⁴⁶ Further, this addition conformed with the standards set by various human rights instruments.⁴⁷ In contrast to the ICTY and ICTR Statutes, the Rome Statute of the International Criminal Court (ICC) included specific provisions on interim release, in both Article 59, which deals with interim release by the custodial state, and Article 60, which deals with interim release by the pre-trial chamber. This chapter will explore these legal frameworks concerning pre-trial release, as well as the specific contexts within which provisional release may be granted during trial.

I. Legal frameworks and context

ICTY and ICTR

Provisional release at the ICTY and ICTR is regulated by Rule 65 of the Rules of Procedure and Evidence (RPE). Prior to a 1999 amendment, an accused at the ICTY had to show, in addition to the other criteria present in Rule 65(B), the existence of 'exceptional circumstances' to be granted provisional release. The provision read: 'Release may be ordered by a Trial Chamber *only in exceptional circumstances*, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person' [emphasis author's own].⁴⁸

44 Schabas and McDermott (see n 7 above) 1636.

45 Other reasons given include the possible dangers to the community, particularly victims and witnesses, if the accused is not detained; the distinct risk that the 'accused would flee to avoid the possibility of a lengthy prison sentence in the event of a conviction; the difficulties that may be involved in locating and arresting the person for a second time given the possibilities of modern transportation; and the absence of any provision for continuing the trial in the absence of the accused'. Virginia Morris and Michael P Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, vol 1 (Transnational Publishers 1995) 238. See also Virginia Morris and Michael P Scharf, *The International Criminal Tribunal for Rwanda*, vol 1 (Transnational Publishers 1998) 531; Karim A A Khan, 'Article 60: Initial Proceedings before the Court' in Otto Triffterer and Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 1472, 1473.

46 See Karim A A Khan, 'Article 60: Initial Proceedings before the Court' in Otto Triffterer and Kai Ambos (eds) *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 1472, 1473 fn 4.

47 *Ibid*, 1473.

48 ICTYRPE Rule 65(b). Prior to amendment UN Doc IT/32/Rev 17 (7 December 1999).

The required proof of exceptional circumstances was a divergence from recognised international standards,⁴⁹ to which the ICTY Trial Chamber in *Delalić* held:

‘The Trial Chamber is cognizant that the international standards view pre-trial detention, in general, as the exception rather than the rule... However, both the shifting of the burden to the accused and the requirement that he show exceptional circumstances to qualify for provisional release are justified by the extreme gravity of the offences with which persons before the International Tribunal are charged and the unique circumstances under which the tribunal operates.’⁵⁰

Another major concern of the ICTY was the risk of flight and the insufficient guarantees offered by states. In *Kovačević*, for example, the Trial Chamber found the assurances given by the Republika Srpska weightless as it had not arrested any of the 48 persons publicly indicted by the tribunal and believed to be resident in that country.⁵¹

Consequently, provisional release was granted only in cases involving serious health conditions of the accused, or the death or serious illness of a close family member.⁵² In 1999, an amendment to the ICTY RPE removed the ‘exceptional circumstances’ language, resulting in a noticeable change in how provisional release applications were handled. The same amendment was applied to the ICTR RPE in 2003 but did not affect any change as provisional release was never granted at the ICTR before or after the amendment.⁵³

At the ICTY, provisional release is not restricted to pre-trial. In *Aleksovski*, the Trial Chamber allowed a defence application for provisional release, stating that provisional release may be presented ‘throughout the duration of the preventive detention and until such time as the final decision has been taken’.⁵⁴ The Appeals Chamber also ruled that Rule 65 applied to all stages of the proceedings.⁵⁵ In 2011, the language of Rule 65(B) was changed to encompass trial proceedings:⁵⁶

‘Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgment by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will

49 See, eg, ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Art 9(3): ‘Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. *It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment*’ [emphasis author’s own].

50 ICTY, Prosecutor v *Zejnir Delalić et al*, Case IT-96-21-T, Decision of Motion for Provisional Release Filed by the Accused Zejnir Delalić, 25 September 1996, para 19.

51 ICTY, Prosecutor v *Simo Drljača and Milan Kovačević*, Case IT-97-24-PT, Decision on Defence Motion for Provisional Release, 20 January 1998, paras 26 and 27. See also ICTY, Prosecutor v *Momčilo Krajišnik et al*, Case IT-00-39 & 40-PT, Decision on Mr Momčilo Krajišnik’s Notice of Motion for Provisional Release, 8 October 2001, para 18.

52 See ICTY, Prosecutor v *Dario Kordić and Mario Čerkez*, Case IT-95-14/2-T, Order on Motion of the Accused Mario Čerkez for Provisional Release, 22 September 1999; ICTY, Prosecutor v *Milan Simić*, Case IT-95-9-PT, Decision on Provisional Release of the Accused, 26 March 1998; ICTY, Prosecutor v *Mirjan Kupreškić et al*, Case IT-95-16-T, Decision on the Motion of Defence Counsel for Drago Josipović, 6 May 1999; ICTY, Prosecutor v *Dorđe Đukić*, Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996.

53 Prior to the amendment, the Defence of several accused before the ICTR argued that because the proof of exceptional circumstances was no longer required before the ICTY, such should also be the case before the ICTR. This argument was not accepted by the judges. See, eg, ICTR, Prosecutor v *Elie Ndayambaje*, Case ICTR-98-42-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 October 2002, para 20. See also ICTR, Prosecutor v *Innocent Sagahutu*, Case ICTR-00-56-I, Decision on Leave to Appeal against the Refusal to Grant Provisional Release, 26 March 2003. After the amendment, the ICTR maintained the same practice where no provisional release was granted.

54 ICTY, Prosecutor v *Zlatko Aleksovski*, Case IT-95-14/I-T, Decision Denying a Request for Provisional Release, 23 January 1998; ICTY Press Release (28 January 1998) CC/PIO/288-E www.icty.org/en/sid/7698 accessed 5 April 2019.

55 ICTY, Prosecutor v *Milan Milutinović*, Case IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, 14 December 2006, paras 5–10.

56 It should be noted that this additional language was added only to the ICTY Rule 65(B) and not the ICTR.

appear for trial and, if released, will not pose a danger to any victim, witness or other person. *The existence of sufficiently compelling humanitarian grounds may be considered in granting such release* [emphasis author's own].⁵⁷

The burden of proof, however, still rests on the accused. The ICTY Trial Chamber has held that Rule 65(B) does not place the burden of proof on the prosecution,⁵⁸ and that it is up to the accused to prove that he/she will appear for trial and will not pose a danger to witnesses, victims or other persons.⁵⁹ These conditions are conjunctive in nature.⁶⁰ The accused must prove both conditions and if the Trial Chamber finds that one condition has not been met, then it need not consider the other and provisional release must be denied.⁶¹ According to the Trial Chamber, the tribunal's lack of power to execute its own arrest warrants and its reliance on local or international authorities to effect arrests means that an applicant for provisional release must satisfy the chamber that he/she will appear for trial.⁶² While this is a substantial burden placed on the accused, it should be noted that the burden is discharged not on proof beyond reasonable doubt, but on a lower standard.⁶³ The Appeals Chamber has confirmed the Trial Chamber's position,⁶⁴ but has in some instances requested that the prosecution present evidence that the accused poses a danger, which then the defence must refute.⁶⁵ In addition, provisional release requires submissions and assurances of the host country and state to which the accused seeks to be released.⁶⁶

However, even if the accused has fully discharged his or her burden in relation to Rule 65(B), that is, has sufficiently proven that he/she will appear for trial and will not pose a danger to witnesses, victims or other persons, the chamber retains discretion on whether to grant provisional release.⁶⁷ This applies even if the prosecution does not object to the application for release.⁶⁸ The ICTY Trial

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- 57 ICTYRPE, Rule 65(B). This is in reference to the ICTY RPE only. The ICTR language differs: 'Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person'. ICTR RPE, Rule 65(B).
- 58 ICTY, Prosecutor v *Fatmir Limaj et al*, Case IT-03-66-PT, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para 40; ICTY, Prosecutor v *Jovica Stanišić and Franko Simatović*, Case IT-03-69-PT, Decision on Provisional Release, 28 July 2004, para 14.
- 59 ICTY, Prosecutor v *Ramush Haradinaj et al*, Case IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para 41.
- 60 ICTR, Prosecutor v *Hormisdas Nsengimana*, Case ICTR-01-69-I, Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release, 11 July 2005, para 17; Prosecutor v *Zejnir Delalić et al*, Case IT-96-21, Decision on Motion for Provisional Release, 25 September 1996, para 1.
- 61 ICTY, Prosecutor v *Ljube Bošković and Johan Tarčulovski*, Case IT-04-82-AR65, Decision on Ljube Bošković's Interlocutory Appeal on Provisional Release, 28 September 2005, para 24 in which the Appeals Chamber upheld the Trial Chamber's findings that the Appellant's release would pose a significant risk of flight and thus it was not necessary for the Trial Chamber to consider whether the Appellant would also pose a danger to others in denying him provisional release. See also ICTY, Prosecutor v *Mico Stanišić*, Case IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal on Mico Stanišić's Provisional Release, 17 October 2005, para 7; ICTY, Prosecutor v *Ramush Haradinaj et al*, Case IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006, para 6.
- 62 ICTY, Prosecutor v *Radoslav Brđanin and Momir Talić*, Case IT-99-36-PT, Decision on Motion by Momir Talić for Provisional Release, 28 March 2001, para 18; Prosecutor v *Zdravko Tolimir et al*, Case IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005, para 8; ICTY, Prosecutor v *Miodrag Jokić*, Case IT-01-42-T, Order on Miodrag Jokić's Motion for Provisional Release, 20 February 2002, para 23.
- 63 ICTY, Prosecutor v *Jovica Stanišić*, Case IT-03-69-PT, Decision on Provisional Release, 28 July 2004, para 14.
- 64 ICTY, Prosecutor v *Milan Martić*, Case IT-04-84-AR65.1, Decision on Application for Leave to Appeal, 18 November 2002, para 3.
- 65 ICTY, Prosecutor v *Ramush Haradinaj et al*, Case IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para 41; ICTY, Prosecutor v *Mičo Stanišić*, Case IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal on Mičo Stanišić's Provisional Release, 17 October 2005, para 27.
- 66 See, eg, ICTR, Prosecutor v *Hormisdas Nsengimana*, Case ICTR-01-69-I, Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release, 11 July 2005, para 18.
- 67 ICTY, Prosecutor v *Ljube Bošković and Johan Tarčulovski*, Case IT-04-82-AR65, Decision on Ljube Bošković's Interlocutory Appeal on Provisional Release, 28 September 2005, para 28; ICTY, Prosecutor v *Ramush Haradinaj et al*, Case IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para 27.
- 68 ICTY, Prosecutor v *Miodrag Jokić*, Case IT-01-42-T, Order on Miodrag Jokić's Motion for Provisional Release, 20 February 2002, para 21.

Chamber in *Jokić* held that there might be circumstances unrelated to absconding and obstruction of justice which the Chamber may take into account.⁶⁹ For example, ‘the destruction of documentary evidence; the effacement of traces of alleged crimes; and potential conspiracy with co-accused who are at large, as well as factors such as the proximity of a prospective judgment date or start of the trial which may all weigh against a decision to release’.⁷⁰ The Trial Chamber added that the public interest may also require the detention of the accused under certain circumstances, if there exist serious reasons to believe that he/she would commit further serious offences.⁷¹

The role of the appeals chamber with regard to requests for provisional release is to determine only whether the trial chamber has not correctly exercised its discretion in reaching its decision.⁷² This would be in instances where the trial chamber has based its decision on an incorrect interpretation of governing law, a patently incorrect conclusion of fact, or where the decision is so unfair or unreasonable as to constitute an abuse of the trial chamber’s discretion.⁷³ Rule 65(C) states that the trial chamber may impose conditions upon the release of the accused as it may determine appropriate to ensure the presence of the accused for trial and the protection of others.

The ICTY and ICTR did not include a provision for the formal review of the necessity of continued detention. The ICTY Trial Chamber has, however, acted *proprio motu* and invited the parties to make submissions on the possible provisional release of the accused.⁷⁴

ICC

The ICC has taken a different approach to provisional release. In contrast to the statutes of the ICTY and ICTR, the Rome Statute provides specific rules for provisional release.

WARRANT OF ARREST VERSUS SUMMONS TO APPEAR

At the ICC, Article 58(1)(b) provides that a pre-trial chamber may either issue a warrant of arrest or a summons to appear, based on whether an arrest appears necessary:

1. to ensure the person’s appearance at trial;
2. to ensure that the person does not obstruct justice or endanger the investigation or the court proceedings; or
3. where applicable, to prevent the person from continuing with the commission of that crime or a related crime that is within the jurisdiction of the ICC and which arises out of the same circumstances.

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

72 ICTY, Prosecutor v *Milan Milutinović et al*, Case IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, 14 December 2006, para 3.

73 ICTY, Prosecutor v *Mičo Stanišić*, Case IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal on Mičo Stanišić’s Provisional Release, 17 October 2005, para 6; ICTY, Prosecutor v *Milan Milutinović et al*, Case IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, 14 December 2006, para 3.

74 ICTY, Prosecutor v *Vojislav Šešelj*, Case IT-03-67-T, Order inviting the parties to make submissions on possible provisional release of the Accused *Proprio Motu*, 13 June 2014, para 2.

According to Article 58(7), if the pre-trial chamber is satisfied that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. Article 58(7) provides for a compromise, in that it allows a measure less restrictive than detention. An earlier version of the draft Rome Statute provided for the option to issue a warrant for judicial supervision in order to place the suspect under restriction of liberty. The proposal was deleted because the issue of judicial supervision was seen to have been dealt with in Article 60.⁷⁵ A decision to issue a summons is without prejudice to the pre-trial chamber to revisit the finding either *proprio motu* or in response to a request submitted by the Prosecutor.⁷⁶

In *Banda and Jerbo*, the Pre-Trial Chamber issued a summons to appear for Mr Banda, with conditions attached: (1) to refrain from discussing issues related to either the charges forming the basis of the summons or the evidence and information presented by the Prosecutor and considered by the Pre-Trial Chamber; (2) to refrain from making any political statements while within the premises of the ICC, including the location assigned to him; (3) not to leave, without specific permission of the Pre-Trial Chamber and for the whole period of his stay in the Netherlands, the premises of the ICC, including the location assigned to him; and lastly (4) to comply, in any case, with all the instructions of the Registrar for the purposes of his appearance before the ICC.⁷⁷

The Pre-Trial Chamber also issued summonses for Mr Ruto, Mr Kosgey and Mr Sang, concurring with the Prosecutor that there was no indication that they were perceived as flight risks, likely to evade the summonses or refrain from cooperating if summoned to appear.⁷⁸

PROVISIONAL RELEASE PENDING SURRENDER

Rule 57 of the ICTR and ICTYRPE provide that an accused shall be detained by the state upon arrest, and his transfer to the tribunal arranged.⁷⁹ While there is no mention of the possibility for provisional release pending surrender, there have been instances where national courts have granted said release. Mr Wenceslas Munyeshyaka and Mr Laurent Bucyibaruta were both provisionally released by the Paris Court of Appeal pending transfer proceedings to the ICTR.⁸⁰

Unlike the ICTY and ICTR, the Rome Statute provides for interim release pending surrender in Article 59(3).⁸¹ In *Bemba Gombo (Jean-Pierre) v Belgium*, the Belgian court determined that an arrested person can apply for interim release where either he/she has been provisionally arrested, or where he/she has been arrested for the purpose of surrender to the ICC.⁸² This is in line with Article 16

75 Christopher K Halt and Cedric Ryngaert, 'Article 58: Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 1437, 1455.

76 ICC, Prosecutor v *William Samoei Ruto et al*, ICC-01/09-01/11-1, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, para 56.

77 ICC, Prosecutor v *Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-3, Summons to Appear for Abdalla Banda Abakaer Nourain, 27 August 2009, para 20.

78 ICC, Prosecutor v *William Samoei Ruto et al*, ICC-01/09-01/11-1, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, para 56. The chamber went on to issue conditions unlike those given in the *Banda* case, but similar to those iterated in Art 58(1)(b).

79 Rule 57 of the ICTR and ICTYRPE.

80 Paris Court of Appeal, Case 2007/05357, Decision on Request for Release (re: Mr Wenceslas Munyeshyaka), 19 September 2007; Paris Court of Appeal, Case 2007/05296, Decision on Request for Release (re: Mr Laurent Bucyibaruta), 19 September 2007.

81 Rome Statute, Art 59(3). 'The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender'.

82 *Bemba Gombo Jean Pierre v Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18 June 2008, para 4.

paragraph 2 of the Belgian law concerning cooperation with the ICC and international criminal tribunals,⁸³ which is in accordance with Article 59 of the Rome Statute. In considering the application, the Pre-Trial Chamber of Appeal (Kamer van Inbeschuldigingstelling) examined whether there were urgent and exceptional circumstances to justify interim release, as well as whether the necessary safeguards existed to ensure that Belgium could fulfil its duty to surrender the person to the ICC.⁸⁴

Article 59 does not provide a test to determine whether arrest is necessary. However, under Article 59(5), the ICC pre-trial chamber shall be notified of any request for interim release and in turn will make recommendations to the competent authority in the custodial state.⁸⁵ These recommendations must be given full consideration before the decision is rendered. The Pre-Trial Chamber in *Mbarushimana* issued recommendations to the Parquet Général de Paris for the continued detention of Mr Mbarushimana pending transfer to the ICC.⁸⁶ Here, the Pre-Trial Chamber based its decision on three rationales:⁸⁷

1. to ensure appearance at trial;
2. to ensure the person does not interfere with witnesses thus endangering the investigation; and
3. to prevent the person continuing with the commission of that crime.

This is the test provided for by Article 58(1)(b) to prove that the arrest of a person appears necessary. Lastly, if interim release in the custodial state is granted, the pre-trial chamber may request periodic reports on the status of the release.⁸⁸

PROVISIONAL RELEASE PENDING TRIAL AND DURING TRIAL

Article 60 deals with interim release pending trial. Article 60(2) provides a test for the determination of pre-trial release: if the pre-trial chamber is satisfied that the conditions set forth in Article 58, paragraph 1, are met, the person shall continue to be detained.⁸⁹ This marks a substantial difference from the practice of the ICTY and ICTR, where an application for provisional release had no substantive connection to the decision issuing an arrest warrant. At the ICC, provisional release as laid out in Article 60 must be read jointly with Article 58 on which a decision to issue an arrest warrant is made. Additionally, there is no discretion in respect of the conditions, that is, if they are met, detention must be continued, and if not, the person shall be released.⁹⁰

A request for interim release under Article 60(2) gives the accused the first opportunity to be heard with regard to information put forth under Article 58(1)(b). When an arrest warrant is issued, an

83 *Wet betreffende de samenwerking met het Internationaal Strafgerechtshof en de internationale straftribunalen*, 29 March 2004 (BEL) www.etaamb.be/nl/wet-van-29-maart-2004_n2004009246.html accessed 23 July 2019.

84 *Bemba Gombo Jean Pierre v Belgium*, Cass No P 08 0896F, ILDC 1115 (BE 2008), Appeal Judgment, Court of Cassation, 18 June 2008, para 7.

85 See related Rule 117.

86 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-15, Recommendations adressées à la Chambre d'instruction de la Cour d'Appel de Paris en vertu de l'article 59 du Statut de Rome, 18 October 2010.

87 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, paras 47–49.

88 Rome Statute, Art 59(6).

89 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, paras 47–49.

90 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-824 (OA 7), Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Decision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo', 13 February 2007, para 134.

accused is not in a position to challenge any of the information put forth by the prosecution, which is the same information the ICC relies on to issue detention. However, the chamber is obliged to review *de novo* its ruling on detention, which then gives the defence its first opportunity to challenge these grounds.⁹¹ The conditions set forth in Article 58(1) (b) are presented in the alternative, with it being sufficient that only one of the conditions is satisfied.⁹² Despite this being the case, the Pre-Trial Chamber has, in most instances, analysed whether other conditions have been met.⁹³

It should be noted that while Article 60(2) bears the words ‘pending trial’, ICC jurisprudence has shown that persons can seek release at various points across the proceedings.⁹⁴ Article 60(3) states that the pre-trial chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require. This paragraph is related to Rule 118(2), which states that the review must be done at least every 120 days, and may also be done any time on request by the Prosecutor or the person. This was reaffirmed in *Katanga*, where the Pre-Trial Chamber took the view that: ‘even in the absence of a specific obligation, the Single Judge, as the ultimate guarantor of the rights of the Defence, would not be precluded from conducting, when the circumstances so require, a *proprio motu* review to determine whether the conditions for pre-trial detention continue to be met’.⁹⁵

After the trial commences, the trial chamber is no longer obliged to conduct automatic reviews on detention pursuant to Article 60(3).⁹⁶

Article 60(4) provides that a pre-trial chamber may grant provisional release to ensure that an accused is not detained for an unreasonable period prior to trial due to an inexcusable delay by the Prosecutor. This release could be granted with or without conditions and will be discussed in depth later in this chapter.

Lastly, Rule 119 deals with conditional release and provides a non-exhaustive list of conditions which the pre-trial chamber may set to restrict liberty. The Appeals Chamber has held that the examination of conditions of release is discretionary.⁹⁷ It goes on to state that conditional release

91 See discussion on disclosure in relation to applications for interim release in ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-323 OA, Judgment on the appeal of Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’, 16 December 2008, paras 23–40.

92 ICC, Prosecutor v *Abdel Raheem Muhammad Hussein*, ICC-02/05-01/12-Red, Public redacted version of ‘Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein’, 1 March 2012, para 51.

93 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-4, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 7 July 2007, para 63; Prosecutor v *Callixte Mbarushimana*, Case ICC-01/04-01/10-1, Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, para 50; ICC, Prosecutor v *Mathieu Ngudjolo Chui*, Case ICC-01/04-02/12-262, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 7 July 2007, para 66.

94 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-2291, Decision on Bemba’s Application for Release, 12 June 2018, paras 9–11. See also ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1626-Red OA 7, Judgment on the appeal of 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; ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-2151-Red OA 10, Public redacted version – Judgment on the appeal of 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 Jean Pierre Bemba Gombo”’, 5 March 2012; ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-992-Red OA 10, Judgment on the appeal of Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled ‘Decision on Mr Gbagbo’s Detention’, 19 July 2017.

95 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-222, Decision Concerning Pre-Trial Detention of Germain Katanga, 21 February 2008, pp 6–7; ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-330, Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, 18 March 2008, paras 8–9.

96 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-846, Decision on Mr Gbagbo’s Detention, 10 March 2017, para 10.

97 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1626-Red OA 7, Judgment on the appeal of 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.

is possible in two situations: (1) where a chamber, although satisfied that the conditions under Article 58(1)(b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in Article 58(1)(b) exist, but the chamber considers that these can be mitigated by the imposition of certain conditions of release.⁹⁸ On appeal, the appeals chamber will not review the findings of the pre-trial chamber *de novo*; instead, it will intervene in the findings of the pre-trial chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the impugned decision.⁹⁹

II. Comparison of context

Unreasonable length of detention as a basis for provisional release

The ICTY and ICTR legal texts did not provide for the possibility of granting provisional release due to an unreasonable length of detention. Prior to the 1999 amendments to the ICTY RPE, when the exceptional circumstances test was employed, the Trial Chamber in *Delalić* held that the length of pre-trial detention could cause an exceptional circumstance warranting provisional release under Rule 65(B).¹⁰⁰ Referring to European Commission of Human Rights jurisprudence, the ICTY Trial Chamber noted seven factors that should be used in examining potential release under these grounds:¹⁰¹

1. the actual length of detention;
2. the length of detention in relation to the nature of the offence, the penalty prescribed and to be expected in the event of conviction, and national legislation on the deduction of the period of detention from any sentence passed;
3. the material, moral or other effects of detention upon the detained person beyond the normal consequences of detention;
4. the conduct of the accused relating to his or her role in delaying the proceedings and his or her request for release;
5. the difficulties in the investigation of the case, such as its complexity in respect of the facts or the number of witnesses or accused and the need to obtain evidence abroad;
6. the manner in which the investigation was conducted; and
7. the conduct of the judicial authorities.

98 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1626-Red OA 7, Judgment on the appeal of 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.

99 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-631-Red OA 2, 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, para 62.

100 ICTY, Prosecutor v *Zejnir Delalić et al*, Case IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnir Delalić, 25 September 1996, para 26.

101 *Ibid.*

The Trial Chamber went on to adopt these factors, but did not find that the test for unreasonable length of pre-trial detention was met to warrant release of the accused.¹⁰² This ground has similarly been rejected by the ICTY in subsequent practice, never having been accepted as justifying provisional release.¹⁰³ In *Blaškić*, the Trial Chamber held that modifications of conditions of detention brought partial relief of the usual effects of incarceration, and consequently denied provisional release.¹⁰⁴ In *Kovačević*, the Trial Chamber looked at the European Commission of Human Rights and European Court of Human Rights (ECtHR) jurisprudence and found that these courts had each upheld periods of pre-trial detention of over four years, and in light of that, six months did not constitute an exceptional circumstance warranting provisional release.¹⁰⁵

Following the 1999 amendment, the ICTY continued to reject applications for provisional release based on the length of pre-trial detention. In doing so, the Trial Chamber has opined that whether a time limit is appropriate can only be evaluated in light of all the circumstances of the case.¹⁰⁶ However, the Appeals Chamber has noted that ‘actual or likely’ excessive length of pre-trial detention is a consideration for provisional release under Rule 65(B).¹⁰⁷

The ICTR has applied an even stricter standard. It has consistently held that long pre-trial detention does not *per se* constitute good cause for release.¹⁰⁸ Pre-trial detention of more than five years has been found to be within acceptable limits when it results from a general complexity of the proceedings, the number of motions filed by both parties and the additional complexity brought by joinder of trials.¹⁰⁹ Detention of seven years with the foreseeability of additional months or years for the prosecution to complete its case has also been found to be within acceptable limits given the general complexity of the proceedings and the gravity of the offences with which the accused is charged.¹¹⁰ However, the ICTR has acknowledged that if attributable to the tribunal, the long pre-trial detention of the applicant may entail the need for reparation for a violation of their fundamental human rights.¹¹¹ As discussed in Chapter 3, the ICTR Appeals Chamber has ruled in favour of compensation on this ground should the accused be found not guilty, or in the alternative, reduction of sentence should the accused be found guilty.¹¹²

102 *Ibid*, para 30.

103 See, eg, ICTY, Prosecutor v *Zejnul Delalić et al*, Case IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Hazim Delić, 24 October 1996 (detention period of four months); ICTY, Prosecutor v *Tihomir Blaškić*, Case IT-95-14, Order Denying a Motion for Provisional Release, 20 December 1996, pp 6–7 (detention period of less than nine months); ICTY, Prosecutor v *Simo Drljača and Milan Kovačević*, Case IT-97-24-PT, Decision on Defence Motion for Provisional Release, 20 January 1998, para 24 (detention period of six months); ICTY, Prosecutor v *Dario Kordić and Mario Čerkez*, Case IT-95-14/2-PT, Decision on Joint Defence Motion Requesting Provisional Release, 22 March 1999, p 3 (detention period of 15 months); ICTY, Prosecutor v *Momčilo Krajišnik*, Case IT-00-39-40-PT, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, 8 October 2001, para 22 (detention period of 18 months); ICTY, Prosecutor v *Mile Mrkšić*, Case IT-95-13/1-PT, Decision on Mile Mrkšić’s Application for Provisional Release, 24 July 2002, para 50 (detention period of two months).

104 ICTY, Prosecutor v *Tihomir Blaškić*, Case IT-95-14, Order Denying a Motion for Provisional Release, 20 December 1996.

105 ICTY, Prosecutor v *Simo Drljača and Milan Kovačević*, Case IT-97-24-PT, Decision on Defence Motion for Provisional Release, 20 January 1998, para 24.

106 ICTY, Prosecutor v *Mile Mrkšić*, Case IT-95-13/1-PT, Decision on Mile Mrkšić’s Application for Provisional Release, 24 July 2002, para 49.

107 ICTY, Prosecutor v *Ramush Haradinaj et al*, Case IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Interlocutory Appeal Against the Trial Chamber’s Decision Denying his Provisional Release, 9 March 2006, paras 22–23.

108 ICTR, Prosecutor v *Jean Bosco Barayagwiza*, Case ICTR-97-20-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), 31 March 2000, para 74; ICTR, Prosecutor v *Joseph Kanyabashi*, Case ICTR-96-15-A, Decision On Application for Leave to Appeal Filed Under Rule 65(D) of the Rules of Procedure and Evidence, 13 June 2001, p 3; ICTR, Prosecutor v *Élie Ndayambaje*, Case ICTR-96-8-A, Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002, paras 2 and 5.

109 ICTR, Prosecutor v *Joseph Kanyabashi*, Case ICTR-96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001, paras 12–13.

110 ICTR, Prosecutor v *Élie Ndayambaje*, Case ICTR-96-8-A, Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002, para 23.

111 ICTR, Prosecutor v *Joseph Kanyabashi*, Case ICTR-96-15-A, Decision On Application for Leave to Appeal Filed Under Rule 65(D) of the Rules of Procedure and Evidence, 13 June 2001, para 3.

112 ICTR, Prosecutor v *Jean-Bosco Barayagwiza*, Case ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), 31 March 2000.

It should be noted that detention for a ‘substantial period of time’ may amount to a special circumstance within the meaning of Rule 65(I) (iii) of the ICTYRPE. This rule lays the ground for provisional release for a convicted person pending appeal and will be discussed in the next chapter.

At the ICC, the pre-trial chamber employs a two-tier test as laid down by Article 60(4). This provision requires first, that the detention be unreasonable, and second, that it be caused by an inexcusable delay by the Prosecutor.¹¹³ This provision does not stipulate what constitutes an unreasonable period. The Zutphen Draft had suggested that pre-trial detention be limited to a maximum of one year, capable of being extended by a further year (with the leave of the pre-trial chamber or presidency) upon the Prosecutor establishing that he/she would be ready for trial within that additional year and upon good cause being shown for the delay.¹¹⁴ The wording finally agreed upon at the Rome Conference did not stipulate any definitive maximum period for pre-trial detention. As it stands now, it is up to the chamber to determine what constitutes an unreasonable period.

The Appeals Chamber in *Lubanga* has held that the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case.¹¹⁵ It has further held that other factors such as complexity of the case, location and volume of evidence are of importance and should be taken into account.¹¹⁶ Karim Khan, in his commentary on Article 60, opines that the advantage of taking these factors into consideration is that ‘it is conceivable that there may be cases, where even a year’s pre-trial detention may be unwarranted, excessive or unreasonable’.¹¹⁷

In *Bemba et al*, the Pre-Trial Chamber was of the view that the reasonableness of the duration of the detention must be balanced against the statutory penalties applicable to the offences charged, and therefore, the further extension of the period of the pre-trial detention would result in making its duration disproportionate.¹¹⁸

The Pre-Trial Chamber in *Katanga* held that pre-trial detention was not unreasonable as the confirmation hearing had taken place in an expeditious manner.¹¹⁹ Additionally, the Pre-Trial Chamber, following the jurisprudence from the ECtHR,¹²⁰ and the ICTY and ICTR,¹²¹ cited the need to ‘weigh the genuine requirement of public interest against the principle of respect for individual liberty’ as a factor in determining the reasonableness of the period of pre-trial detention.¹²²

113 Rome Statute, Art 60(4).

114 See discussion in Khan (see n 46 above) 1481, fn 51.

115 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-824 OA 7, Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Decision sur la demande de mise en liberte provisoire de Thomas Lubanga Dyilo’, 13 February 2007, para 122.

116 *Ibid*, para 123.

117 See also Khan’s commentary on the advantages of the wording of the statute in Khan (see n 46 above) 1481, fn 51.

118 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-703, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 21 October 2014, p 4.

119 ICC, Prosecutor v *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-702, Review of the ‘Decision on the Conditions of the Pre-Trial Detention of Germain Katanga’, 18 August 2008, pp 11–12.

120 See, eg, *W v Switzerland* App No 14379/88 (ECtHR, 26 January 1993) para 30; *Ilykov v Bulgaria*, App No 33977/96 (ECtHR 26 July 2001) para 84.

121 See, eg, ICTR, Prosecutor v *Ferdinand Nahimana*, Case ICTR-99-52-T, Decision on the Defence’s Motion for the Release or Alternatively Provisional Release of Ferdinand Nahimana: Rule 65 of the Rules of Procedure and Evidence, 5 September 2002, para 10; ICTR, Prosecutor v *Élie Ndayambaje*, Case ICTR-96-8-A, Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002, 10 January 2003, para 27.

122 ICC, Prosecutor v *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-702, Review of the ‘Decision on the Conditions of the Pre-Trial Detention of Germain Katanga’, 18 August 2008, para 12.

Looking at the second tier, the ‘inexcusable delay by the prosecutor’, the Trial Chamber in *Lubanga* held that the failure of the prosecution to fulfil its disclosure obligations and the impact of that failure on the trial date are relevant factors for consideration under this provision.¹²³ However, if the delays are not solely attributable to the prosecution, and are not inexcusable, then the requirements under Article 60(4) will not have been met.¹²⁴

This second tier has been criticised for being tied solely to the Prosecutor.¹²⁵ Jurisprudence from the ICTY and ICTR shows that a delay in proceedings can be caused by other organs of the court. For example, the ICTY Trial Chamber in *Šešelj proprio motu* invited submissions on provisional release following the disqualification of one of the judges from the bench and subsequent appointment of a new judge who needed time to familiarise himself with the record.¹²⁶ It is conceivable that the need to replace a judge could cause a similar ‘inexcusable delay’ at the ICC, in particular as the existing provision for the appointment of an alternate judge has yet to be put into practice.¹²⁷

In *Bemba et al*, the Single Judge ordered the release of four accused, noting that the fact that the duration of the detention of the suspects was not due to the Prosecutor’s inexcusable delay did not relieve the chamber of its ‘distinct and independent obligation... to ensure that a person is not detained for an unreasonable period prior to trial under Article 60(4) of the Statute’.¹²⁸ The Appeals Chamber, however, held that the wording of Article 60(4) of the Statute is unequivocal.¹²⁹ It went on to state that a chamber may also determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecutor, pursuant to Articles 60(2)¹³⁰ and 60(3).¹³¹ Further, the Appeals Chamber found that Articles 60(2) and 60(3) ‘must be interpreted and applied consistently with “internationally recognized human rights”, pursuant to Article 21(3) of the Statute’, making these provisions ‘a proper legal avenue to protect the right to liberty of a person, as well as the right to be tried within a reasonable period of time or to release pending trial’.¹³² In subsequent decisions, the court has evaluated the length of detention within the meaning of Article 60(3).¹³³

123 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-1359, Decision Reviewing the Trial Chamber’s ruling on the Detention of Thomas Lubanga Dyilo in accordance with Rule 118(2), 29 May 2008, para 17.

124 *Ibid*, para 18.

125 See Khan (see n 46 above) 1482 where he speaks of occasions such as insufficiency in the number of judges, lack or insufficiency of court rooms, or budgetary and resource problems.

126 ICTY, Prosecutor v *Vojislav Šešelj*, Case IT-03-67-T, Order Inviting the parties to Make Submissions on Possible Provisional Release of the Accused Proprio Motu, 13 June 2014, para 2.

127 Rome Statute, Art 74(1) and RPE Rule 39.

128 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-703, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 21 October 2014, pp 4–5. It should be noted that due to the ongoing case against Mr Bemba, his release was made subject to the determination to be made by Trial Chamber III in respect of proceedings in Case 01/05-01/08. (ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-798, Decision on ‘Bemba’s Request for provisional release’, 23 January 2015, paras 4–5).

129 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-969, 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, paras 40–42.

130 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-970, 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, para 23.

131 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-969, 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, paras 43–45.

132 *Ibid*, para 43; ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-970, 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, para 23.

133 ICC, Prosecutor v *Dominic Ongwen*, ICC-02/04-01/15-421, Decision on the review of Dominic Ongwen’s detention pursuant to Article 60(3) of the Statute, 23 March 2016, para 7; ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-992-Red, Judgment on the appeal of Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled ‘Decision on Mr Gbagbo’s Detention’, 19 July 2017, paras 75–77; ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1038-Red, Public redacted version of the Decision on Gbagbo’s Detention, 25 September 2017, paras 48–60.

Humanitarian grounds as a basis for provisional release

As noted in this chapter, prior to the removal of the exceptional circumstances threshold in 1999, provisional release was granted in very few occasions at the ICTY.¹³⁴ On all these occasions, the grounds were humanitarian reasons, medical conditions of the accused, or the death or serious illness of a close family member. Even after the 1999 revision, humanitarian grounds remain the most commonly accepted reasoning at the ICTY for granting provisional release,¹³⁵ despite there being no mention of ‘humanitarian grounds’ as a possible basis for release until the term was incorporated in Rule 65(B) of the ICTYRPE in 2011. ICTY jurisprudence has, however, shown that chambers enjoy a measure of discretion when deciding on provisional release on humanitarian grounds.¹³⁶ In some instances, when the two requirements of ICTY Rule 65(B) have not been met, chambers have cited ‘exceptionally compelling humanitarian reasons’ in granting provisional release.¹³⁷

Jurisprudence at the ICTY and ICTR also shows that for a medical condition to rise to the level of compelling humanitarian grounds, it is required that the relevant treatment be unavailable in the host country.¹³⁸ The burden falls on the accused to show that the proposed medical treatment is unavailable in the Netherlands.¹³⁹ When provisional release is premised on health problems of family members, the problems need to be sufficiently serious.¹⁴⁰

The word ‘compelling’ has been used at the ICTY and ICTR to add gravity to the considerations of humanitarian grounds. For example, wishing to exercise the right to vote has also not been accepted as compelling.¹⁴¹ Additionally, ‘compelling humanitarian grounds’ have been applied by the ICTY Trial Chamber as an *ex gratia* consideration in the exercise of its discretion under Rule 65.¹⁴² However, the Appeals Chamber held that, after a *98bis* decision has been rendered,

134 ICTY, Prosecutor v *Dario Kordić and Mario Čerkez*, Case IT-95-14/2-T, Order on Motion of the Accused Mario Čerkez for Provisional Release, 22 September 1999; ICTY, Prosecutor v *Mirjan Kupreškić et al*, Case IT-95-16-T, Decision on the Motion of Defence Counsel for Drago Josipović (Request for Permission to Attend a Funeral), 6 May 1999, p 2 (mother’s funeral); ICTY, Prosecutor v *Blagoje Simić et al*, Case IT-95-9-PT, Decision on Provisional Release of the Accused, 26 March 1998, para 20 (father’s memorial service); ICTY, Prosecutor v *Dorđe Đukić*, Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996, para 4.

135 It is of note that fatigue caused by the length of the trial has not been accepted as a serious enough medical condition to rise to compelling humanitarian grounds. See ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-T, Decision on the Accused Praljak’s Motion for Provisional Release, 1 April 2008, p 8.

136 ICTY, Prosecutor v *Milan Milutinović et al*, Case IT-05-87-T, Decision on Ojdanić Motion for Provisional Release, 10 July 2008, para 17; ICTY, Prosecutor v *Milan Milutinović et al*, Case IT-05-87-T, Decision on Lazarević Motion for Temporary Provisional Release, 26 September 2008, para 8.

137 ICTY, Prosecutor v *Dorđe Đukić*, Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996, para 4.

138 ICTY, Prosecutor v *Jovica Stanišić*, Case IT-03-69-PT, Decision on Provisional Release, 28 July 2004, paras 37–41; ICTY, Prosecutor v *Slobodan Milošević*, Case IT-02-54-T, Decision on Assigned Counsel Request for Provisional Release, 23 February 2006, paras 14–18; ICTR, Prosecutor v *Édouard Karemera et al*, Case ICTR-9844-AR65, Decision on Matthieu Ndirumpatse’s Appeal Against Decision on Remand on Provisional Release, 8 December 2009, para 15; ICTR, Prosecutor v *Georges Rutaganda*, Case ICTR-96-3-T, Decision on the Request Submitted by the Defence, 25 September 1996, pp 2–3; ICTR, Prosecutor v *Jérôme Bicomupaka*, Case ICTR-99-50-T, Decision on the Defence’s Motion for Provisional Release Pursuant to Rule 65 of the Rules, 25 July 2001, paras 22–25.

139 ICTY, Prosecutor v *Vujadin Popović et al*, Case IT-05-88-AR65.8, Decision on Prosecution’s Appeal against Decision on Gvero’s Motion for Provisional Release, 20 July 2009, para 13; ICTY, Prosecutor v *Dragomir Milošević*, Case IT-02-54-T, Decision on Assigned Counsel Request for Provisional Release, 23 February 2006, paras 14–18.

140 ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-T, Decision on the Motion of the Accused Petković for Provisional Release, 31 March 2008, paras 6–7; ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-T, Decision on the Motion for Provisional Release of the Accused Prlić, 7 April 2008, para 5; ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-T, Decision on Second Motion for Provisional Release of the Accused Stojić, 8 April 2008, para 8; ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-T, Decision on the Accused Prlić’s Motion for Provisional Release, 17 July 2008, para 28; ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-T, Decision on Valentin Čorić’s Request for Provisional Release, 2 December 2008, para 34.

141 ICTY, Prosecutor v *Vujadin Popović et al*, Case IT-05-88-T, Decision on Borovčanin’s Motion for Custodial Visit, 17 December 2008, paras 31–33.

142 ICTY, Prosecutor v *Mičo Stanišić and Stojan Župljanin*, Case IT-08-91-T, Decision denying Mičo Stanišić’s Request for Provisional Release during the Break after the Close of the Prosecution Case, 25 February 2011, para 22; see also ICTY, Prosecutor v *Blagoje Simić*, Case IT-95-9-A, Decision on motion of Blagoje Simić pursuant to Rule 65(1) for provisional release for a fixed period to attend memorial services for his father, 21 Oct 2004, para 14.

an accused must show sufficiently compelling humanitarian reasons to justify release.¹⁴³ This additional test was justified as a means to offset the flight risk that would, in the Appeals Chamber's view, increase after a *98bis* decision.¹⁴⁴ In respecting this precedent set by the Appeals Chamber, the Trial Chamber in *Stanišić* denied provisional release despite the accused having fulfilled all the requirements set out in Article 65(B), finding that Mr Stanišić failed to establish compelling humanitarian grounds.¹⁴⁵ The amendment in 2011 clarified this discrepancy by converting the requirement of showing compelling humanitarian grounds 'from a *conditio sine qua non* when granting provisional release at advanced stages of proceedings to a discretionary consideration in granting such release' [emphasis author's own].¹⁴⁶

By contrast, the legal framework of the ICC does not include humanitarian circumstances as an explicit ground for provisional release. However, the ICC has in practice granted provisional release for humanitarian reasons. The Trial Chamber in *Bemba* relied on its inherent powers under Article 64(6)(f) to grant provisional release for humanitarian reasons, in this instance, release to participate in the funerals of his father and stepmother in Belgium.¹⁴⁷ In *Gbagbo*, the Appeals Chamber noted the lack of provisions in the ICC's legal texts for provisional release on medical grounds, specifically the health of the accused.¹⁴⁸ In response to this *lacuna*, the Appeals Chamber addressed ways in which provisional release could be granted on medical grounds. First, and in line with ICTY jurisprudence, the Appeals Chamber was of the view that existing medical conditions could offset the risk of flight.¹⁴⁹ Second, the Appeals Chamber found that the medical condition of the detained person may be a reason for a pre-trial chamber to exercise its discretion to grant interim release with conditions.¹⁵⁰ Despite the fact that the drafters of the Rome Statute did not codify provisional release on humanitarian grounds, current ICC jurisprudence has shown that provisional release is more likely to be granted on humanitarian grounds than it is under Articles 60(2) or 60(4).

143 ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para 21. See also ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 16 December 2008, para 15.

144 ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para 20.

145 ICTY, Prosecutor v *Mičo Stanišić and Stojan Župljanin*, Case IT-08-91-T, Decision Granting Mičo Stanišić's Request for Provisional Release, 18 November 2011, para 14.

146 *Ibid*; ICTY, Prosecutor v *Jovica Stanišić and Franko Simatović*, Case IT-03-69-T, Decision on Simatović Request for Provisional Release, 13 December 2011, para 10. 'The existence of sufficiently compelling humanitarian grounds may be considered in granting such release'.

147 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1099-Red, Decision on the Defence Request for Jean-Pierre Bemba to Attend his Stepmother's Funeral, 12 January 2011, paras 13–15. See also ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-437-Red, Decision on the Defence's Urgent Request Concerning Jean Pierre Bemba's Attendance of his Father's Funeral, 3 July 2009, para 9.

148 The Appeals Chamber pointed out the available text dealing with health matters of a detained person such as Regulation 103 of the Regulations of the ICC, which assumes that medical problems of detained persons would be treated within the detention centre and that, in case of hospitalisation, the detained person should remain continuously detained. ICC, Prosecutor v *Laurent Koudou Gbagbo*, ICC-02/11-01/11-278-Red, Judgment on the Appeal of Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense Demandant la Mise en Liberté Provisoire du Président Gbagbo"', 26 October 2012, para 86.

149 ICC, Prosecutor v *Laurent Koudou Gbagbo*, ICC-02/11-01/11-278-Red, Judgment on the Appeal of Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense Demandant la Mise en Liberté Provisoire du Président Gbagbo"', 26 October 2012, para 87.

150 *Ibid*.

III. Other factors considered in provisional release determinations

Risk of flight

For a court to grant provisional release, it must be satisfied that the accused will appear for trial. This is true for the ICTY, ICTR and ICC, which have all devoted significant analysis to risk of flight. Some of the factors associated with the risk of flight, including the gravity of the offences charged, circumstances of surrender, position/influence of the accused, state guarantees and the position of the Host State, are discussed further below.

GRAVITY OF THE OFFENCES CHARGED

The ICTY evaluated the question of whether an accused would be tempted to abscond due to the gravity of the crimes charged in the context of sentencing. In this context, the ICTY evaluated whether the prospect of a lengthy sentence would constitute an incentive for an accused to flee, and concluded that a more severe possible sentence created a greater incentive to flee.¹⁵¹ The ICTY Trial Chamber also found that ‘the expectation of a lengthy sentence cannot be held against the accused *in abstracto*, however, because all accused before the Tribunal face lengthy sentences if convicted’.¹⁵² The ECtHR has also held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand.¹⁵³

Following similar reasoning to the ICTY, the ICC Appeals Chamber has held that a person charged with grave crimes might face a lengthy prison sentence, which might make the person more likely to abscond.¹⁵⁴ In *Ngudjolo*, the Appeals Chamber held that ‘evading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail’.¹⁵⁵ The ICC has consistently held that there need not be concrete evidence that a person will abscond. Continued detention ‘revolves around the possibility, not the inevitability, of a future occurrence’.¹⁵⁶ However, as with the ICTY, the ICC has also held that continued detention in order to ensure the detainee’s appearance at trial does not have to be established on the basis of any single factor, but on an analysis of all relevant factors taken together.¹⁵⁷

In *Bemba et al*, the ICC Pre-Trial Chamber for the first time evaluated the impact of lesser crimes, namely, offences against the administration of justice, on the risk of flight. The Single Judge acknowledged the statutory limitation to five years of detention in the case of conviction for offences

151 ICTY, Prosecutor v *Fatmir Limaj et al*, Case IT-03-66-AR65.2, Decision on Haradin Bala’s Request for Provisional Release, 31 October 2003, para 25; ICTY, Prosecution v *Ivan Čermak and Mladen Markač*, Case IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, 2 December 2004, para 25; ICTY, Prosecutor v *Zdravko Tolimir et al*, Case IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005, para 10.

152 ICTY, Prosecutor v *Ljube Bošković and Johan Tarčulovski*, Case IT-04-82-PT, Decision on Johan Tarčulovski’s Motion for Provisional Release, 18 July 2005, para 15.

153 *Ilykov v Bulgaria* App No 33977/96 (ECtHR, 26 July 2001) para 81.

154 ICC, Prosecutor v *Lubanga Dyilo Thomas*, ICC-01/04-01/06-824, ‘Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”’ 13 February 2007, para 136.

155 ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-01/07-572 OA, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, para 21.

156 *Ibid*; ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-323 OA, Judgment on the appeal of Jean Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’, 16 December 2008, para 55.

157 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-323 OA, Judgment on the appeal of Jean Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’, 16 December 2008, para 55.

against the administration of justice; however, he went on to hold that this was not ‘*per se* suitable to diminish the risk of flight’.¹⁵⁸ On appeal, the Appeals Chamber emphasised that offences under Article 70, while certainly serious in nature, cannot be considered to be as grave as the core crimes under Article 5 of the Statute.¹⁵⁹ It found the language used by the Pre-Trial Chamber problematic, as it may give the impression that the Pre-Trial Chamber accorded undue weight to the seriousness of the alleged offences in assessing the risk under Article 58(1)(b)(i) of the Statute.¹⁶⁰

With respect to the charges, the ICC has also held that the increased knowledge of the charges,¹⁶¹ the increased awareness of the incriminatory evidence¹⁶² and the confirmation of the charges,¹⁶³ are all factors that increase the risk of flight. This means that a chamber may find a greater risk of flight at more advanced stages of proceedings, even when based on the same charges.

CIRCUMSTANCES OF SURRENDER

The ICTY placed considerable weight on the voluntary surrender of an accused, especially absent coercive measures.¹⁶⁴ However, it was noted in *Brđanin* that an accused person would be denied the opportunity to surrender if he/she was not aware of an indictment, such as with a sealed indictment, and therefore absent specific evidence directed to non-surrender, this factor would not be taken into account.¹⁶⁵

The ICC has held that there must be concrete evidence of an intention of voluntary surrender for it to hold weight in an application for provisional release.¹⁶⁶ This was in response to Mr Bemba and Mr Lubanga’s claims that they would have surrendered voluntarily to the ICC had they been given an opportunity to do so. However, even when surrender has been voluntary, the ICC has gone on to analyse the context of surrender. In *Ntaganda*, the Pre-Trial Chamber was of the view that his surrender was not prompted by goodwill to comply with international justice, but rather by the likelihood of him being killed or by pressure imposed on him by the Rwandan government.¹⁶⁷

158 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-258, Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’, 14 March 2014, para 22.

159 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-559, Judgment on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the “Requete urgente de la Defense sollicitant la mise en liberte provisoire de monsieur Fidèle Babala Wandu”’, 11 July 2014, para 88.

160 *Ibid.*

161 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-163, Decision on the ‘Defence Request for Interim Release’, 19 May 2011, para 59.

162 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-428, Public Redacted Version of the ‘Decision on Applications for Provisional Release’ of 27 June 2011, ICC-01/05-01/08-1565-Red, 16 August 2011, para 55; Review of Detention and Decision on the ‘Third Defence request for interim release’, 16 September 2011, para 42.

163 ICC, Prosecutor v *Lubanga Dyilo Thomas*, ICC-01/04-01/06-826, Review of the ‘Decision on the Application for the Interim Release of Thomas Lubanga Dyilo’, 14 February 2007, p 6; ICC, Prosecutor v *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-794-tENG, Second Review of the Decision on the Conditions of Detention of Germain Katanga, 12 December 2008, para 10.

164 ICTY, Prosecutor v *Blagoje Simić et al*, Case IT-95-9, Decision on Simo Zarić’s Application for Provisional Release, 4 April 2000; ICTY, Prosecutor v *Zdravko Tolimir et al*, Case IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005, para 10. See also ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-AR65, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, paras 29–30.

165 ICTY, Prosecutor v *Radoslav Brđanin and Momir Talić*, Case IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, para 17.

166 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-323, Judgment on the appeal of Jean Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’, 16 December 2008, para 56; ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-824, Judgment on the appeal of Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’, 13 February 2007, para 138.

167 ICC, Prosecutor v *Bosco Ntaganda*, ICC-01/04-02/06-147, Decision on the Defence’s Application for Interim Release, 18 November 2013, paras 42–44.

The Single Judge concluded that Mr Ntaganda's surrender to the ICC was not sufficient in and of itself to justify his release.¹⁶⁸

When evaluating flight risk with regard to Article 58, the ICC has considered the accused's failure to surrender to a national warrant of arrest as an indication that he/she will similarly attempt to avoid ICC proceedings.¹⁶⁹

POSITION/INFLUENCE OF THE ACCUSED

The ICTY considered the position an accused held prior to his/her arrest, and took into account the possibility for an accused to influence the government, particularly in relation to the willingness of the state to arrest an accused should he/she refuse to surrender.¹⁷⁰

The ICC has also found that a person's political position, contacts both within and outside the country and/or economic resources are reasons that may increase the risk of absconding.¹⁷¹ Further, the ICC has found that the existence of a political party that supports the detained person is a relevant factor for the determination of whether continued detention appears necessary.¹⁷² In this regard, there is no need for the Prosecutor to establish the criminality of the network of supporters, but merely its ongoing existence, on the basis that such support could indeed facilitate absconding.¹⁷³

In addition, the Pre-Trial Chamber has found that the existence of a network would provide an accused with the means to abscond. In this instance, the Pre-Trial Chamber has gone on to apply a broad definition of the term 'network'. In *Bemba et al*, the Single Judge found that Mr Musamba and Mr Mangenda belonged to the network of Mr Bemba by virtue of their positions in his defence team, which in turn increased the likelihood that they might have access to resources enabling them to abscond.¹⁷⁴ This finding was upheld by the Appeals Chamber.¹⁷⁵

168 *Ibid*, para 42.

169 See, eg, ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-02/15-3, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé, 6 January 2012, para 41 (Mr Blé Goudé who fled after the Republic of Ivory Coast issued a warrant of arrest against him for economic crimes), and ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-262, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, para 63 (Mr Ngudjolo Chui who had previously failed to surrender to a Congolese warrant of arrest).

170 ICTY, Prosecutor v *Zdravko Tolimir et al*, Case IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005, para 13; ICTY, Prosecutor v *Ljube Bošković and Johan Tarčulovski*, Case IT-04-82-PT, Decision on Johan Tarčulovski's Motion for Provisional Release, 18 July 2005, para 16.

171 ICC, Prosecutor v *Simone Gbagbo*, ICC-02/11-01/12-2-Red, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, para 43; ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-9-Red, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, 30 November 2011, para 85; ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-262, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, para 64; ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, para 47.

172 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-846, Decision on Gbagbo's Detention, 10 March 2017, para 14; ICC, Prosecutor v *Laurent Gbagbo*, ICC-02/11-01/11-278-Red, Judgment on the appeal of Laurent Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"', 26 October 2012, para 59.

173 *Ibid*.

174 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-259, Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba', 14 March 2014, paras 22–24; ICC, Prosecutor v *Jean Pierre Bemba et al*, Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean Jacques Mangenda Kabongo, ICC-01/05-01/13-261, 17 March 2014, para 29.

175 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-558, Judgment on the appeal of Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the "Demande de mise en liberté provisoire de Maître Aime Kilolo Musamba"', 11 July 2014, paras 104–105.

Both the ICTR and ICTY's Rule 65(B) provide that trial chambers will give the state to which the accused seeks to be released the opportunity to be heard. If released, an accused would be under the jurisdiction of the receiving state and the tribunal would rely on that state to ensure the accused's return to the tribunal. As stated earlier, provisional release was not granted at the ICTR. It has been suggested that this is largely due to the absence of any state guarantees.¹⁷⁶ In *Rukundo*, for example, the Trial Chamber in dismissing the application for provisional release was of the view that the government of Switzerland had not provided specific guarantees.¹⁷⁷ Similarly, the Trial Chamber in *Ndindiliyimana* denied provisional release due to the lack of state guarantees.¹⁷⁸ In these cases, it was clear that the burden was on the accused to provide state guarantees.

At the ICTY, the Appeals Chamber in *Jokić* held that there is no obligation for the accused to provide state guarantees.¹⁷⁹ Despite this precedent, the ICTR Trial Chamber in *Nsengimana* held that even though it was not a prerequisite to provide a state guarantee, it was advisable for an applicant to provide such a guarantee, and further, that a Trial Chamber in line with Rule 65(C) could impose the production of a state guarantee as a condition for release.¹⁸⁰ In an attempt to correct this strict standard applied by the ICTR trial chambers, the Appeals Chamber in *Ngirumpatse* found that the Trial Chamber had erred in placing an obligation on the accused to provide a state guarantee.¹⁸¹

Despite their diverging application and interpretation of the same provision, in both ICTY and ICTR jurisprudence, a state guarantee, when deemed credible, carries considerable weight in an application for provisional release.¹⁸² While a receiving state's guarantee is seen as a factor mitigating the risk of flight, and former Yugoslav states regularly offered guarantees on behalf of the accused, the chamber evaluated the reliability of these guarantees in light of each state's cooperation with the tribunal. In various instances, the ICTY Trial Chamber found government assurances less credible when states had not arrested persons publicly indicted by the tribunal and believed to be resident in their territories.¹⁸³

The *Šešelj* case at the ICTY presents an example of an accused not returning to a court following provisional release. The Trial Chamber, acting *proprio motu* in response to the deteriorating health of Mr Šešelj, invited observations from the Host State (Netherlands) and the receiving state (Serbia) on

176 de Meester, 'Investigation, Coercive Measures, Arrest, and Surrender' (see n 28 above) 327–328.

177 ICTR, Prosecutor v *Emmanuel Rukundo*, Case ICTR 2001-70-1, Decision on the Motion for Provisional Release of Father Emmanuel Rukundo, 15 July 2004, para 18.

178 ICTR, Prosecutor v *Augustin Ndindiliyimana et al*, Case ICTR-2000-56-1, Decision on Augustin Ndindiliyimana's Emergency Motion for Temporary Provisional Release, 11 November 2003.

179 ICTY, Prosecutor v *Vidoje Blagojević and Dragan Jokić*, Case IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, para 8; ICTY, Prosecution v *Ivan Čermak and Mladen Markač*, Case IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para 30.

180 ICTR, Prosecutor v *Hormisdas Nsengimana*, Case ICTR-01-69-AR65, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, 23 August 2005, para 3.

181 ICTR, Prosecutor v *Edouard Karemera et al*, Case ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse's Appeal against Trial Chamber's Decision Denying Provisional Release, 7 April 2009, paras 10–13.

182 ICTY, Prosecutor v *Vidoje Blagojević et al*, Case IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, para 7; ICTY, Prosecution v *Ivan Čermak and Mladen Markač*, Case IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para 25.

183 ICTY, Prosecutor v *Simo Drljača and Milan Kovačević*, Case IT-97-24-PT, Decision on Defence Motion for Provisional Release, 20 January 1998, paras 26–27; ICTY, Prosecutor v *Radoslav Brđanin and Momir Talić*, Case IT-99-36-PT, 25 July 2000, Decision on Motions of Radoslav Brđanin for Provisional Release, para 15; ICTY, Prosecutor v *Momčilo Krajišnik et al*, Case IT-00-39 & 40-PT, Decision on Krajišnik, Momčilo's Notice of Motion for Provisional Release, 8 October 2001, para 18.

the possibility of granting provisional release on humanitarian grounds.¹⁸⁴ Serbia provided guarantees on the condition that the accused confirmed that he would accept conditions imposed by the Trial Chamber.¹⁸⁵ The Trial Chamber, however, did not consult the accused.¹⁸⁶ An earlier consultation with the accused had not been successful, with the accused expressing criticism of the current authorities of his country whose guarantees Mr Šešelj said he did not recognise.¹⁸⁷ The Trial Chamber went on to grant provisional release, with one dissenting opinion from Judge Niang, who questioned Mr Šešelj's willingness to observe the conditions of his release and lamented the lack of imposition of direct obligations for Serbia to monitor the accused, and to ensure in this way the protection of witnesses and the return of the accused.¹⁸⁸ After release, Mr Šešelj expressly stated that he would not return to the tribunal, and also threatened people who cooperated with the prosecution.¹⁸⁹ On appeal, Mr Šešelj's provisional release was revoked.¹⁹⁰ However, Mr Šešelj did not return to the tribunal as Serbia initially refused to extradite him,¹⁹¹ and later informed the tribunal that Mr Šešelj's medical treatment could not be interrupted or continued in The Hague.¹⁹²

Regulation 51 states that for the purposes of interim release, the pre-trial chamber shall seek observations from the Host State and from the state to which the person seeks to be released.¹⁹³ In *Bemba*, the Single Judge initially held the view that state guarantees were important to ensure the accused's appearance at trial.¹⁹⁴ In a subsequent decision four months later, the Single Judge found that state guarantees were merely an assurance, the lack of which cannot weigh heavily against release and neither are they a 'prior indispensable requirement for granting interim release'.¹⁹⁵ On appeal, the Appeals Chamber held that identification of a state willing to accept the person concerned, as well as enforce related conditions, is necessary.¹⁹⁶ It invoked Rule 119(3), 'which obliges the Court to seek, *inter alia* the views of the relevant states before imposing or amending any conditions restricting liberty', and concluded that 'a state willing and able to accept the person concerned ought to be identified prior to a decision on conditional release'.¹⁹⁷

However, when a state was willing to accept Mr Bemba on its territory, the Trial Chamber held that the conditions specified by the state were not explicit enough, and there continued to be a

184 ICTY, Prosecutor v *Vojislav Šešelj*, Case IT-03-67-T, Order on the Provisional Release of the Accused Proprio Motu, 6 November 2014, para 2.

185 *Ibid*, para 4.

186 ICTY, Prosecutor v *Vojislav Šešelj*, Case IT-03-67-T, Dissenting Opinion of Judge Mandiaye Niang to the Order on the Provisional Release of the Accused Proprio Motu, 11 November 2014, para 4.

187 *Ibid*, para 6.

188 *Ibid*, paras 6 and 11.

189 ICTY, Prosecutor v *Vojislav Šešelj*, Case IT -03-67-T, Prosecution Motion to Revoke Provisional Release, 28 November 2014, para 3.

190 ICTY, Prosecutor v *Vojislav Šešelj*, Case 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.

191 See Denic Džidić and Denis Džidic, 'UN Court to Deliver Mr Šešelj Vojislav Verdict' *Balkan Insight* (The Hague, 11 April 2018) <https://balkaninsight.com/2018/04/11/un-court-to-deliver-vojislav-seselj-verdict-04-10-2018> accessed 7 May 2019.

192 ICTY, Prosecutor v *Vojislav Šešelj*, Case IT-03-67-T, Order on Arrangements for Delivery of Judgment, 16 March 2016, p 2.

193 Regulations of the Court, Regulation 51.

194 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-403, Decision on Application for Interim Release, 14 April 2009, paras 48–50; ICC, Prosecutor v *Dominic Ongwen*, ICC-02/04-01/15-349, Decision on the 'Defence Request for the Interim Release of Dominic Ongwen', 27 November 2015, para 25.

195 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, 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 88.

196 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-631-Red, 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, para 106.

197 *Ibid*.

meaningful risk that if provisionally released into the territory of that state, the accused would not return to complete his trial.¹⁹⁸ The Appeals Chamber, however, found that the Trial Chamber had erred in dismissing the state's observations.¹⁹⁹ In discussing conditional release, the Appeals Chamber illuminated various important considerations. First, the Appeals Chamber held that where the Trial Chamber finds that detention is necessary to ensure the person's appearance at trial, the chamber has the *discretion* to consider whether the risk of flight can be mitigated by the imposition of conditions and to order conditional release.²⁰⁰ The Appeals Chamber further held that if a chamber is considering conditional release and a state has indicated its general willingness and ability to accept a detained person and enforce conditions, the chamber 'must seek observations from that state as to its ability to enforce specific conditions identified by the chamber'.²⁰¹ And, depending on the circumstances, the chamber may have to seek further information from the state if it finds that the state's observations are insufficient to enable the chamber to make an informed decision.²⁰² This, however, does not mean that a state guarantee ensures conditional release, only that it allows a chamber to make an informed decision.²⁰³ Subsequently, when making a new determination, the Trial Chamber confirmed that the state willing to receive Mr Bemba in its territory had sent additional letters, which included an 'extensive and comprehensive list of the measures' that the state was willing to implement if the accused was released into its territory.²⁰⁴ However, the Trial Chamber held that while the measures proposed by the state may increase the difficulty of absconding, they do not eliminate that risk.²⁰⁵ Further, the Trial Chamber held that the risk of interfering with witnesses would not be mitigated by the conditions the receiving state was willing to implement and thus, invoking its discretion on matters relating to conditional release, it declined to grant release.²⁰⁶ The Appeals Chamber upheld this decision.²⁰⁷

It therefore remains unclear what conditions imposed by a state would be acceptable to mitigate the risk of flight. The Appeals Chamber stated that while the state in question might not have given an exhaustive list of conditions, it had extensively and specifically covered nearly all of the conditions enumerated in Rule 119(1).²⁰⁸ It has also stated that the Trial Chamber 'must seek observations from that State as to its ability to enforce specific conditions identified by the chamber',²⁰⁹ which the Trial Chamber did not do.

198 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1565-Red, Public Redacted Version of the 'Decision on Applications for Provisional Release' of 27 June 2011, 16 August 2011, paras 59–61.

199 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1626-Red, Judgment on the appeal of 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 53.

200 *Ibid*, para 55.

201 *Ibid*.

202 *Ibid*.

203 *Ibid*.

204 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1789-Red, Public Redacted Version of the 26 September 2011 Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011, 27 September 2011, para 17.

205 *Ibid*, paras 37–38.

206 *Ibid*, paras 40–42.

207 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1937-Red2, Judgment on the appeal of Jean Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled 'Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011', 15 December 2011.

208 *Ibid*, para 37.

209 See n 199 above, para 55.

In *Ongwen*, the Single Judge did not seek the observations of Belgium, the country which Mr Ongwen requested to be released to.²¹⁰ In the Single Judge's view, there existed risks that Mr Ongwen would attempt to abscond,²¹¹ as well as a 'concrete and identifiable' risk that if released, he may exercise pressure over witnesses.²¹² Due to these risks, the Single Judge held that:

'[i]ndeed, while interim or conditional release cannot be granted before observations are requested from the State to which the person seeks to be released and the Host State, and while recognising that, in certain circumstances, observations from such States would be relevant to the question of whether any risk may be mitigated by certain measures short of detention, the Single Judge considers that regulation 51 of the Regulations of the Court cannot be understood to require that observations must be requested even in the absence of any reasonable prospect that an application for interim release (with or without conditions) may be granted'.²¹³

Conditional release was also considered by the *Gbagbo* Trial Chamber, when addressing the possible interim release of Mr Gbagbo during trial. The Trial Chamber stated that it was aware of 'one tentative proposal for conditional release', but 'it is far from clear how this would work in practice. In particular, it is entirely unclear how Mr Gbagbo would still be able to attend his trial if released in another country'.²¹⁴ In this regard, the Trial Chamber noted that 'the Court does not have an obligation to make excessive expenditures in order to facilitate the conditional release of an accused'.²¹⁵ Further, the Trial Chamber held that there was 'no realistic proposal that would permit the conditional release of Mr Gbagbo' and consequently denied release.²¹⁶ From the public record of the case, it does not appear that the Trial Chamber, following the *Bemba* precedent, sought more information from the state in question.

Another related issue that bears mentioning is the weight accorded to previous compliance with court conditions while on provisional release. In *Bemba*, the Single Judge noted Mr Bemba's compliance with the conditions set during his release as an important factor in favour of release.²¹⁷ However, the Appeals Chamber, in their reversal of this decision, found that Mr Bemba had been left with no choice but to comply, and therefore disproportionate weight had been given to this factor.²¹⁸

HOST STATE POSITION

The ICTY, ICTR and ICC are located outside the countries where the crimes took place. In order for an accused to be tried by these courts, he/she has to be relocated to these host countries. Rule 65(B) offers the Host State an opportunity to be heard on matters relating to provisional release.

210 ICC, Prosecutor v *Dominic Ongwen*, ICC-02/04-01/15-349, Decision on the 'Defence Request for the Interim Release of Dominic Ongwen', 24 March 2016, para 25.

211 *Ibid*, paras 16–18.

212 *Ibid*, paras 19–22.

213 *Ibid*, para 25.

214 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-846, Decision on Gbagbo's Detention, 10 March 2017, para 22.

215 *Ibid*.

216 *Ibid*.

217 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, 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 65.

218 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, 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, para 83.

The Kingdom of the Netherlands set out its position on matters of provisional release in a letter to the Registrar of the ICTY dated 18 July 1996, in which it opposed the release of accused persons in its territory.²¹⁹ Later the same year, the Host State sent another letter to the Registrar stating that it could only comment on the practical consequences of such a release, in particular the obligation of the accused to apply for a residence permit to remain in the Netherlands pending trial.²²⁰

Regulation 51 of the ICC states that for the purposes of interim release, the pre-trial chamber shall seek observations from the Host State. The ICC has regularly sought the observations of the Host State, and although these observations remain largely confidential, those that have been made public appear to highlight practical considerations, as with the ICTY.

A comparison of headquarters agreements between these international courts and tribunals shows a noticeable difference. The ICTY Headquarters Agreement does not mention provisional release. The ICC Headquarters Agreement states that the Host State shall facilitate the transfer of persons granted interim release to a state other than the Host State.²²¹ It also provides for the re-entry and short-term stay in the Host State for any purpose related to proceedings before the ICC.²²² The International Residual Mechanism for Criminal Tribunals (IRMCT) and the Special Tribunal for Lebanon's (STL) Headquarters Agreements with the Netherlands are identical to that of the ICC in both respects.²²³ On the occasion of signing of the STL Headquarters Agreement, the Ambassador of the Permanent Representation of the Kingdom of the Netherlands to the United Nations stated that 'the agreement does not address the conditions and modalities of provisional release into the Host State, because provisional release into the Host State is not foreseen'.²²⁴

In a departure from these other agreements, the Kosovo Specialist Chambers' (KSC) Headquarters agreement with the Netherlands specifically states that persons shall not be provisionally released in the Host State.²²⁵ The Law on Specialist Chambers and Specialist Prosecutor's Office further provides that if the court decides to grant release, the detainee shall not be released in the Host State, but instead would be transported either to where he/she was originally detained on the KSC's behalf, to a place where he/she is ordinarily and lawfully resident, or to another state that agrees to accept him/her.²²⁶

The Headquarters Agreements for the ICTY, ICC, STL, IRMCT and KSC were signed in 1994, 2007, 2007, 2015 and 2016, respectively. The Host State's positions on provisional release with respect to

219 ICTY, Letter to Registrar, Prosecutor v *Tihomir Blaškić*, Case IT-95-14-T, 18 July 1996 as cited by Karel de Meester, 'The Investigation Phase in International Criminal Procedure: In Search of Common Rules' (2014) vol 1. University of Amsterdam Dissertation, 826.

220 ICTY, Prosecutor v *Zejnir Delalić et al*, Case IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Hazim Delić, 24 October 1996.

221 Headquarters Agreement between the International Criminal Court and the Host State, Art 47(1) ('ICC Headquarters Agreement').

222 ICC Headquarters Agreement, Art 47(2). See also IRMCT Headquarters Agreement, Art 38(2) and STL Headquarters Agreement, Art 42(2).

223 See Agreement between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals, Arts 38(1) and 47(2) ('IRMCT Headquarters Agreement') and Agreement between the Kingdom of the Netherlands and the United Nations Concerning the Headquarters of the Special Tribunal for Lebanon, Arts 42(1) and 42(2) ('STL Headquarters Agreement').

224 STL Headquarters Agreement, Letter from the Permanent Representation of the Kingdom of the Netherlands to the United Nations: The Ambassador (New York, 21 December 2007, NYV/2007/3766) p 38 www.stl-tsl.org/sites/default/files/documents/legal-documents/cooperation/STL_Headquarters_Agreement_EN.pdf accessed 8 August 2019.

225 Agreement between the Kingdom of the Netherlands and the Republic of Kosovo concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands, Art 42.

226 KSC, Law on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015) Law No 05/L-053, c VI, Art 41 (11).

the different tribunals, and the effect of this position on the rights of the accused, will be discussed in subsequent chapters.

Interference with witnesses/obstruction of justice

Under ICTYRPE Rule 65, a trial chamber must review whether there is any danger posed by an accused, if released, to victims, witnesses or other persons. ‘The Trial Chamber may consider whether there was any suggestion that an accused had interfered with the administration of justice in any way since the date when an indictment was confirmed against him.’²²⁷ Such assessments under Rule 65 cannot be done *in abstracto*; a concrete danger must be identified.²²⁸ If the influence of the accused over victims or witnesses is at issue, the trial chamber must rely on the information before it determines whether the accused would exercise such influence unlawfully.²²⁹ Essentially, even if the accused continues to enjoy influence, it does not necessarily follow that he/she will exercise it unlawfully.²³⁰ In addition, the disclosure of prosecution witnesses to the accused does not, in and of itself, indicate an increased risk that the accused will pose to witnesses.²³¹ There has to be evidence showing that the accused has the contacts or intent necessary for exerting influence over witnesses, victims or other persons.²³²

The ICC looks at the issue of interference from a broader angle. The wording of Article 58(1)(b)(ii) deals with obstruction of justice and the endangerment of the investigation or ICC proceedings. Specific arguments for detention under this provision have been that the suspect might interfere with, destroy or conceal evidence.²³³

With regard to the specific issue of interference with witnesses, the ICC Pre-Trial Chamber has seen the leadership position of an accused as indicating contacts and networks that could facilitate contact with witnesses and potential witnesses.²³⁴ Additionally, the disclosure of prosecution witnesses to the accused has been seen as a risk that an accused would, directly or indirectly, exert pressure on witnesses, thereby obstructing or endangering ICC proceedings.²³⁵ In *Gbagbo*, the Single Judge held that knowledge of the details of incriminating evidence does not as such make detention necessary, but constitutes a factual circumstance that must be taken into account when assessing the level of risk

227 ICTY, Prosecutor v *Ljube Bošković and Johan Tarčulovski*, Case IT-04-82-PT, Decision on Johan Tarčulovski’s Motion for Provisional Release, 18 July 2005, para 18.

228 *Ibid.*

229 *Ibid.*

230 ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-PT, Order on Provisional Release of Jadranko Prlić, 30 July 2004, para 28.

231 ICTY, Prosecutor v *Mičo Stanišić*, Case IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal on Mičo Stanišić’s Provisional Release, 17 October 2005, para 28.

232 *Ibid.*

233 ICC, Prosecutor v *Ahmad Harun and Ali Kushayb*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, 15 May 2007, para 131; ICC, Situation in Libya, ICC-01/11-01/11-1, Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi’, 30 June 2011, para 101.

234 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor’s Under Seal Application for a Warrant of Arrest of Mbarushimana, 28 September 2010, paras 48–50; ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-14-ENG, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean Pierre Bemba Gombo, 10 June 2008, para 89; ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-4, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, para 63; ICC, Prosecutor v *Omar Hassan Ahmed Al-Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmed Al-Bashir, 4 March 2009, para 233.

235 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-586, Decision on the Application for Interim Release of Thomas Lubanga Dyilo, 3 October 2006, para 6; ICC, Prosecutor v *Germain Katanga and Mathieu Ngudjolo*, Case ICC-01/04-01/07-694, Review of the ‘Decision on the Application for Interim Release of Mathieu Ngudjolo Chui’, 23 July 2008, para 10; ICC, Prosecutor v *Germain Katanga and Mathieu Ngudjolo*, ICC-01/04-01/07-750, Second Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo, 19 November 2008, para 15; ICC, Prosecutor v *Bosco Ntaganda*, ICC-01/04-02/06-147, Decision on the Defence’s Application for Interim Release, 18 November 2013, para 59.

for the investigation and the court proceedings in the event of the interim release of the suspect.²³⁶ While the Single Judge in *Bemba* made reference to the lack of any concrete evidence to substantiate allegations of witness interference,²³⁷ the ICC has generally been persuaded by the possibility, not the inevitability, of such an occurrence.²³⁸ In some decisions, it has been held that past instances of obstruction of justice or court proceedings showed a concrete possibility of similar future actions.²³⁹

Continued commission of crimes

While ICTY Rule 65(B) did not expressly list the continued commission of crimes as a factor necessitating detention, the Trial Chamber in *Jokić* was of the view that the conditions in Rule 65(B) should not be construed as an exhaustive list, and that public interest may also require the detention of the accused if there are serious reasons to believe that he/she would commit further serious offences.²⁴⁰

Article 58(1) (b) (iii) of the Rome Statute calls for the arrest of a person where applicable to prevent the person from continuing with the commission of the charged crime or a related crime within the jurisdiction of the court and arising from the same circumstance. The wording of this provision has been seen as problematic for the assumption that the suspect has already committed the crime.²⁴¹

However, this provision has yet to be evaluated in depth, as the conditions of Article 58(1) (b) are presented in the alternative, with it being sufficient that only one of the conditions is satisfied.²⁴²

The Single Judge, in her decision granting Mr Bemba's provisional release, held that the situation in the Central African Republic (CAR) was stable and that no information indicated that Mr Bemba would interfere or act in the CAR and commit the same or related crimes arising out of the same circumstances.²⁴³ When it overturned this decision, the Appeals Chamber did not address this factor as it was satisfied that the risk of flight was enough to justify detention.²⁴⁴ While it therefore remains unclear whether this reasoning suffices, it is clear that, as with the determination of risk of flight and

236 ICC, Prosecutor v *Laurent Gbagbo*, ICC-02/11-01/11-180-Red, Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo', 13 July 2012, para 66.

237 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, 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 73.

238 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-323, Judgment on the appeal of Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release', 16 December 2008, para 55; ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1789-Red, Public Redacted Version of the 26 September 2011 Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011, 27 September 2011, para 32.

239 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-163, Decision on the 'Defence Request for Interim Release', 19 May 2011, para 65; ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-259, Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba', 14 March 2014, para 35; ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-261, Decision on the 'Requête de mise en liberté submitted by the Defence for Jean-Jacques Mangenda', 17 March 2014, para 35; ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-588, Decision on 'Narcisse Arido's request for interim release', 24 July 2014, para 20.

240 ICTY, Prosecutor v *Miodrag Jokić*, Case IT-01-42-T, Order on Miodrag Jokić's Motion for Provisional Release, 20 February 2002, para 21.

241 Hall and Ryngeart (see n 75 above), para 18.

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

243 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, 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 76.

244 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-631-Red, 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, para 89.

obstruction of justice, the ICC has dealt with the risk of re-offending as a question revolving around the possibility, not the inevitability, of a future occurrence.²⁴⁵

In *Mbarushimana*, the Pre-Trial Chamber noted that Mr Mbarushimana had contributed to the commission of crimes ‘by organising and conducting an international campaign through media channels’.²⁴⁶ The Pre-Trial Chamber found that due to, *inter alia*, Mr Mbarushimana’s ‘information technology experience and his ability to have internet and telephone access in ways which cannot be easily monitored or controlled’, his detention appeared necessary.²⁴⁷ In *Gbagbo*, the Pre-Trial Chamber was of the view that Mr Gbagbo could utilise the network of his supporters (who were seen to be intent still on getting him back to power) to commit crimes within the jurisdiction of the ICC.²⁴⁸

245 ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-01/07-572, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, para 21; ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-323, Judgment on the appeal of Jean Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’, 16 December 2008, paras 55 and 67.

246 ICC, Prosecutor v *Callixte Mbarushimana*, ICC-01/04-01/10-163, Decision on the ‘Defence Request for Interim Release’, 19 May 2011, para 66.

247 *Ibid.*

248 ICC, Prosecutor v *Laurent Gbagbo*, ICC-02/11-01/11-180-Red, Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’, 13 July 2012, para 69.

Chapter 2: Release during advanced stages of proceedings

The rules of the ICTY and ICTR, within both the contexts of a conviction and an acquittal, differ to some extent from those of the ICC on the release of an accused person during advanced stages of proceedings.

This chapter will examine the courts' legal frameworks with regard to convicted and acquitted persons, and the legal issues arising thereof. For the purposes of this paper, the advanced stages of proceedings are:

- from the close of the prosecution case;
- during appeal;
- awaiting transfer to enforcement state; and
- after an acquittal.

I. Legal framework and context

ICTY and ICTR

ICTY Rule 98*bis* provides that the trial chamber may, at the close of the prosecution's case, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction.²⁴⁹ As mentioned in the previous chapter, ICTY Rule 65(B) governs provisional release of an accused person prior to the rendering of a final judgment by the trial chamber, and therefore would govern any requests for provisional release after the close of the prosecution's case. The Appeals Chamber has held that at such an advanced stage of proceedings, the justification for provisional release must be 'compelling'.²⁵⁰ Further, 'sufficiently compelling humanitarian reasons' have been found to 'tip the balance' in favour of provisional release.²⁵¹

This additional requirement of 'sufficiently compelling humanitarian reasons' has been criticised as reverting to the pre-1999 amendment standard of the 'exceptional circumstances' requirement and thus breaching the presumption of innocence.²⁵² The requirement of compelling humanitarian reasons has further been criticised as imposing 'a form of the "special circumstances" requirement applicable to convicted persons upon individuals who have not been found guilty following the full

249 This Rule 98*bis* proceeding is the equivalent of a 'no case to answer' motion in the common law tradition. The trial chamber hears oral submissions from the parties and may issue an oral ruling.

250 ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-AR65.5, Decision on prosecution's consolidated appeal against decisions to provisionally release the accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para 21.

251 ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 16 December 2008, para 15; ICTR, Prosecutor v *Edouard Karemera et al*, Case ICTR-98-44-AR65, Decision on Matthieu Ndirumpatse's Appeal Against Decision on Remand on Provisional Release, 8 December 2009, para 7.

252 ICTY, Prosecutor v *Ljubomir Borovčanin*, Case IT-05-88, Partly Dissenting Opinion of Judge Guney, para 6, Partly Dissenting Opinion of Judge Liu, para 2, Decision on Consolidated Appeal against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motion for Provisional Release during the break in the proceedings; ICTY, Prosecutor v *Mičo Stanišić and Stojan Župljanin*, Case IT-08-91-AR-65.1, Separate Opinion of Judge Robinson, Decision on Mičo Stanišić's Appeal against Decision on his Motion for Provisional Release, 11 May 2011, para 3.

process and evaluation of trial'.²⁵³ This is because Rule 65(I), which governs provisional release for convicted persons, specifically requires the accused to show special circumstances to be granted provisional release. In 2011, ICTY Rule 65(B) was amended to include 'sufficiently compelling humanitarian grounds' as a factor that *may* be considered in matters relating to provisional release pending conviction, making it discretionary rather than a *conditio sine qua non*.²⁵⁴

For convicted persons, Rule 65(I) states that the appeals chamber may grant provisional release pending an appeal or for a fixed period if it is satisfied that:

1. the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;
2. the appellant, if released, will not pose a danger to any victim, witness or other person; and
3. special circumstances exist warranting such release.

In line with ICTY RPE Rules 65(C) and 65(H), the appeals chamber may impose conditions on such release to ensure the presence of the accused for trial and the protection of others, and if necessary, issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty.

The Appeals Chamber has held that the three requirements in Rule 65(I) must be considered cumulatively, and that the chamber need only consider the first two requirements if a special circumstance exists.²⁵⁵ Consequently, a request for release after conviction depends on whether an accused can prove that special circumstances exist.²⁵⁶ Special circumstances that have been accepted include medical need²⁵⁷ and the memorial service of a close family member.²⁵⁸ The wish to spend time with family,²⁵⁹ visit a sick family member²⁶⁰ or attend a son's wedding²⁶¹ have not been found to be special circumstances.

According to the Appeals Chamber, provisional release was included in the rules due to humane and compassionate considerations that remain even if the applicant has been convicted at trial.²⁶² While humanitarian grounds remain the most commonly accepted reason for release at this stage

253 ICTY, Prosecutor v *Jadranko Prlić et al*, Case IT-04-74-AR65.7, Decision on 'Prosecution's Appeal from Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković', 31 March 2008, Partially Dissenting Opinion of Judge Güney, 21 April 2008, para 4; see also ICTY, Prosecutor v *Mičo Stanišić and Stojan Župljanin*, Case IT-08-91-AR-65.1, Separate opinion of Judge Robinson, Decision on Mičo Stanišić's appeal against decision on his motion for provisional release, 11 May 2011, para 19.

254 ICTY, Prosecutor v *Mičo Stanišić and Stojan Župljanin*, Case IT-08-91-T, Decision Granting Mičo Stanišić's Request for Provisional Release, 18 November 2011, para 14.

255 ICTY, Prosecutor v *Dario Kordić and Mario Cerkez*, Case IT-95-14/2-A, Decision on Mario Cerkez's Request for Provisional Release, 12 December 2003, para 10; ICTY, Prosecutor v *Stanislav Galić*, Case IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005, para 3; ICTY, Prosecutor v *Radoslav Brđanin*, Case IT-99-36, Decision on Mr Radoslav Brđanin's Motion for Provisional Release, 23 February 2007, paras 5 and 6.

256 ICTY, Prosecutor v *Blagoje Simić*, Case IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, 21 October 2004, para 14; ICTY, Prosecutor v *Radoslav Brđanin*, Case IT-99-36-A, Decision on Radoslav Brđanin's Motion for Provisional Release, 23 February 2007, para 6.

257 ICTY, Prosecutor v *Pavle Strugar*, Case IT-01-42-A, Decision on 'Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the republic of Montenegro', 16 December 2005.

258 ICTY, Prosecutor v *Blagoje Simić*, Case IT-95-9-A, 21, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, October 2004.

259 *Ibid*, para 21.

260 ICTY, Prosecutor v *Miroslav Kvočka et al*, Case IT-98-3-/1-A, Order of the Appeals Chamber on the Motion for Provisional Release by Miroslav Kvočka, 11 September 2002.

261 ICTY, Prosecutor v *Dragomir Milošević*, Case IT-98-2, Decision on Application for Provisional Release Pursuant to Rule 65(I), 29 April 2008, para 7.

262 ICTY, Prosecutor v *Blagoje Simić*, Case IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, 21 October 2004, para 14.

of the proceedings, release has also been granted on the basis of the duration of detention. If the period of detention has been found to be substantial (in line with standards for early release), the convicted person awaiting appeal judgment has been granted provisional release, and this constitutes a special circumstance within the meaning of Rule 65(I) (iii).²⁶³

A convicted person seeking provisional release need not wait for the appeal proceedings to begin; release can be sought at any point after a conviction.²⁶⁴ The Appeals Chamber has held that there is no explicit or implicit provision in the ICTYRPE suggesting that a higher standard of proof should be applied on appeal.²⁶⁵

Following the final decision of the appeals chamber, the convicted person is designated a state to carry out the remainder of his/her sentence.²⁶⁶ While awaiting this transfer, the convicted person remains in the custody of the tribunal.²⁶⁷ In a few instances at the ICTY, a convicted person awaiting transfer has requested provisional release. In *Radić*, following an unsuccessful appeal of the trial judgment, Mr Radić filed an application before the President for provisional release to attend his son's wedding and grandchild's christening.²⁶⁸ The President rejected the application, citing the lack of provisions that would empower him to grant such a request, and additionally remarked that he was not persuaded that the reasons were sufficient to justify release to an accused convicted of such serious crimes.²⁶⁹

In *Limaj*, when an application for provisional release by Mr Bala was made after an appeal judgment, the President assigned an Appeals Chamber.²⁷⁰ The Appeals Chamber went on to apply Rule 65(I).²⁷¹ The Appeals Chamber found that 'there is an increased incentive to abscond once the proceedings have been completed and the convicted person is awaiting transfer to a State in which his sentence will be served'.²⁷² This 'high risk of flight' was found sufficient to deny the convicted person

263 ICTY, Prosecutor v *Miroslav Kvočka et al*, Case IT-98-30/1-A, Decision on the Request for Provisional Release of Miroslav Kvočka, 17 December 2003, para 3; ICTY, Prosecutor v *Enver Hadžihasanović and Amir Kubura*, Case IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para 13; ICTY, Prosecutor v *Mile Mrkšić and Veselin Šljivančanin*, Case IT-95-13, Decision on the Motion of Veselin Šljivančanin for Provisional Release, 11 December 2007, para 3; ICTY, Prosecutor v *Astrid Haraqija and Bajrush Morina*, Case IT-04-84-R77.4, Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009, para 10; ICTY, Prosecutor v *Astrid Haraqija and Bajrush Morina*, Case IT-04-84-R77.4, Decision on Motion of Astrit Haraqija for Provisional Release, 8 April 2009, paras 11–12; Prosecutor v *Rasim Delić*, Case IT-04-83, Decision on Motion of Rasim Delić for Provisional Release, 11 May 2009, paras 17–18; ICTY, Prosecutor v *Ramush Haradinaj et al*, Case IT-04-84, Decision on Lahi Brahimaj's Application for Provisional Release, 25 May 2009, para 16; ICTY, Prosecutor v *Jelena Rašić*, Case IT-98-32, Decision on Jelena Rašić's Urgent Motion for Provisional Release Pursuant to Rule 65(I), 4 April 2012, para 12; ICTY, Prosecutor v *Vujadin Popović et al*, Case IT-05-88-A, Decision on Vinko Pandurević's Motion for Provisional Release, 14 March 2014, para 9 (Dissenting Opinion of Judge Mandiaye Niang).

264 ICTY, Prosecutor v *Milan Milutinović et al*, Case IT-05-87, Public Redacted Version of the 'Decision on Vladimir Lazarević's Second Motion for Temporary Provisional Release on the Grounds of Compassion', 21 May 2009, 22 May 2009, para 12.

265 ICTY, Prosecutor v *Blagoje Simić*, Case IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, Case IT-95-9-A, October 2004, para 14.

266 ICTYRPE, Rule 103(A).

267 ICTYRPE, Rule 103(C).

268 ICTY, Prosecutor v *Mlađo Radić*, Case IT-98-30/1-A, Decision on Request for Provisional Release, 13 July 2005, para 1.

269 ICTY, Prosecutor v *Mlađo Radić*, Case IT-98-30/1-A, Decision on Request for Provisional Release, 13 July 2005, at paras 3–4.

270 ICTY, Prosecutor v *Fatmir Limaj et al*, Case IT-03-66-A, Order Assigning Judges to a Case Before the Appeals Chamber, 7 February 2008, para 2. It is worth noting that the case number indicates the case was still in appeals stage.

271 ICTY, Prosecutor v *Fatmir Limaj et al*, Case IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para 5. The Appeals Chamber referred to Rule 107 to state that whole of Rule 65 applies *mutatis mutandis* to applications before the Appeals Chamber. This reference of Rule 107 seems irrelevant because the Appeals Chamber goes on to apply Rule 65(I), which already gives the power to the Appeals Chamber, see para 12.

272 ICTY, Prosecutor v *Fatmir Limaj et al*, Case IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para 9.

provisional release.²⁷³ Further, the humanitarian case brought forward by Mr Bala was found not to be compelling enough to override the serious flight risk posed.²⁷⁴

In *Krajišnik*, the order designating a state for enforcement had already been issued when the application for a ‘custodial visit’ was made and a trial chamber was assigned to hear the motion.²⁷⁵ The Trial Chamber invoked its supervisory power under Rule 104 of the RPE.²⁷⁶ It then followed Appeals Chamber jurisprudence that ‘special circumstances related to humane and compassionate considerations must be present to justify a custodial release, just as they must be present where appellate proceedings are pending before the Appeals Chamber’, and therefore, there must be an acute justification, such as the medical condition of the applicant or the memorial service of a close family member.²⁷⁷ The Trial Chamber accepted the request by Mr Krajišnik to visit his elderly and gravely ill mother as a special circumstance, noting that following his transfer, the likelihood of being able to see his mother again would be low.²⁷⁸

As seen from this discussion, there has not been a uniform approach at the ICTY with regard to the legal framework for evaluating requests for provisional release of a convicted person pending transfer to enforcement state. In *Tolimir*, adjudicated by the IRMCT, an application for provisional release to the President was assigned an appeals chamber.²⁷⁹ The Appeals Chamber stated that neither the IRMCT Statute nor Rules explicitly regulate the provisional release of convicted persons awaiting transfer to an enforcement state, acknowledging the gap in the law.²⁸⁰ The Appeals Chamber, however, noted that previous appeals chambers had relied on Rule 65(I) and went on to apply it.²⁸¹

At the ICTR and ICTY, Rule 99 of the respective RPE provide that the accused shall be released immediately. However, at the ICTY, if the Prosecutor indicates his/her intention to appeal at the time the judgment is pronounced, the trial chamber has the discretion to issue an order for the continued detention of the accused pending the determination of the appeal. ICTY Rule 99 requires the Prosecutor to apply for continued detention and for both parties to be heard. At the ICTR, Rule 99 makes no reference of hearing the parties and effectively, upon the request of the Prosecutor, a trial chamber may issue a warrant of arrest and further detention of the accused with immediate effect.

In assessing the need for an order of further detention, trial chambers will consider a number of factors, including ‘risk of flight’, namely that an accused may abscond during the appeal proceedings.²⁸² The burden to show risk of flight is on the prosecution as the party requesting

273 *Ibid.*

274 ICTY, Prosecutor v *Fatmir Limaj et al*, Case IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para 10. The Appeals Chamber also noted that the area to which he sought to be released was where he perpetrated many and serious crimes for which he was convicted, para 12.

275 ICTY, Prosecutor v *Momčilo Krajišnik*, Case IT-00-39-ES, Decision on Krajišnik’s Application for Custodial Visit, 17 June 2009, para 1.

276 *Ibid*, para 11.

277 *Ibid*, para 14.

278 ‘Detainees at the UNDU are accommodated far away from the former Yugoslavia and as a consequence have limited opportunities for seeing their families’. ICTY, Prosecutor v *Momčilo Krajišnik*, Case IT-00-39-ES, Decision on Krajišnik’s Application for Custodial Visit, 17 June 2009, para 18. (Trial Chamber also went on to acknowledge the lengthy period of detention awaiting trial, during trial and pending appeal.)

279 ICTY, Prosecutor v *Zdravko Tolimir*, Case IT-15-95-ES, Public Redacted Version of the ‘Decision on Motion for Provisional Release’ Filed on 28 January 2016, 23 February 2016, paras 3–11.

280 *Ibid*, paras 7–27. Rule 68 of the IRMCT RPE (8 June 2012) is materially identical to Rule 65 of the ICTY RPE.

281 ICTY, Prosecutor v *Zdravko Tolimir*, Case IT-15-95-ES, Public Redacted Version of the ‘Decision on Motion for Provisional Release’ Filed on 28 January 2016, 23 February 2016, paras 7–27.

282 ICTR, Prosecutor v *Ignace Bagilishema*, Case ICTR-95-1A-T, ‘Decision on the Prosecutor’s Request Pursuant to Rule 99(B)’, 8 June 2001, para 8.

continued detention.²⁸³ The prosecution at the ICTR has, in some instances, requested conditional release of the acquitted person as an alternative to detention.²⁸⁴ The Trial Chamber has acknowledged that Rule 99(B) is silent on the material conditions that have to be fulfilled for the chamber to make such an order,²⁸⁵ but has gone on to grant conditional release of an acquitted person as a means of ensuring that he/she would appear for his/her appeal proceedings.

ICC

Article 81 of the Rome Statute governs appeals against decisions of acquittal, conviction or sentence. Paragraph 3 establishes a general rule that a convicted person will remain detained unless the trial chamber orders otherwise. If a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released unless the Prosecutor appeals, although such release may be subject to conditions.²⁸⁶ The execution of the conviction decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.²⁸⁷ This means that the convicted person cannot be transferred to the state of enforcement and there will be a suspension of any fine imposed or any order for forfeiture of assets.²⁸⁸ It follows that an order for reparations also cannot be executed until the conviction is confirmed on appeal.²⁸⁹

In the case of an acquittal, the person shall be released immediately,²⁹⁰ notwithstanding a notice of appeal, respecting 'the fundamental right to liberty of the person'.²⁹¹ ICC RPE Rule 185 regulates the release of a person from the custody of the court other than upon completion of sentence, and provides that the person shall be transferred to a state that is obliged to receive him/her, to another state which agrees to receive him/her, or to a state that has requested his/her extradition with the consent of the original surrendering state.²⁹²

ICC jurisprudence has established that the trial chamber, at the request of the Prosecutor, may maintain detention of the person pending appeal, but only under exceptional circumstances.²⁹³ The burden is on the Prosecutor to show that 'particularly strong reasons' exist that clearly outweigh the person's 'statutory right to be released immediately following his acquittal'.²⁹⁴ According to the Appeals Chamber in *Gbagbo*, this exceptional circumstances test is a 'rigorous test' and 'must be understood and interpreted in light of internationally recognised human rights, as mandated by

283 *Ibid.*

284 ICTR, Prosecutor v *André Ntagurera et al*, Case ICTR-99-46-T, 'Decision on the Prosecutor's Request Pursuant to Rule 99(B)', 26 February 2004, p 2; ICTR, Prosecutor v *Ignace Bagilishema*, Case ICTR-95-1A-T, 'Decision on the Prosecutor's Request Pursuant to Rule 99(B)', 8 June 2001, para 3; ICTR, Prosecutor v *Théoneste Bagosora et al*, Case ICTR-98-41-T, 'Decision on Prosecution Motion to Impose Conditions on Kabiligi's Liberty', 31 December 2008, para 2.

285 ICTR, Prosecutor v *Ignace Bagilishema*, Case ICTR-95-1A-T, 'Decision on the Prosecutor's Request Pursuant to Rule 99(B)', 8 June 2001, para 8.

286 Rome Statute, Art 81(3)(b).

287 *Ibid*, Art 81(4).

288 Christopher Staker and Franziska Eckelmanns, 'Article 81: Appeal against decision of acquittal or conviction or against sentence' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 1922.

289 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-2953, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14 December 2012, para 86.

290 ICC RPE, Art 81(3)(c).

291 ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-12, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, 20 December 2012, para 22.

292 ICC RPE, Rule 185(1).

293 See n 291 above.

294 *Ibid.*

Article 21 (3) of the Statute’.²⁹⁵ In discussing this provision, the Appeals Chamber noted that the Specialist Chamber of the Constitutional Court of Kosovo found in 2017 that a draft rule of the RPE before the KSC, which provided for the continued detention of an acquitted person pending appeal ‘under exceptional circumstances’, was incompatible with the Constitution of Kosovo, as well as with Article 5(1) of the European Convention on Human Rights.²⁹⁶

Further to the exceptional circumstances test, the chamber also considers:²⁹⁷

- the concrete risk of flight;
- the seriousness of the offences charged; and
- the probability of success on appeal.

It should be noted that Article 81 (3) (i) does not expressly contemplate the possibility of conditional release of an acquitted person. Conditional release is provided for in relation to a convicted person, whereas in relation to an acquitted person, the provisions allow either immediate release or, under exceptional circumstances, continued detention. In *Ngudjolo*, the Legal Representative for Victims asked the Trial Chamber to set conditions for release after the acquittal of Mr Ngudjolo, but the Trial Chamber declined to rule on the matter.²⁹⁸

In *Gbagbo and Blé Goudé*, following the majority of the Trial Chamber’s acquittal on the basis of a no case to answer motion, the prosecution, citing ICTR jurisprudence, argued that conditional release was possible within the ambit of the legal framework of the court. The prosecution argued that the Trial Chamber’s authority ‘to impose the harshest limitation on the liberty of a person pending appeal’ meant that the chamber also had the ‘authority to order and implement less intrusive restrictions on the exercise of that right, such as conditional release as set out in Rule 119’.²⁹⁹

The Appeals Chamber held that ‘before continued detention can be ordered, all reasonable measures less severe than detention must be considered and found to be insufficient’.³⁰⁰ Further, the Appeals Chamber agreed with the prosecution that the Trial Chamber’s statutory power to continue to detain an acquitted person meant that it also had the power to order conditional release, finding that ‘[t]he possibility to impose conditions on an acquitted person is justified by the Court’s continued jurisdictional interest in the acquitted person pending the appeal against the acquittal’.³⁰¹

The *Gbagbo and Blé Goudé* case presents the first conditional release of acquitted persons following a no case to answer judgment at the ICC. The Appeals Chamber found that with regard to the conditional release of an acquitted person, it is not necessary to meet the ‘exceptional circumstances’

295 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1251-Red2, Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81 (3) (c) (i) of the Statute, 21 February 2019, para 50.

296 *Ibid.* See also KSC, Case KSV-CC-PR-2017-01/F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, 26 April 2017, para 194 fn 140.

297 Rome Statute, Art 81 (3) (c) (i).

298 ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-T-3-ENG ET WT, Transcript hearing to deliver the judgment, 18 December 2012, pp 3–5.

299 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1235, Urgent Prosecution’s request pursuant to article 81 (3) (c) (i) of the Statute, 15 January 2019, para 16.

300 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1251-Red2, Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81 (3) (c) (i) of the Statute, 21 February 2019, para 52.

301 *Ibid.*, para 53.

threshold pursuant to Article 81(3)(c) for continued detention following an acquittal.³⁰² Nevertheless, there must be compelling reasons for imposing conditions on the released person.³⁰³ The Appeals Chamber thus follows aspects of the ‘compelling humanitarian reasons’ test used by the ICTY and ICTR Appeals Chamber in Rule 98*bis* proceedings.³⁰⁴

Other factors considered for release at advanced stages of proceedings

Concrete risk of flight

At the ICTY, the issuance of a Rule 98*bis* decision was considered to increase the risk of flight.³⁰⁵ A trial chamber may examine the accused’s arguments for acquittal, to assess the accused’s perception of the strength of the case against him/her, going towards whether there existed an increased risk of flight.³⁰⁶ In considering provisional release of a convicted person, the trial chamber would take into account the fact that an individual had already been sentenced, and considered that a more severe sentence created a greater incentive to flee.³⁰⁷

Factors that have been accepted as mitigating the risk of flight have included age, voluntary surrender and compliance with conditions during previous provisional releases.³⁰⁸ State guarantees, particularly to enforce conditions of release, have also supported findings in favour of provisional release.³⁰⁹ At the ICTY, the fact that the appellant was ready to accept any order given by the Appeals Chamber on the conditions for his provisional release supported the appellant’s good faith.³¹⁰ Further, the fact that a convicted person had served most of his sentence would be seen as militating against the risk of flight.³¹¹

At the ICC, assessing the ‘risk of flight’ at these advanced stages of proceedings appears to require a higher standard of proof. Whereas in the early stages of proceedings it is enough to show the

302 *Ibid.*, para 54.

303 *Ibid.*

304 ICTY, Prosecutor v *Jadranko Prlić et al.*, Case IT-04-74-AR65.11, Decision on Slobodan Praljak’s Appeal of the Trial Chamber’s 2 December 2008 Decision on Provisional Release, 16 December 2008, para 15; ICTR, Prosecutor v *Édouard Karemera et al.*, Case ICTR-98-44-AR65, Decision on Mathieu Ndirumpatse’s Appeal Against Decision on Remand on Provisional Release, 8 December 2009, para 7.

305 ICTY, Prosecutor v *Vujadin Popović et al.*, Case IT-05-88-T, Decision on Milan Gvero’s Motion for Provisional Release during the Break in the Proceedings, 9 April 2008, para 16.

306 ICTY, Prosecutor v *Vujadin Popović et al.*, Case IT-05-88-AR65.4, Decision on Consolidated Appeal against Decision on Borovčanin’s Motion for a Custodial Visit and Decisions on Gvero’s and Miletić’s Motion for Provisional Release during the Break in the Proceedings, 15 May 2008, para 22.

307 ICTY, Prosecutor v *Stanislav Galić*, Case IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005, para 16; Prosecutor v *Dario Kordić and Mario Čerkez*, Case IT-95-14/2-A, Decision on Dario Kordić’s Request for Provisional Release, 19 April 2004, para 8; Prosecutor v *Dario Kordić and Mario Čerkez*, Case IT-95-14/2-A, Decision on Mario Čerkez, Request for Provisional Release, 12 December 2003, para 7.

308 ICTY, Prosecutor v *Vujadin Popović et al.*, Case IT-05-88-AR65.4, Decision on Consolidated Appeal against Decision on Borovčanin Motion for a Custodial Visit and Decisions on Gvero’s and Miletić’s Motion for Provisional Release during the Break in the Proceedings, 15 May 2008, para 23; ICTY, Prosecutor v *Jadranko Prlić et al.*, Case IT-04-74-T, Decision on the Accused Čorić’s Request for Provisional Release, 17 July 2008, para 17.

309 ICTY, Prosecutor v *Stanislav Galić*, Case IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005, para 12; ICTY, Prosecutor v *Blagoje Simić*, Case IT-95-9-A, Decision on Motion of Simić, Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, 21 October 2004, para 17.

310 ICTY, Prosecutor v *Stanislav Galić*, Case IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para 16; ICTY, Prosecutor v *Blagoje Simić*, Case IT-95-9-A, Decision on Motion of Blagoje Simić, Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, 21 October 2004, para 16.

311 ICTY, Prosecutor v *Vujadin Popović et al.*, Case IT-05-88-A, Decision on Vinko Pandurević’s Motion for Provisional Release, 14 March 2014, para 13.

‘possibility not the inevitability of a future occurrence’,³¹² when challenging immediate release after an acquittal, the prosecution needs to show a ‘concrete’ risk of flight. In *Gbagbo and Blé Goudé*, the prosecution quoted the lack of state cooperation, in particular that Ivory Coast had yet to surrender Ms Simone Gbagbo and had in fact granted her amnesty.³¹³ Second, the prosecution argued that there existed an organised network of supporters who could facilitate Mr Gbagbo’s travel to a country in which his presence before the ICC could not be compelled.³¹⁴ With regard to Mr Blé Goudé, the prosecution argued that he had tried to evade justice by hiding and was in possession of false documents when he was arrested in Ghana.³¹⁵

The Trial Chamber, by majority, held that ‘the fact that a State Party may or may not fail to comply with a request for surrender does not necessarily mean that the persons in question will not appear voluntarily or on their own motion if summoned by the Court’.³¹⁶ The Trial Chamber also considered the assurances from Mr Gbagbo and Mr Blé Goudé and, by majority, dismissed the prosecution’s argument regarding Mr Blé Goudé by reasoning that the allegations ‘date back more than five years’ and a lot had changed since then.³¹⁷ In the majority’s view, it would be unreasonable ‘to rely on these elements to justify the continued detention of a person who has just been acquitted’.³¹⁸ On appeal, however, the Appeals Chamber considered ‘the seriousness of the charges with the resulting potentially high sentence’ as constituting ‘sufficient factual indication that Mr Gbagbo and Mr Blé Goudé might abscond if released unconditionally’.³¹⁹

Seriousness of offences charged

At the ICC, the Trial Chamber in *Ngudjolo* held that while the offences that have been attributed to Mr Ngudjolo were serious, the Chamber could not rely on the single criterion to keep a person in detention after a unanimous acquittal.³²⁰ Further, the Trial Chamber held that ‘[a]t this particular stage in the proceedings, release should be more than ever the rule and continued detention should be the exception’.³²¹

In *Gbagbo and Blé Goudé*, the Trial Chamber, by majority, found that because all persons charged by the ICC face serious charges, ‘there is little point in creating a hierarchy of seriousness of offences under the Statute’.³²² Further, the majority held that, although the charges are clearly serious in nature, this in itself did not present an extraordinary circumstance that could warrant detaining

312 ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-01/07-572 OA, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the application of the appellant for Interim Release, 9 June 2008, para 21; ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-323 OA, Judgment on the appeal of Jean Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’, 16 December 2008, para 55.

313 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1235, Urgent Prosecution’s request pursuant to article 81(3)(c)(i) of the Statute, 15 January 2019, para 20.

314 *Ibid.*

315 *Ibid.*

316 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-T-234-ENG ET WT, Transcript of the Delivery of Decision, 16 January 2019, p 3.

317 *Ibid.*

318 *Ibid.*, 3–4.

319 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1251-Red2, Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 21 February 2019, paras 59–60.

320 ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-T-3-ENG ET WT, Transcript of the Judgment, 18 December 2012, p 4.

321 *Ibid.*

322 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-T-234-ENG ET WT, Transcript of the Delivery of Decision, 16 January 2019, p 2.

acquitted persons.³²³ On appeal, the Prosecutor argued that the charges against Mr Gbagbo and Mr Blé Goudé were extremely grave in that they ‘are at the upper end of the scale of crimes that can be charged at the Court’ and involved crimes against people as opposed to property offences or offences against the administration of justice.³²⁴ The Appeals Chamber held that ‘the seriousness of the charges with the resulting potentially high sentence constitute incentives to abscond’.³²⁵ However, the Appeals Chamber did not address whether there exists a hierarchy of seriousness of offences under the statute as a general matter.

Probability of success on appeal

While this is not a test enumerated in the ICTY and ICTR legal frameworks, the ICTY Appeals Chamber has held that the outcome of an appeal is unforeseeable and thus not a factor that could be relied upon in determining whether provisional release should be granted.³²⁶

At the ICC, the probability of success on appeal is included as a factor in Article 81(3)(c) regarding the continued detention of an acquitted person. In *Ngudjolo*, the Trial Chamber was of the view that the Chamber’s judgment of acquittal had been issued unanimously and that the probability of a successful appeal might be different if there had been a dissenting opinion, or separate opinions.³²⁷

In *Gbagbo*, the prosecution argued that the Trial Chamber should merely assess whether the appeal is a viable one that could lead to a reversal of the decision.³²⁸ The prosecution compared this factor to one used in some national jurisdictions when considering bail pending an appeal by a convicted person, that is, ‘the appeal should be “reasonably arguable and not manifestly doomed to failure”’, ‘the appeal is free from predictable failure to avoid imprisonment’, ‘[t]here appears to be the faintest prospect of success on appeal’ and ‘whether the appeal is not frivolous and has a reasonable prospect of success’.³²⁹ Additionally, the prosecution argued that the decision to acquit was not unanimous and emphasised Judge Herrera Carbuca’s dissenting opinion, and in particular that the dissenting opinion questioned the totality of the majority’s ruling.³³⁰

The Trial Chamber, by majority, ruled that an acquittal before the defence has presented its evidence ‘shows how exceptionally weak the Prosecutor’s evidence is’.³³¹ It acknowledged that the Appeals

323 *Ibid.*

324 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1245, Prosecution’s Document in Support of Appeal Pursuant to Article 81(3)(c)(ii) of the Statute, 23 January 2019, para 6.

325 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1251-Red2, Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 21 February 2019, para 59.

326 ICTY, Prosecutor v *Stanislav Galić*, Case IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005, para 16; ICTY, Prosecutor v *Dario Kordić and Mario Čerkez*, Case IT-95-14/2-A, Decision on Dario Kordić’s Request for Provisional Release, 19 April 2004, para 8.

327 ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-T-3-ENG ET WT, Transcript of the Hearing to Deliver the Decision, 18 December 2012, p 4.

328 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1235, Urgent Prosecution’s request pursuant to Article 81(3)(c)(i) of the Statute, 15 January 2019, para 20.

329 *Ibid.*, paras 20–62.

330 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-1235, Urgent Prosecution’s request pursuant to Article 81(3)(c)(i) of the Statute, 15 January 2019, para 20.

331 ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-T-234-ENG ET WT, Transcript of the Delivery of Decision, 16 January 2019, p 4.

Chamber might agree with the dissenting opinion but held that this was ‘entirely speculative and unexceptional’ and could not serve as a reason to maintain the accused in detention.³³²

The criteria on which to base a probability of success on appeal was not addressed by the Appeals Chamber.

³³² ICC, Prosecutor v *Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15-T-234-ENG ET WT, Transcript of the Delivery of Decision, 16 January 2019, p 5.

Chapter 3: Early and final release

This chapter will examine the courts' legal frameworks with regard to final release. For the purposes of this paper, final release will include early release, release after the completion of sentence and release after a final acquittal.

II. Legal frameworks and context: early release

ICTY and ICTR

Articles 27 and 28 of the ICTR and ICTY Statutes, respectively, govern pardon or commutation of sentence. Both provisions look to the applicable law of the state in which the convicted person is imprisoned to determine if he/she is eligible for pardon or commutation of sentence. If pardon or commutation is possible in the state of enforcement, that state shall notify the tribunal and the President of the tribunal will consult the judges and decide on the matter on the basis of the interests of justice and the general principles of law.³³³ The ICTY has, in its Practice Directions, included language that allows the convicted person to apply for early release him/herself. This is not included in the ICTR Practice Directions but was subsequently adopted by the IRMCT.³³⁴

Rule 125 (ICTY) and Rule 126 (ICTR) establish the criteria for the President to take into account when deciding on applications for early release. These are:

- the gravity of the crime or crimes for which the prisoner was convicted;
- the treatment of similarly situated prisoners;
- the prisoner's demonstration of rehabilitation; and
- any substantial cooperation of the prisoner with the Prosecutor.

Further, according to the ICTY Practice Directions,³³⁵ the Registrar shall 'request reports and observations from the relevant authorities in the enforcing State as to the behaviour of the convicted person during his/her period of incarceration and the general conditions under which he/she was imprisoned, and request from such authorities any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration'.³³⁶

Although both the ICTY and ICTR legal frameworks allow for early release, the ICTY implemented its provisions and granted early release from 1999 onwards,³³⁷ while the ICTR did not grant early release

333 The ICTR Statute explicitly states that there shall only be pardon or commutation of sentence if the president decides on it.

334 ICTY, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, (IT/146/Rev.1), 16 September 2010 (ICTY Practice Direction); ICTR, Practice Direction for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Criminal Tribunal for Rwanda, 10 May 2000; IRMCT, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism (MICT/3), 5 July 2012.

335 The IRMCT Practice Directions are the only ones currently in force. They are materially identical to the ICTY Practice Directions.

336 ICTY Practice Direction, para 3(b).

337 ICTY, Prosecutor v *Dražen Erdemović*, Case IT-96-22-ES, Order Issuing a Public Redacted Version of Decision of the President on Early Release, 15 July 2008, p 2.

until 2011.³³⁸ It has been noted that the crime of genocide has attracted the most severe sentences and that the majority of ICTR defendants were sentenced to life in prison or lengthy determinate sentences for the crime of genocide.³³⁹ In *Serushago* and *Ruggiu*, applications for early release were denied on the basis that their crimes of genocide and public incitement to commit genocide, respectively, were of the utmost gravity.³⁴⁰ In *Bagaragaza*, the ICTR President considered that, given the gravity of the crime of genocide, it was only appropriate to consider early release after three-quarters of Mr Bagaragaza's sentence had been served.³⁴¹

ICTY practice shows that an application for early release was considered after two-thirds of a sentence had been served.³⁴² In *Krajišnik*, an application for early release was denied as Mr Krajišnik had not served two-thirds of his sentence.³⁴³ In his evaluation, the ICTY President noted that to avoid discrepancies in the treatment of similarly situated prisoners, he would have to take into account the established practice of the ICTY.³⁴⁴ It is of note, however, that a convicted person having served two-thirds of his sentence is merely eligible for early release and not entitled to such release.³⁴⁵

ICTY practice also shows that while the gravity of crimes weighs against release, the President may grant the application on the basis of other factors.³⁴⁶ In *Blagojević*, the President noted the Trial Chamber's finding that 'the crime of persecutions is "particularly grave because it incorporates manifold acts committed with discriminatory intent"'.³⁴⁷ He further noted that while the role played by Mr Blagojević was limited, the gravity of the crime was extremely high thereby weighing against early release.³⁴⁸ Similarly, in *Krajišnik*, the President noted that the conviction was on the basis of the 'most severe crimes known to humankind, the gravity of which required a severe and proportionate sentence'.³⁴⁹ However, both Mr Blagojević's and Mr Krajišnik's applications were granted on the basis of other factors.

With the IRMCT taking over the residual functions of the ICTR and ICTY,³⁵⁰ the question arose as to whether persons convicted and sentenced by the ICTR should be considered 'similarly-situated' to those convicted and sentenced by the ICTY or the IRMCT.³⁵¹ Taking into account the principle of

338 ICTR, Prosecutor v *Michel Bagaragaza*, Case ICTR-05-86-S, Decision on the Early Release of Michel Bagaragaza, 24 October 2011, para 8.

339 Barbora Holá and Joris van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview', *Journal of International Criminal Justice* (2014) 12(1) *Journal of International Criminal Justice* 109, 112 fn 12.

340 ICTR, Prosecutor v *Omar Serushago*, Case ICTR-98-39-S, Decision of the President on the Application for Early Release of Omar Serushago, 12 May 2005; ICTR, Prosecutor v *Georges Ruggiu*, Case ICTR-97-32-S, Decision of the President on the Application for Early Release of Georges Ruggiu, 12 May 2005.

341 ICTR, Prosecutor v *Michel Bagaragaza*, Case ICTR-05-86-S, Decision on the Early Release of Michel Bagaragaza, 24 October 2011, para 10.

342 ICTY, Prosecutor v *Duško Tadić*, Case IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 3 November 2004, para 1. See also, ICTY, Prosecutor v *Zdravko Mucić et al*, Case IT-96-21, Order of the President in Response to Zdravko Mucić's Request for Early Release, 9 July 2003, p 3.

343 ICTY, Prosecutor v *Momčilo Krajišnik*, Case IT-00-39-ES, Decision of the President on Early release of Momčilo Krajišnik, 2 July 2013, para 33.

344 *Ibid*, paras 18–22. See also more recently IRMCT, Prosecutor v *Stanislav Galić*, Case MICT-14-83-ES, Decision on the Early Release of Stanislav Galić, 26 June 2019, para 38.

345 ICTY, Prosecutor v *Momčilo Krajišnik*, Case IT-00-39-ES, Decision of the President on Early release of Momčilo Krajišnik, 2 July 2013, para 18.

346 ICTY, 'ICTY Manual on Developed Practices' (UNICRI 2009) p 162. www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf accessed 25 May 2019.

347 ICTY, Prosecutor v *Vidoje Blagojević*, Case IT-02-60-ES, Decision of the President on Early release of Vidoje Blagojević, 3 February 2012, para 18.

348 *Ibid*, para 21.

349 ICTY, Prosecutor v *Momčilo Krajišnik*, Case IT-00-39-ES, Decision of the President on Early release of Momčilo Krajišnik, 2 July 2013, para 16.

350 The timelines of the three tribunals should be taken into account as there is some crossover. The ICTY was established in 1993 and closed on 31 December 2017. The ICTR was established in 1994 and closed on 31 December 2015. The IRMCT was established in 2010 with the Arusha branch opening on 1 July 2012 and The Hague branch opening on 1 July 2013.

351 IRMCT, Prosecutor v *Paul Bisengimana*, Case MICT-12-07, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012, para 16.

lex mitior, IRMCT President Theodor Meron ruled that all convicted persons supervised by the IRMCT should be treated equally for purposes of early release determinations, irrespective of the tribunal that convicted them.³⁵² Noting that the practice of releasing convicted persons after two-thirds of their sentence was served originated from the ICTY, the President was of the view that ‘fundamental fairness and justice are best served if the ICTY practice applies uniformly to the entire prisoner population to be ultimately supervised by the Mechanism’.³⁵³ This led to the granting of early release to ICTR persons who had served at least two-thirds of their sentences.³⁵⁴

Of the factors weighed when assessing early release, good conduct was frequently cited³⁵⁵ and was specifically relied on as an indicator of rehabilitation.³⁵⁶ Indeed, while the legal framework mentions a ‘demonstration of rehabilitation’, it does not explicitly explain what rehabilitation entails. It is therefore left to the President to interpret this concept.³⁵⁷

Other than good conduct, the ICTY and ICTR also considered the convicted person’s reflection of their crimes in the form of acceptance of responsibility or any expressions of remorse.³⁵⁸ Mr Simić, for example, pled guilty at trial and expressed ‘sincere regret and remorse’,³⁵⁹ a factor that was weighed in favour for early release.³⁶⁰ At the ICTR, in the first two cases where early release was granted, the convicted persons had both pled guilty, expressed ‘genuine remorse’ and exhibited good behaviour.³⁶¹

In the cases where remorse was not discussed in the decision, good conduct remained the predominant indicator of rehabilitation.³⁶² Holá and van Wijk analysed 53 individuals who have been released by the ICTY before serving their full sentence, and found that in the case of 19 individuals, their reflection and attitude toward their crimes was not discussed whatsoever in the decision.³⁶³

In the remaining 34 cases, Holá and van Wijk identified nine types of reflection of crimes ranging between lack of acceptance, general acceptance and specific expression of personal remorse.³⁶⁴ In *Krajišnik*, for example, the President noted Mr Krajišnik’s continued denial of the offences but held

352 *Ibid*, para 20; see also, IRMCT, Prosecutor v *Omar Serushago*, Case MICT-12-28-ES, Public Redacted Version of Decision of the President on the Early Release of Omar Serushago, 13 December 2012, para 16.

353 See n 351 above.

354 Eg, *ibid*, para 20; IRMCT, Prosecutor v *Obed Ruzindana*, Case MICT-12-10-ES, Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014; IRMCT, Prosecutor v *Gérard Ntakirutimana*, MICT-12-17-ES, Public Redacted Version of the 26 March 2014 Decision of the President on the Early Release of Gérard Ntakirutimana, 24 April 2014; IRMCT, Prosecutor v *Alphonse Nteziryayo*, Case MICT-15-90, Decision of the President on the Early Release of Alphonse Nteziryayo, 9 March 2016; IRMCT, Prosecutor v *Ferdinand Nahimana*, Case MICT-13-37-ES.1, Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana, 5 December 2016; IRMCT, Prosecutor v *Emmanuel Rukundo*, Case MICT-13-35-ES, Public Redacted Version of the 19 July 2016 Decision of the President on the Early Release of Emmanuel Rukundo, 5 December 2016; IRMCT, Prosecutor v *Aloys Simba*, Case MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019.

355 Jessica Kelder, Barbora Holá and Joris Van Wijk, ‘Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR’ (2014) 14 *International Criminal Law Review* 1186. See also ICTY, Prosecutor v *Tihomir Blaškić*, Case IT-95-14-A, Order of the President on the Application for Early Release of Tihomir Blaškić, 29 July 2004, para 5; ICTY, Prosecutor v *Anto Furundžija*, Case IT-95-17/1, Order of the President on the Application for Early Release of Anto Furundžija, 29 July 2004, p 3; ICTY, Prosecutor v *Miroslav Tadić*, Case IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 3 November 2004, para 1.

356 Kelder, Holá and Van Wijk (see *ibid*). See also, ICTY, Prosecutor v *Vidoje Blagojević*, Case IT-02-60-ES, Decision of the President on Early release of Vidoje Blagojević, 3 February 2012, paras 22–23.

357 Kelder, Holá and Van Wijk (see n 355 above).

358 *Ibid*.

359 ICTY, Prosecutor v *Milan Simić*, Case IT-95-9/2, Transcript of hearing, 22 July 2002.

360 ICTY, Prosecutor v *Milan Simić*, Case IT-95-9/2, Order of the President on the Application for the Early Release of Milan Simić, 27 October 2003.

361 ICTR, Prosecutor v *Michel Bagaragaza*, Case ICTR-05-86-S, Decision on the Early Release of Michel Bagaragaza, 24 October 2011; ICTR, Prosecutor v *Juvénal Rugambarara*, Case ICTR-00-59, Decision on the Early Release of Juvénal Rugambarara, 8 February 2012.

362 Barbora Holá and Joris Van Wijk, ‘Does Remorse Count? ICTY Convicts’ Reflections on Their Crimes in Early Release Decisions’ (2018) 28(4) *International Criminal Justice Review* 349, 357.

363 *Ibid*.

364 *Ibid*.

that there existed ‘significant evidence’ of his rehabilitation.³⁶⁵ Similarly, Mr Tarčulovski denied any wrongdoing, but was granted early release based on ‘demonstrated rehabilitation’ evidenced by good conduct in prison.³⁶⁶

More recent practice shows that while good behaviour may still be taken into account as an indicator of rehabilitation, it may not be considered sufficient when weighed against other factors. The IRMCT President, addressing an application for early release in *Galić*, considered good behaviour as an indicator of rehabilitation, along with stable family ties and low risk of recidivism.³⁶⁷ However, he noted that indicators of rehabilitation in the national context were insufficient given the gravity of the crimes committed.³⁶⁸ In President Carmel Agius’ view, in order to assess Mr Galić’s reintegration into society, it would be necessary to analyse the conditions in the community he intends to live in and the potential impact his return might have.³⁶⁹ However, given that at the time of the request Mr Galić was yet to complete two-thirds of his sentence, the President did not request more information regarding rehabilitation or make further findings regarding rehabilitation in that case.

Further, the IRMCT has most recently, pursuant to paragraph 4(d) of the Practice Direction,³⁷⁰ requested the views of the Republic of Rwanda on applications on early release.³⁷¹ Rwanda’s submissions oppose the applications of Mr Ngeze, Mr Simba, Mr Ntawukulilyayo³⁷² and Mr Semanza³⁷³ on various grounds. These include: (1) the gravity of the crimes; (2) the psychological impact of early release to the survivors and victims; (3) that the ICTR considered ICTR-convicted persons eligible to apply for early release upon completion of three-quarters of their sentences; and (4) that the countries enforcing the sentences (Benin and Mali) do not provide for unconditional early release.³⁷⁴

In his decision to grant early release to Mr Simba, the President recalled ‘the guiding principle established by the Mechanism’ that all prisoners sentenced by the ICTR were considered similarly situated to all other prisoners under the IRMCT’s supervision, and thus considered eligible to apply for early release upon the completion of two-thirds of their sentences.³⁷⁵ Further, the President noted ‘that persons convicted by the ICTR with equal or higher sentences and with convictions for crimes of graver than or of equal magnitude’ to those of Mr Simba, including convictions of genocide, had

365 ICTY, Prosecutor v *Momčilo Krajišnik*, Case IT-00-39-ES, Decision of the President on Early release of Momčilo Krajišnik, 2 July 2013, paras 24 and 33.

366 ICTY, Prosecutor v *Johan Tarčulovski*, Case IT-04-82-ES, Decision of President on Early Release of Tarčulovski Johan 8 April 2013, paras 21–23.

367 IRMCT, Prosecutor v *Stanislav Galić*, Case MICT-14-83-ES, Decision on the Early Release of Stanislav Galić, 26 June 2019.

368 *Ibid*, para 38.

369 *Ibid*.

370 Para 4(d) states: ‘After receiving the notification of eligibility, the Registry shall obtain any other information that the President considers relevant’.

371 See reference in IRMCT, Prosecutor v *Aloys Simba*, Case MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019, para 13; IRMCT, Prosecutor v *Laurent Semanza*, Case MICT-13-36, Petition for Early Release on 26 March 2019, 26 July 2018, para 6.

372 IRMCT, Prosecutor v *Aloys Simba*, Case MICT 14-62-ES.1; Prosecutor v *Dominique Ntawukulilyayo*, Case MICT 13-34-ES; Prosecutor v *Hassan Ngeze*, Case MICT 13-37-ES-2; The Government of Rwanda’s Additional Submission in Opposition to the Early Release of Messrs. Aloys Simba, Dominique Ntawukulilyayo and Hassan Ngeze and request for Reconsideration of the 12 July 2018 MICT Decision Denying the Supplementary Request for Documents, 26 July 2018.

373 IRMCT, The Prosecutor v *Laurent Semanza*, Case MICT-13-36, Opposition to Application for Early Release, 29 August 2018.

374 IRMCT, Prosecutor v *Aloys Simba*, Case MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019, para 67; IRMCT, The Prosecutor v *Laurent Semanza*, Case MICT-13-36, Opposition to Application for Early Release, 29 August 2018.

375 IRMCT, Prosecutor v *Aloys Simba*, Case MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019, paras 31–32.

been granted early release upon reaching the two-thirds benchmark. The fact that Mr Simba had already served two-thirds of his sentence therefore weighed for release.³⁷⁶

As of the time of writing this paper, there were no public decisions on the applications of Mr Ngeze, Mr Semanza and Mr Ntawakulilyayo.

CONDITIONAL EARLY RELEASE

The ICTY and ICTR did not generally place conditions on early release. In *Beara*, ‘conditional release’ was granted based on health concerns.³⁷⁷ Germany, as the state where the sentence was being served, notified the IRMCT of the ‘precarious health condition’ of Mr Beara, and requested prompt action from the tribunal.³⁷⁸ The judges agreed with the President that sufficient humanitarian considerations existed to warrant release, but expressed concern over granting early release.³⁷⁹ The President particularly noted the gravity of the crimes for which Mr Beara was convicted, as well as the limited amount of time he had served of his life sentence.³⁸⁰ Balancing this with the ‘clear and compelling circumstances’ brought on by Mr Beara’s health condition, the President was of the view that conditions must be placed on release.³⁸¹ Consequently, reporting obligations were placed on the state of release to keep the IRMCT informed of Mr Beara’s health condition in the event that revocation would become necessary.³⁸² The decision was rendered a day before Mr Beara passed away in the detention facility in Germany.³⁸³

The IRMCT’s practice of conditional early release became further established following Security Council Resolution 2422 (2018) which, *inter alia*, encourages the IRMCT to consider placing conditions on early release.³⁸⁴ Subsequently, both *Simba*³⁸⁵ and *Coric*³⁸⁶ have attached conditions to early release.

ICC

There are several distinctions between the ICC criteria for reduction of sentences as compared to the ICTY and ICTR. In the ICC framework, gravity of crimes is not listed as a factor weighing for or against reduction of sentence. At the ICC, the decision on early release is rendered by a panel of three judges rather than the President.³⁸⁷ The panel in *Lubanga* was of the view that ‘the sentence

376 *Ibid*, para 34.

377 IRMCT, Prosecutor v *Ljubiša Beara*, Case MICT-15-85-ES.3, Public Redacted Version of 7 February 2017 Decision of the President on the Early Release of Ljubiša Beara, 16 June 2017.

378 *Ibid*, para 7.

379 *Ibid*, para 48.

380 *Ibid*.

381 *Ibid*.

382 *Ibid*, paras 48–49.

383 Sam Roberts, ‘Ljubiša Beara, Who Oversaw Massacre at Srebrenica, Dies at 77’ *New York Times* (10 February 2017) www.nytimes.com/2017/02/10/world/europe/ljubisa-beara-dead-srebrenica-genocide.html accessed 16 July 2019.

384 UNSC Res 2422 (27 June 2018) UN Doc S/RES/2422 para 10. Adopted by the Security Council at its 8295th meeting. During this debate, Rwanda expressed concerns that a number of convicted persons who had been granted early release had ‘regrouped and organized themselves into an association of genocide denialists’.

385 IRMCT, Prosecutor v *Aloys Simba*, Case MICT-14-62-ES.1, Public Redacted Version of the President’s 7 January 2019 Decision on the Early Release of Aloys Simba, 7 January 2019.

386 IRMCT, Prosecutor v *Valentin Ćorić*, Case MICT-17-112-ES.4, Further Redacted Public Redacted Version of the Decision of the President on the Early Release of Valentin Ćorić and Related Motions, 16 January 2019.

387 ICC RPE, Rule 224.

imposed reflects the Trial Chamber's determination of a punishment proportionate to *inter alia*, the gravity of the crimes committed' and thus 'should not be considered again when determining whether it is appropriate to reduce a sentence'.³⁸⁸

Article 110 of the Rome Statute sets out the procedure for the review by the ICC concerning reduction of sentence. It also provides that the state of enforcement shall not release the person before the expiry of his/her sentence and the ICC alone shall have the right to decide on any reduction of sentence.³⁸⁹ The ICC shall review the sentence to determine whether it should be reduced after the person has served two-thirds of his/her sentence or 25 years in the case of life imprisonment.³⁹⁰ The review is conducted by a panel of three judges of the appeals chamber.³⁹¹ This initial review is not triggered by the convicted person, rather, it is an automatic and mandatory function of the court once the threshold of two-thirds has been reached.³⁹² The prosecution in *Lubanga* argued that the burden of proof lies on the convicted person, a claim refuted by the panel of judges. The panel held that 'while a sentenced person clearly has a strong interest in presenting information sufficient to establish the presence of factors justifying a reduction of his or her sentence, this does not equate to a burden of proof as such'.³⁹³ It went on to state that all participants in the sentence review, not only the sentenced person, are required to provide any information in their possession, whether weighing for or against release.³⁹⁴ However, the decision by the ICC is discretionary,³⁹⁵ and should the court determine that it is not appropriate to reduce the sentence, it is obliged to review the sentence at intervals of every three years unless it deems it necessary to review within a shorter period.³⁹⁶

Article 110 and Rule 223 set out a list of factors and criteria for reduction of sentences:

(a) *The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions.*

In this regard, the early cooperation of the person is taken into account, despite the acknowledgment that said cooperation, had it existed during trial, was taken into account in the sentencing decision as a mitigating factor.³⁹⁷ Cooperation at trial must exceed 'mere good behaviour', which while welcome, 'cannot on its own amount to a circumstance that could mitigate the sentence to be imposed'.³⁹⁸ Further, there has to be a show of continued willingness to cooperate.³⁹⁹ The panel in *Katanga*

388 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, para 24.

389 Rome Statute, Arts 110(1) and 110(2).

390 *Ibid*, Art 110(3).

391 ICC RPE, Rule 224 on the procedure for review concerning reduction of sentence states that three judges of the Appeals Chamber will be appointed to conduct a hearing. This is referred to as a panel.

392 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, para 20.

393 *Ibid*, para 32.

394 *Ibid*.

395 *Ibid*, para 21.

396 Rome Statute, Art 110(5) and ICC RPE, Rule 224(3).

397 See n 392 above, para 36.

398 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 29.

399 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, para 36.

noted Mr Katanga's withdrawal of appeal, acknowledgment of guilt, and apology to victims as a demonstration of cooperation.⁴⁰⁰

- (b) *The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims.*
- (c) *The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime.*

In his sentence review hearing, Mr Lubanga expressed remorse for the general situation of unrest in his community and expressed his opposition to the crime he was convicted of, namely conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities.⁴⁰¹ However, the panel held that 'there is a difference between a person expressing opposition to a particular criminal act in the abstract and that person accepting responsibility and expressing remorse for having committed those criminal acts'.⁴⁰² This is another departure from the jurisprudence of the ICTY and ICTR. The conduct of the convicted person is considered in specific relation to a genuine dissociation of his crimes, rather than in an abstract nature. As noted in *Lubanga*, good conduct is not 'sufficient on its own to establish the necessary connection between this conduct and a dissociation from the crimes'.⁴⁰³ Additionally, a 'genuine dissociation' means acknowledging one's own culpability for the specific crimes they were convicted of.⁴⁰⁴

- (d) *The prospect of the resocialisation and successful resettlement of the sentenced person.*

This is yet another marked difference from the criteria assessed by the ICTY and ICTR. As described above, the criteria for showing that a convicted person was rehabilitated was not fully explained or explored by those tribunals. The ICC Registrar, having been instructed by the panel to make specific comments on the criteria set out in Rule 223,⁴⁰⁵ stated:

'[Mr Lubanga is] much involved in group activities with other detainees, such as common sport activities. This could hardly be indicative of a prospect of resocialization and successful resettlement of the sentenced person considering that the ICC Detention Centre does not possess the necessary expertise for assessing that criterion. Indeed, the ICC Detention Centre is not mandated by the Court legal texts to undertake those responsibilities, does not have the specialist staff with the requisite skills and is not designed for that purpose.'⁴⁰⁶

400 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 34.

401 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, paras 42 and 45.

402 *Ibid*, para 46.

403 *Ibid*, para 45.

404 *Ibid*, para 46. See also ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 50. In this case, Katanga accepted the Trial Chamber's findings on his role and conduct in the Bogoro crimes and his expression of regret to the victims of Bogoro. Additionally, Katanga filmed an apology that was made available to various communities in the DRC.

405 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3137, Scheduling order for the review concerning reduction of sentence of Thomas Lubanga Dyilo, 15 June 2015, para 4.

406 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3144-Red, Confidential Redacted version of 'Observations on the criteria set out in rule 223 (a) to (e) of the Rules of Procedure and Evidence', 17 August 2015, para 5.

In both *Lubanga* and *Katanga*, the panels considered the future plans outlined by both persons. Mr Lubanga planned to resume postgraduate studies in psychology,⁴⁰⁷ whereas Mr Katanga planned to return to the army or farm and had also expressed interest in studying law.⁴⁰⁸ The panel was of the view that the plans demonstrated a prospect of resocialisation and successful resettlement should early release be granted.⁴⁰⁹ Additionally, strong family ties were found to support the prospect of successful resettlement.⁴¹⁰

(e) *Whether the early release of the sentenced person would give rise to significant social instability.*

This factor is reported to have been the subject of much debate during the drafting of the ICC's legal texts.⁴¹¹ The debate centred on the concept of considering the political conditions in the territorial state as a factor in review for early release.⁴¹² It was ultimately agreed that the central concern for the ICC was whether early release would give rise to social instability within the territorial state.⁴¹³ It is, however, clear that assessment of this factor would be to a large extent discretionary.⁴¹⁴ The Registrar's submissions in *Lubanga* laid out three factors to aid in assessment: (1) the timing of early release (potentially coinciding with elections); (2) the potential impact on the militia; and (3) local perceptions.⁴¹⁵ Other commentary on this factor states that significant social instability may be demonstrated by information indicating that the person's return could, *inter alia*, 'undermine public safety, cause social unrest such as riots or acts of ethnic-based violence, lead to the commission of new international crimes by the sentenced person or by his or her supporters, or undermine public confidence in the domestic legal system'.⁴¹⁶

In *Lubanga*, the panel was of the view that the information presented to them was conflicting, that is, that Mr Lubanga's release '(i) would be beneficial to the reconciliation process; (ii) would have some destabilizing effect, but that this could be lessened by his resettlement in an area other than Bunia; or (iii) would risk causing significant social instability, particularly in light of the upcoming elections'.⁴¹⁷ The panel concluded that 'Mr Lubanga's release would give rise to some level of social instability, but

407 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, para 48.

408 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 54.

409 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, 22 September 2015, paras 52–53; ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 58.

410 *Ibid.*

411 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, para 63.

412 Kimberly Prost, 'Enforcement' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001). See also ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, para 63.

413 *Ibid.*

414 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, para 63.

415 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3144-Red, Confidential Redacted version of 'Observations on the criteria set out in Rule 223 (a) to (e) of the Rules of Procedure and Evidence' (ICC-01/04-01/06-3144-Conf-Exp), 17 August 2015, para 6; ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3584, Registrar's Observations on the criteria set out in rule 223 of the Rules of Procedure and Evidence, 4 September 2015, para 6.

416 Anna Oehmichen, 'Commentary on Article 110 of the Rome Statute and Rules 223 and 224 of the Rules of Procedure and Evidence of the International Criminal Court' in Mark Klamburg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic Epublischer 2017) 403; see also ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 74.

417 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Thomas Lubanga Dyilo, 22 September 2015, para 64.

that this instability has not been demonstrated to be “significant” as required under this factor’.⁴¹⁸ The same conclusion was reached in *Katanga* as a result of similar conflicting information.⁴¹⁹

(f) *Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release.*

It is unclear what rises to the level of ‘significant’. In *Lubanga*, the panel noted his lack of involvement in the reparation process or any demonstration of regret, which it stated would, if present, be viewed as relevant to this factor.⁴²⁰ In *Katanga*, the panel considered Mr Katanga’s filmed apology and its effect on the victims, also noting the Registrar’s submission that the apology had been found inadequate by the victims.⁴²¹ It concluded that while Mr Katanga’s actions had some benefit to the victims, the benefits were not ‘significant’ within the meaning of Rule 223(d).⁴²² However, as Esther Gumboh has noted with respect to life sentences, the limitations placed on prisoners by imprisonment may greatly limit their ability to assist victims and prisoners with good connections and sufficient finances are better placed to take such significant actions.⁴²³ As such, ‘continued detention based on the perceptions of victims would tend to be arbitrary’.⁴²⁴

(g) *Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.*

This factor is linked to Article 110(4) (c), where the panel may reduce the sentence if it finds ‘other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence as provided for in the Rules of Procedure and Evidence’.⁴²⁵ The panel does not consider the death of a family member as a personal circumstance that is relevant to reduction of sentence, rather, this would be relevant to the issue of interim release.⁴²⁶ In *Katanga*, however, the deaths of his father and older brother were seen as a change in familial responsibilities, essentially that he would now be the main provider, and thus the deaths were viewed as a ‘clear and significant’ change in Mr Katanga’s individual circumstances.⁴²⁷

CONDITIONAL EARLY RELEASE

As discussed above, there have only been two instances where the ICC has considered early release. The ICC has yet to impose conditions on early release and neither does the legal framework provide for it to do so. However, precedent for conditional early release can be found in the jurisprudence of the Special Court for Sierra Leone (SCSL), and the evolving jurisprudence of the IRMCT.

418 *Ibid.*

419 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, paras 75–76.

420 See n 417 above, para 69.

421 See n 419 above, para 99.

422 *Ibid.*, para 105.

423 Esther Gumboh, ‘The Penalty of Life Imprisonment under International Criminal Law’ (2011) 11 African Human Rights Law Journal 75, 89.

424 *Ibid.*, 90.

425 ICC RPE, Art 110(4) (c). See also ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 108.

426 ICC RPE, Art 110(4) (c). See also ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 109.

427 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 109.

While the SCSL is outside the scope of this paper, its practice of conditional early release provides a novel practice that is worth considering. The Statute and the Rules of the SCSL do not include explicit reference to conditional early release or rehabilitation.⁴²⁸ However, the SCSL created a ‘Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone’ that introduced conditional early release as well as rehabilitation.⁴²⁹ With regard to rehabilitation, the Practice Direction invokes Article 10(3) of the ICCPR, which provides, *inter alia*, that ‘[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’. Further, it mentions General Principle 59 of the Standard Minimum Rules for the Treatment of Prisoners, which provides that penal institutions ‘should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of prisoners’.

The Practice Direction is premised on the idea that ‘the goals of rehabilitation, public safety and protection of victims and witnesses’ are best served by ‘allowing supervised placement of the convicted person in the community on conditions promoting good behaviour’.⁴³⁰ To be eligible for consideration for conditional early release, a convicted person shall, *inter alia*, provide proof of a ‘positive contribution to peace and reconciliation in Sierra Leone and the region such as public acknowledgement of guilt, public support for peace projects, public apology to victims, or victim restitution’.⁴³¹ The Registrar plays an important role in collecting information about the convicted person to determine eligibility for conditional early release.⁴³² If the conditions of release are violated, the person would be arrested and transferred to the Special Court pending a decision of the President as to whether or not there is probable cause to believe that conditions were violated.⁴³³ Once the full term of the sentence has passed, the person is considered to be discharged from the conditions of the conditional early release agreement.⁴³⁴

The SCSL’s practice of conditional early release is also notable for its emphasis on rehabilitation. In viewing conditional early release as an ‘incentive for rehabilitation’ and encouraging convicted persons ‘to engage in meaningful contributions to reconciliation and ongoing peace’, the Practice Direction takes an explicit focus on rehabilitation and reintegration.

To this end, specific training intended to promote reintegration could support decisions for early release. For example, the SCSL President delayed the granting of early release to Mr Kondewa as he had not completed his ‘human rights and correct behaviour as a citizen of Sierra Leone’ training.⁴³⁵

428 Residual Special Court for Sierra Leone, Rules of Procedure and Evidence (adopted 7 March 2003, entered into force 1 January 2014) (RSCSL RPE) Rule 123: If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he is eligible for pardon or commutation of sentence, the State concerned shall, in accordance with Article 23 of the Statute, notify the Registrar. Rule 124: There shall only be pardon, commutation of sentence or early release if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law, but an early release shall only occur after the prisoner has served a minimum of two thirds of his original sentence.

429 Residual Special Court for Sierra Leone, Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone, 1 October 2013.

430 *Ibid*, preamble.

431 *Ibid*, para 2(C) (iii).

432 *Ibid*, para 5.

433 *Ibid*, para 12.

434 *Ibid*, para 13.

435 RSCSL, Prosecutor v *Allieu Kondewa*, Case RSCSL-04-14-ES, Decision of the President on a Request for Extension of Time for Completion of Allieu Kondewa’s Training as Ordered in the Decision of the President on Application for Conditional Early Release, 22 March 2018.

In the case of Mr Fofana, who was granted conditional early release, he ‘underwent a six month training programme to enable him to understand the nature and gravity of the crimes for which he was convicted; to understand that there is no justification for using illegal means to undertake a legitimate cause; and to acknowledge his own responsibility and role in the armed conflict’.⁴³⁶

Legal frameworks and context: final release

ICTY and ICTR

The legal frameworks of the ICTY and ICTR do not contain explicit provisions addressing final release of persons who have served their sentences. While the texts contain provisions on the status of acquitted persons and the criteria to grant early release, no mention is made on what happens after sentences are completed. Enforcement agreements, concluded between the tribunals and states that have agreed to enforce sentences on behalf of the tribunals, contain similar language regarding termination of enforcement.⁴³⁷

These agreements state that:

1. Enforcement of the sentence shall cease:
 - (i) when the sentence has been completed;
 - (ii) upon the demise of the convicted person;
 - (ii) upon the pardon of the convicted person; and
 - (iv) following a decision of the International Tribunal, as provided for in paragraph 2 below.
2. The International Tribunal may at any time decide to request the termination of the enforcement of the sentence in the requested state and transfer the convicted person to another state or to the International Tribunal.
3. The competent authorities of the requested state shall terminate the enforcement of the sentence as soon as it is informed by the Registrar of any decision or measure as a result of which the sentence ceases to be enforceable.

However, some countries, including the United Kingdom and Austria, have added a fourth paragraph in which they reserve the right to deport or transfer the convicted person from their territory after the completion of their sentence unless notified of another state willing to accept the convicted person.⁴³⁸

The 1994 ICTY Host State Agreement with the Netherlands⁴³⁹ contains no provisions on release.

However, this did not become an issue for the ICTY as acquitted and released persons were able to

⁴³⁶ RSCSL, *Prosecutor v Moinina Fofana*, Case RSCSL-04-14-ES, Disposition of the Matter of Moinina Fofana’s Violations of the Terms of His Conditional Early Release, 25 April 2016, para 28.

⁴³⁷ Agreement between the ICTR and Benin (26 August 1999), Agreement between the ICTR and Sweden (27 April 2004), Agreement between the ICTY and Belgium (2 May 2007), Agreement between the ICTY and France (25 September 2000), Art 9.

⁴³⁸ Agreement between the ICTY and Austria (23 July 1999) and Agreement between the ICTY and the United Kingdom (11 March 2004), Art 9(4).

⁴³⁹ Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (UN-Netherlands) (adopted 29 July 1994, entered into force 17 November 1994).

go back to their countries in the former Yugoslavia.⁴⁴⁰ For example, Mr Gotovina, Mr Boškoski, Mr Halilović and Mr Haradinaj were all reported to have reintegrated and, in fact, been welcomed back.⁴⁴¹

Persons acquitted by the ICTR have been in a notably different position.⁴⁴² These persons are of Hutu descent and do not want to return to Rwanda, which is now led by a Tutsi government.⁴⁴³ The most prominent example is those individuals living in Tanzania at a ‘safe house’ of the ICTR, one of whom has been there since his acquittal by the ICTR in 2004.⁴⁴⁴

It is worth noting that the IRMCT Host State Agreements, adopted in 2013 (Tanzania) and 2015 (the Netherlands), contain specific articles on provisional and other release. In the agreement between the IRMCT and the Netherlands,⁴⁴⁵ a released person shall not remain on the territory of the Host State except with the Host State’s agreement.⁴⁴⁶ While the IRMCT agreement with Tanzania⁴⁴⁷ has similar wording, it also states that ‘[t]he Host State shall facilitate the temporary stay of the person on its territory until the transfer under paragraph 1 of this Article takes place’.⁴⁴⁸ The term ‘temporary’ may reflect that the IRMCT has inherited the safe house situation and is also ‘dependent on the good will of states to relocate acquitted and released persons’.⁴⁴⁹ In practice, the ICTR Appeals Chamber stated that:

‘[w]here a person has been acquitted and all proceedings against him have been finalized, the Tribunal is obliged to release him from its detention facility. The Registrar’s responsibility in this respect is limited to making the necessary diplomatic, logistical, and physical arrangements for such release, taking into consideration, to the extent possible and as appropriate, the requests of the acquitted person.’⁴⁵⁰

Further, the Appeals Chamber held that ‘the diplomatic initiatives of the Registrar in relation to relocation do not fall within the ambit of the obligation of States to cooperate with the Tribunal under Article 28 of the Statute’.⁴⁵¹ In *Ntagerura*, the Appeals Chamber, noting ‘the limitations on the capacity of the Tribunal to secure relocation’ and the Registrar’s continued efforts to secure relocation, requested the Registrar ‘to make enquiries with the Office of the United Nations High Commissioner for Refugees and solicit its assistance in relocating the Appellant’.⁴⁵² Mr Ntagerura has remained in the safe house since 2004.

The *Nzuwonemeye* case highlights another gap in the cooperation framework as it relates to ICTR acquitted persons. Mr Nzuwonemeye was arrested on the basis of an ICTR arrest warrant in February

440 Holá and van Wijk (see n 339 above) 130.

441 Holá and van Wijk (see n 35 above) 244.

442 See n 37 above, para 104.

443 Holá and van Wijk (see n 339 above) 131.

444 See n 37 above, para 104.

445 Agreement between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals (23 February 2015).

446 *Ibid*, Art 39(3).

447 Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals (26 November 2013).

448 *Ibid*, Art 39(3).

449 See n 37 above, para 104.

450 ICTR, Prosecutor v *André Ntagerura*, Case ICTR-99-46-A2, Decision on Motion to Appeal the President’s Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008, 18 November 2008, para 14.

451 *Ibid*, para 15.

452 *Ibid*, para 19.

2000. At that point he had been living in France since 1997 with his wife and children and had a pending asylum application.⁴⁵³ Mr Nzuwonemeye was acquitted on February 2014.⁴⁵⁴ In July 2014, the Registrar sent a note verbale to France requesting that it take Mr Nzuwonemeye back, but France declined to do so.⁴⁵⁵ Mr Nzuwonemeye remains in the safe house and has continued to appeal to France for relocation. Mr Nzuwonemeye's appeal to France involves Article 1F of the 1951 Convention relating to the Status of Refugees,⁴⁵⁶ which states:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.'

The threshold of 'serious reasons to consider' is considerably lower than the beyond reasonable doubt standard of proof required in criminal proceedings. Essentially, an indictment by an international criminal court or tribunal alone is enough to trigger the exclusion clause, notwithstanding that some indictments result in acquittal. In *Nzuwonemeye*, the *Conseil d'État* recalled this lower threshold, reiterating that these provisions do not require proof or conviction beyond reasonable doubt, and that the rule of the presumption of innocence under criminal law was no longer applicable.⁴⁵⁷ Further, it held that Mr Nzuwonemeye's position as commander of the Kigali Armoured Reconnaissance Battalion, the RECCE battalion, one of the three elite units of the Rwandan Army directly involved in the planning, organisation and commission of massacres, meant that there were 'serious reasons to consider that he had contributed to the preparation and commission of the crime of genocide or had facilitated its commission without seeking at any moment, in the context of his situation, to prevent or dissociate himself from it'.⁴⁵⁸

453 IRMCT, Prosecutor v *François Xavier Nzuwonemeye*, Case MICT-13-43, Appeal from Decision on Motion for Order to the Government of France, 17 December 2018, para 2.

454 *Ibid*, paras 2-4.

455 *Ibid*, para 5.

456 Convention relating to the Status of Refugees, (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 Art 1F. One hundred and forty five countries are States Parties to the Refugee Convention.

457 Unofficial translation of the *Conseil d'État* ruling on Case No 414821, Hearing of 18 February 2019, Reading of 28 February 2019, para 7. 'D'autre part, il ressort des termes mêmes de l' article 1er de la Convention de Genève que les clauses d'exclusion peuvent être mises en œuvre dès lors qu'il existe « des raisons sérieuses de penser » que le demandeur d'asile a commis un ou plusieurs des crimes qui y sont mentionnés, l'application de ces stipulations n'exigeant pas l'existence d'une preuve ou d'une conviction au-delà de tout doute raisonnable et faisant obstacle à l'application de la règle pénale de la présomption d'innocence.'

458 Unofficial translation of the *Conseil d'État* ruling on Case No 414821, Hearing of 18 February 2019, Reading of 28 February 2019, para 9. 'Au cours de l'année 1994, notamment entre les 6 avril et 4 juillet 1994, alors qu'avaient lieu des massacres génocidaires de masse décidés par le gouvernement intérimaire auquel il avait prêté allégeance, il a commandé à Kigali le bataillon blindé de reconnaissance, dit bataillon RECCE, l'une des trois unités d'élite de l'armée rwandaises, qui a directement pris part à la planification, à l'organisation et à la réalisation des massacres. S'il fait valoir qu'il se serait en réalité opposé au génocide et aurait protégé des personnes menacées, de telles assertions ne sont pas corroborées par les pièces versées au dossier des juges du fond. Dans ces conditions, en estimant qu'il existait des raisons sérieuses de penser qu'il avait contribué à la préparation ou à la réalisation du crime de génocide ou en avait facilité la commission ou avait assisté à son exécution sans chercher à aucun moment, eu égard à sa situation, à le prévenir ou à s'en dissocier, au sens et pour l'application du a) de l'article 1er de la Convention de Genève, et devait, par suite, être exclu du statut de réfugié, la Cour nationale du droit d'asile, qui n'a pas méconnu les règles de dévolution de la charge de la preuve, n'a pas inexactement qualifié les faits de l'espèce.'

Following Mr Nzuwonemeye's application to the IRMCT, submitting that the Single Judge had committed a 'discernible error' by incorrectly interpreting Article 28 of the Statute 'to not include the power to order a State to take back an acquitted person who was arrested in its territory',⁴⁵⁹ the IRMCT Appeals Chamber ruled that it does not have the power to compel France to accept an acquitted person in its territory, but encouraged France to 'renew its consideration of [Mr] Nzuwonemeye's request to be allowed in France under the same conditions in which he was arrested and be given the opportunity to, through the proper procedures, attempt to legalize his status in that country'.⁴⁶⁰

ICC

Release of persons after completion of a sentence at the ICC is governed by Article 107 of the Rome Statute. If the person is not a national of the state of enforcement, they may be transferred to another state that is obliged or agrees to receive them, 'taking into account any wishes of the person to be transferred to that State'. The State of enforcement may also authorise the person to remain in its territory, and may also, pursuant to Article 108, extradite or surrender the person to another state for the purposes of trial or enforcement of a sentence.⁴⁶¹

The ICC Host State Agreement with the Netherlands also contains provisions that address release without conviction. If a person is released without conviction:

'the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State'.⁴⁶²

This provision mirrors Rule 185 of the ICC RPE, which governs the release of a person from the custody of the ICC. A number of ICC enforcement agreements also contain provisions that mirror Article 107 of the Rome Statute, allowing transfer to a state obliged or agreeing to accept the person, unless the person is authorised to remain.⁴⁶³ However, despite the conclusion of a number of enforcement agreements containing this language, the ICC has been less successful in concluding cooperation agreements to resettle convicted persons who have completed their sentences. Only one country, Argentina, has signed a cooperation agreement on release (other than interim release).⁴⁶⁴

459 IRMCT, Prosecutor v *François Xavier Nzuwonemeye*, Case MICT-13-43, Appeal from Decision on Motion for Order to the Government of France, 17 December 2018, para 19.

460 IRMCT, Prosecutor v *François Xavier Nzuwonemeye*, Case MICT-13-43, Decision on the Appeal of the Single Judge's Decision of 22 October 2018, 17 April 2019, paras 27–30.

461 Rome Statute, Art 108 prohibits the prosecution, punishment or extradition to a third state for any conduct engaged in prior to that person's delivery to the state of enforcement, unless such prosecution, punishment or extradition has been approved by the ICC.

462 Headquarters Agreement between the International Criminal Court and the Host State (ICC-Netherlands) (adopted 7 June 2007, entered into force 1 March 2008) ICC-BD/04-01-08, Art 48.

463 Agreement Between the Government of Sweden and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court (ICC-Sweden) (adopted 26 April 2017, entered into force 24 April 2017) ICC-PRES/20-02-17, Art 11; Agreement between the International Criminal Court and the Government of the Kingdom of Belgium on the Enforcement of Sentences of the International Criminal Court (ICC-Belgium) (adopted and entered into force 1 June 2010) ICC-PRES/06-01-10, Art 16; Agreement between the Kingdom of Denmark and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court (ICC-Denmark) (adopted 1 June 2010, entered into force 5 July 2012) ICC-PRES/12-02-12, Art 16; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court (ICC-UK) (adopted 8 November 2007, entered into force 8 December 2007) ICC-PRES/04-01-07, Art 14; Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court (ICC-Austria) (adopted 27 October 2005, entered into force 26 November 2005) ICC-PRES/01-01-05, Art 15.

464 'Argentina and ICC sign agreements on Interim Release and Release of Persons, reinforcing Argentina's commitment to accountability and fair trial' Press Release: ICC-CPI-20180228-PR1360 (ICC, 28 February 2018) www.icc-cpi.int/Pages/item.aspx?name=pr1360 accessed 4 July 2019.

Another barrier to this type of voluntary cooperation can be found in domestic legislation. For example, Canada's domestic legal system includes a war crimes programme that supports Canada's policy to 'deny safe haven to suspected perpetrators of war crimes, crimes against humanity or genocide'.⁴⁶⁵ Canada's Department of Justice and its partners work together to:⁴⁶⁶

- prevent the admission to Canada of people involved in war crimes, crimes against humanity or genocide;
- detect, at the earliest possible opportunity, alleged perpetrators of war crimes, crimes against humanity or genocide who are in Canada, and take steps to prevent them from obtaining status or citizenship;
- revoke the status or citizenship of individuals involved or complicit in war crimes, crimes against humanity or genocide who are in Canada, and remove them from Canada; and
- examine all claims that there are suspected perpetrators of war crimes and crimes against humanity living in Canada and, where appropriate, investigate and prosecute these individuals.

Another potential barrier may be found in Article 1F of the Refugee Convention. Following the ICC's acquittal of Mr Ngudjolo, he applied for asylum in the Netherlands, claiming that he would face considerable risks should he return to Democratic Republic of Congo (DRC) due to statements he made at trial.⁴⁶⁷ Article 3 of the European Convention on Human Rights prevents expulsion to a country where the person might face persecution.⁴⁶⁸ However, the Dutch courts relied on Article 1F of the Refugee Convention and denied the claim for asylum. Similar to the French court's ruling in the case of Mr Nzuwonemeye, the Dutch court found that Mr Ngudjolo's alleged senior position in the Front des Nationalistes et Intégrationnistes (FNI) and the Force de résistance patriotique de l'Ituri (FRPI) meant that Mr Ngudjolo had control over the fighters of the FNI and the FRPI.⁴⁶⁹ And even though acquitted, the Dutch court found that there remained 'serious reasons to believe' that

465 See n 39 above.

466 *Ibid.*

467 Wieteke Theeuwen, 'Asylum Proceedings in the *Ngudjolo* Case: What Happened in the Dutch Courts?' *International Justice Monitor* (13 March 2015) www.ijmonitor.org/2015/03/asylum-proceedings-in-the-ngudjolo-case-what-happened-in-the-dutch-courts accessed 4 July 2019. See also Raad van State, ECLI:NL:RVS:2014:3833 15 October 2014, para 4.1. <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2014:3833> accessed 4 July 2019.

'De vreemdeling heeft gesteld dat hij bij terugkeer in de DRC te vrezen heeft van de Congolese president, de Oegandese president, Congolese legerleiders en de Rassemblement Congolais pour la Démocratie-Kisangani/Mouvement de Libération (hierna: de RCD-K/ML), omdat hij hen heeft genoemd in zijn verklaring bij het Strafhof en hen in verband heeft gebracht met het conflict in Ituri. In dat kader heeft hij erop gewezen dat twee getuigen door bedreigingen van de Congolese autoriteiten hebben afgezien van het afleggen van een getuigenverklaring bij het Strafhof, en dat hij geen salaris meer ontvangt van het Congolese leger. Voorts heeft de vreemdeling gesteld te vrezen dat leden van de Hema-gemeenschap wraak op hem zullen willen nemen. Hij heeft verklaard dat hij heeft vernomen dat in die gemeenschap onvrede bestaat over zijn vrijspraak door het Strafhof. Ook heeft hij gesteld te vrezen voor een Congolese rebellenleider, omdat hij heeft gewerkt voor het Congolese leger. Daarnaast heeft de vreemdeling erop gewezen dat een lokale non-gouvernementele organisatie het Congolese openbaar ministerie heeft verzocht een strafzaak tegen hem aan te spannen.'

468 European Union Agency for Fundamental Rights and the Council of Europe, 'Handbook on European law relating to asylum, borders and immigration' (Publications Office of the European Union 2014) 66 www.echr.coe.int/Documents/Handbook_asylum_ENG.pdf accessed 4 July 2019.

469 Unofficial Translation of Raad van State, ECLI:NL:RVS:2014:3833, 15 October 2014, para 2.5 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2014:3833> accessed 4 July 2019.

'Uit het vorenstaande blijkt dat de vreemdeling vanaf van maart tot oktober 2003 een leidinggevende functie heeft bekleed binnen de alliantie tussen de FRPI en het FNI. Ook blijkt dat de vreemdeling van 2005 tot oktober 2006 een leidinggevende functie heeft bekleed binnen de MRC. Daarnaast blijkt uit het vorenstaande dat strijders van het FNI en de FRPI in 2003 en strijders van de MRC in 2006 op grote schaal misdrijven hebben begaan als bedoeld in artikel 1(F), onder a en b. De leidinggevende functies van de vreemdeling rechtvaardigen de conclusie van de staatssecretaris dat de vreemdeling zodanige zeggenschap had over het handelen van de strijders van de FRPI en het FNI, alsmede de MRC, dat hij medeverantwoordelijk kan worden gehouden voor de door die strijders gepleegde misdrijven. Weliswaar heeft de vreemdeling bij het Strafhof op 28 oktober 2011 verklaard dat de samenwerking tussen het FNI en de FRPI in de praktijk op problemen is gestuit, maar hieruit volgt niet dat hij geen enkele invloed heeft kunnen uitoefenen op de strijders van deze organisaties.'

Mr Ngudjolo was involved in crimes.⁴⁷⁰ In analysing Mr Ngudjolo's risk of persecution in the DRC, the Dutch court referenced correspondence from the ICC Registry. The Victim and Witnesses Unit (VWU) of the ICC Registry had corresponded with the Ministry of Foreign Affairs, informing it on 12 March 2013 that Mr Ngudjolo might run a risk on return to the DRC.⁴⁷¹ However, the VWU subsequently sent a second note verbale on 6 December 2013 advising that Mr Ngudjolo could return to the DRC.⁴⁷² The Dutch court then concluded that there was no proof of risk.⁴⁷³ The decision to deny asylum was confirmed on appeal⁴⁷⁴ and Mr Ngudjolo was subsequently repatriated to the DRC.

III. Other post-sentence and post-acquittal issues

Re-trials, domestic trials and ne bis in idem

According to the legal frameworks of the international courts and tribunals, a person should not be tried by another court for a crime for which he has already been convicted or acquitted by that court.⁴⁷⁵ However, there are cases where the possibility of a trial against a released or acquitted person might occur. At the ICC, in the *Kenyatta* case, the Trial Chamber terminated the proceedings after the Prosecutor withdrew the charges but left the door open for a possible retrial should the Prosecutor submit new evidence.⁴⁷⁶ Similarly, in the *Ruto and Sang* case, the Trial Chamber terminated the case and released Mr Ruto and Mr Sang without prejudice to re-prosecution at either the ICC or a national jurisdiction.⁴⁷⁷

470 Unofficial Translation of Raad van State, ECLI:NL:RVS:2014:3833, 15 October 2014, para 2.5 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2014:3833> accessed 4 July 2019.

'Hieraan staat niet in de weg dat de vreemdeling bij de onder 1. vermelde uitspraak is vrijgesproken door Trial Chamber II van het Strafhof. Bij het Strafhof stond de vreemdeling terecht voor zijn vermeende betrokkenheid, als leidinggevende van het FNI dan wel als aanvoerder van Lendu-strijders uit Bedu-Ezekere, bij oorlogsmisdrijven en misdrijven tegen de menselijkheid, gepleegd tijdens de aanval op het dorp Bogoro, in Ituri, op 24 februari 2003. Trial Chamber II heeft aan de vrijspraak ten grondslag gelegd dat uit het bewijsmateriaal niet 'beyond reasonable doubt' kan worden afgeleid dat de vreemdeling ten tijde van de aanval op Bogoro leiding heeft gegeven aan het FNI of Lendu-strijders uit Bedu-Ezekere. Dit laat echter onverlet dat er ernstige redenen zijn om te veronderstellen dat de vreemdeling nadien als leidinggevende betrokken is geweest bij andere ernstige misdrijven. De uitspraak van Trial Chamber II biedt daarvoor ook aanknopingspunten, nu zij daarin heeft overwogen dat de vreemdeling in maart 2003 is benoemd op een zeer hoge positie binnen de alliantie tussen het FNI en de FRPI, en dat daaruit weliswaar niet noodzakelijkerwijs volgt dat hij daarvoor reeds een hoge militaire leider was, maar dat niettemin niet kan worden uitgesloten dat hij zich vanaf dat moment heeft kunnen positioneren als een sleutelfiguur.'

471 Unofficial Translation of Raad van State, ECLI:NL:RVS:2014:3833, 15 October 2014, para 4.4 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2014:3833> accessed 4 July 2019.

'De vrees van de vreemdeling wordt evenmin gestaafd door de VWU. Weliswaar heeft de Griffie van het Strafhof het Ministerie van Buitenlandse Zaken in een note verbale van 12 maart 2013 meegedeeld dat de VWU van oordeel is dat de vreemdeling een risico zou kunnen lopen bij terugkeer naar de DRC, maar nadien heeft de Griffie het Ministerie bij note verbale van 6 december 2013 meegedeeld dat de vreemdeling kan terugkeren naar de DRC.'

472 Unofficial Translation of Raad van State, ECLI:NL:RVS:2014:3833, 15 October 2014, para 4.4 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2014:3833> accessed 4 July 2019.

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473 Unofficial Translation of Raad van State, ECLI:NL:RVS:2014:3833, 15 October 2014, para 4.4, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2014:3833> accessed 4 July 2019.

'Gezien het vorenstaande heeft de vreemdeling niet aannemelijk gemaakt dat hij bij terugkeer zodanig in de belangstelling van de Congolese autoriteiten zal staan dat dit leidt tot de detentie bedoeld in het arrest Z.M. tegen Frankrijk. Anders dan de rechtbank heeft overwogen, brengt dit arrest dus niet met zich dat de staatssecretaris zijn standpunt ondeugdelijk heeft gemotiveerd.'

474 Rechtbank Den Haag, ECLI:NL:RBDHA:2015:4659, 23 April 2015.

475 ICC Statute, Art 20(2); ICTY Statute, Art 10(1); ICTR Statute, Art 9(1).

476 ICC, Prosecutor v *Uhuru Muigai Kenyatta*, ICC-01/09-02/11-1005, Decision on the withdrawal of charges against Kenyatta, 13 March 2015, para 9.

477 ICC, Prosecutor v *William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2027-Red-Corr, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016.

Further, trials by domestic courts can take place on the basis of other incidents that fall outside of the charges brought by the international tribunals or courts. For example, Mr Bagambiki was charged with genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity and war crimes by the ICTR. On 25 February 2004, Mr Bagambiki was acquitted of all the charges against him, with the Trial Chamber citing insufficient evidence.⁴⁷⁸ On 8 February 2006, the Appeals Chamber upheld his acquittal.⁴⁷⁹ After his acquittal, the Court of First Instance of Rusizi tried him *in absentia* and convicted him of rape during the genocide.⁴⁸⁰

The ICTY Prosecutor charged Mr Orić with the war crimes of murder, cruel treatment and wanton destruction of cities, towns or villages not justified by military necessity. He was acquitted of all charges on 3 July 2008.⁴⁸¹ In 2014, Serbia issued an arrest warrant against Mr Orić for war crimes.⁴⁸² He was arrested by Swiss police who, despite the Serbian arrest warrant, extradited him to Bosnia where he was subsequently charged with war crimes.⁴⁸³ He filed an application to the IRMCT claiming that the criminal proceedings against him violated the principle of *non bis in idem*.⁴⁸⁴ The application was denied as the Appeals Chamber concluded that the acts charged differed fundamentally with respect to the alleged victims and the nature, time and location of the alleged criminal conduct.⁴⁸⁵ Mr Orić was subsequently acquitted by the Bosnian court in 2018.⁴⁸⁶

Mr Haradinaj has also been subject to two attempts to try him in domestic courts. After being acquitted twice by the ICTY,⁴⁸⁷ Serbia attempted to extradite him from Slovenia. The extradition was denied because the Slovenian Minister of Foreign Affairs reasoned that ‘all the charges in the arrest warrant have been addressed by the Hague Tribunal’.⁴⁸⁸ Serbia also attempted to extradite Mr Haradinaj from France, claiming there existed other war crimes for which he had not been prosecuted.⁴⁸⁹ France denied the extradition request.⁴⁹⁰

Domestic prosecution may be an even greater possibility when the international case focuses on a narrower spatial and temporal scope. For example, at the ICC, the *Katanga and Ngudjolo* case focused on a single incident on a single day, namely the attack on the village of Bogoro on 24 February 2003.⁴⁹¹ Such cases increase the likelihood of a subsequent domestic prosecution that does not violate *ne bis in idem* upon acquittal or completion of sentence. Following Mr Katanga’s ICC conviction and serving a portion of his sentence, Mr Katanga expressed his desire to serve the remainder of

478 ICTR, Prosecutor v *André Ntagerura et al*, Case ICTR-99-46-T, Judgment and Sentence, 25 February 2004.

479 ICTR, Prosecutor v *André Ntagerura et al*, Case ICTR-99-46-A, Judgment, 7 July 2006.

480 Holá and Van Wijk (see n 35 above) 252.

481 ICTY, Prosecutor v *Naser Orić*, Case IT-03-68-A, Judgment, 3 July 2008.

482 BIRN, ‘Bosnian Army Wartime Commander Naser Oric Arrested’ *Balkan Insight* (Sarajevo, 10 June 2015) <https://balkaninsight.com/2015/06/10/bosnian-army-wartime-commander-naser-oric-arrested> accessed 1 August 2019. See also, Holá and Van Wijk (see n 35 above) 252.

483 Holá and Van Wijk (see n 35 above) 252.

484 IRMCT, Prosecutor v *Naser Orić*, Case MICT-14-79, Decision on an Application for Leave to Appeal the Single Judges Decision of 10 December 2015, 17 February 2016, para 3.

485 *Ibid*, para 11.

486 Admir Muslimovic, ‘Bosnia Acquits Srebrenica Commander Naser Oric at Retrial’ *Balkan Insight* (Sarajevo, 30 November 2018) <https://balkaninsight.com/2018/11/30/srebrenica-commander-naser-oric-war-crimes-retrial-verdict-11-30-2018> accessed 5 July 2019.

487 ICTY, Prosecutor v *Ramush Haradinaj et al*, Case IT-04-84bis-T, Public Judgment with Confidential Annex, 29 November 2012.

488 Una Hajdar, ‘Slovenia ‘Will Not Extradite’ Kosovo Ex-PM to Serbia’ *Balkan Insight* (Pristina, 19 June 2015) <https://balkaninsight.com/2015/06/19/haradinaj-will-not-be-extradited-to-serbia-says-slovenian-minister> accessed 5 July 2019.

489 Filip Rudic, ‘France Refuses to Extradite Kosovo Ex-PM to Serbia’ *Balkan Insight* (Belgrade, 27 April 2017) <https://balkaninsight.com/2017/04/27/kosovo-haradinaj-serbia-extradition-france-court-04-27-2017> accessed 4 July 2019.

490 *Ibid*.

491 ICC, Prosecutor v *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008.

his sentence in the DRC.⁴⁹² The ICC and DRC concluded an ad hoc agreement that allowed Mr Katanga to serve the remainder of his sentence in the DRC.⁴⁹³ On 19 December 2015, Mr Katanga was transferred to a prison facility in the DRC.⁴⁹⁴ He was subsequently granted early release to take effect as of 18 January 2016.⁴⁹⁵ However, the DRC transmitted a number of documents to the ICC, including a ‘*Décision de renvoi*’ issued by the Haute Cour Militaire in which they alleged that Mr Katanga had committed a number of offences between 2002 and 2006.⁴⁹⁶ In this communication, reference was made to Article 108 of the Rome Statute. Article 108 states:

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person’s delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person.
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

The ICC Presidency sought clarification from the DRC as to the legal consequences of the ‘*Décision de renvoi*’, as well as the next procedural steps, bearing in mind the early release date set for Mr Katanga.⁴⁹⁷ On the day set for release, Mr Katanga was not released from prison. The DRC transmitted a letter to the ICC reiterating its intention to conduct domestic criminal proceedings against Mr Katanga, referring to its sovereignty and the principle of complementarity. Later correspondence indicates that the proceedings were ongoing despite the lack of approval from the ICC.⁴⁹⁸

In analysing this case, the ICC Presidency noted that ‘[t]he legal texts of the Court do not expressly set out any relevant criteria to be applied by the Court when considering the approval of the prosecution, punishment or extradition of a sentenced person by a State of enforcement’.⁴⁹⁹ Further noting that the ICC was an ‘institution of last resort, intended to complement and not replace national systems’, the Presidency found that ‘the Court’s approval should only be denied when the prosecution, punishment or extradition of sentenced persons may undermine certain fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court’.⁵⁰⁰

492 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3679, Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016, para 1, citing Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3545-Conf, Defence Observations on the designation of a State of enforcement, paras 9–10; ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3613-Conf-Exp, Defence Observations on the Possible Designation of the DRC as a State of Enforcement, para 3.

493 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3626-Anx, Accord ad hoc entre le gouvernement de la République Démocratique du Congo et La Cour Pénale Internationale sur l’exécution de la peine de M. Germain Katanga, prononcée par la Cour, 19 December 2015.

494 ‘Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment’ Press Release: ICC-CPI-20151219-PR1181 (ICC, 19 December 2015) www.icc-cpi.int/pages/item.aspx?name=PR1181 accessed 4 July 2019.

495 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Germain Katanga, 13 November 2015, para 116.

496 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3631-Anx1, Annex I to the Communication des autorités Congolaises concernant les poursuites nationales à l’encontre de Monsieur Germain Katanga, 12 January 2016.

497 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3679, Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016, para 5.

498 *Ibid*, paras 8–11.

499 *Ibid*.

500 *Ibid*, para 20.

In its submissions, the Defence for Mr Katanga sought to show the interrelationship between the principle of *ne bis in idem* (Article 20) and Article 108(1), submitting that evidence pertaining to the localities and events featuring in the ‘*Décision de renvoi*’ were presented to the ICC.⁵⁰¹

ICC RPE Rule 214(1), which is to be read together with Article 108, requires the state of enforcement to provide the ICC Presidency with documents detailing the intended prosecution, including the statement of facts, legal characterisation and legal provisions, including those concerning the statute of limitations and the applicable penalties, as well as a protocol containing views of the sentenced person obtained after the person has been informed sufficiently about the proceedings.⁵⁰² As such, the Presidency was of the opinion that the court should indeed consider the principle of *ne bis in idem* when deciding on requests for approval.⁵⁰³ Further, the Presidency held that

‘in applying Article 108(1) in conjunction with Article 20(2), the Presidency cannot widen the scope of the latter which only prohibits trial for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court and does not prohibit trials for conduct within the ambit of the ICC’s investigations’.⁵⁰⁴

Since the ‘*Décision de renvoi*’ articulated crimes other than those for which Mr Katanga had been convicted and acquitted, the Presidency approved the DRC’s request to prosecute.

The DRC’s continued prosecution of Mr Katanga is noteworthy as the state of enforcement for the ICC sentence is also the state of nationality of the accused, and also the state in which the crimes allegedly took place. As noted by Holá and van Wijk, the possibility of further prosecutions by states of enforcement can raise questions about the motivations for further prosecution, namely ‘[g]iven the volatile and emotionally charged environment in many post-conflict societies, such prosecutions in the name of fighting impunity and achieving justice might, in practice, serve as a cloak to pursue other, less noble, aims’.⁵⁰⁵

The ICC Presidency considered ‘whether the prosecution, punishment or extradition referred to in Article 108(1) undermines other fundamental principles or procedures or otherwise affects the integrity of the Court’.⁵⁰⁶ It concluded that ‘where the State of enforcement is also the State of nationality of Mr Katanga, there is clearly no question of the procedure for the designation of a State of enforcement having been used inappropriately as a guise to obtain custody over a sentenced person’.⁵⁰⁷ Further, the Presidency had ‘designated the DRC as the State of enforcement following a request from Mr Katanga himself’ who, despite having been informed of the possibility that he would face domestic criminal proceedings, continued to express his desire to return to the DRC.⁵⁰⁸ The Presidency further noted that ‘there was no claim that Mr Katanga would be prosecuted for offences of a political character’ and that the assertions of the defence that ‘several persons’ considered the prosecution of Mr Katanga improperly motivated were unsubstantiated.⁵⁰⁹

501 *Ibid*, para 21.

502 ICC RPE, Rule 214.

503 See n 497 above, para 22.

504 *Ibid*, para 23.

505 Holá and Van Wijk (see n 35 above) 256.

506 See n 497 above, para 26.

507 *Ibid*, para 27.

508 *Ibid*.

509 *Ibid*, para 29.

In an application for reconsideration of the presidency decision, Mr Katanga invoked Article 9 of the ICCPR, Article 67(1) (a) of the Rome Statute and Article 6(3) (a) of the European Convention on Human Rights, claiming that his fair trial rights were being violated. According to his January 2019 application for reconsideration to the ICC presidency, Mr Katanga remains in custody without any sign of progress in his case, there have been no evidential hearings, two judges have withdrawn from the case, and there has been no provision of material sufficient for Mr Katanga to know the nature of the charges and evidence against him.⁵¹⁰ Mr Katanga therefore asserted that the DRC is unable or unwilling to progress the case and asks for the ICC to revoke the permission granted under Article 108.⁵¹¹ The Presidency, however, rejected the application, stating that Mr Katanga had failed to demonstrate that new information existed to warrant the revocation.⁵¹²

The litigation surrounding the DRC's prosecution of Mr Katanga highlights the residual functions that the ICC may have to exercise following conviction and during and after enforcement of the ICC's sentence. Rule 108 was formulated to protect a person who has served or is serving his sentence from prosecution within the enforcement state or extradition to a third state.⁵¹³ According to William Schabas, the court 'should refuse authorization under Article 108 where there is a real danger of abuse of its own process, for example, where the prosecution is politically motivated or is in some way vexatious, or where there appears to be a likely breach of the *ne bis in idem* rule set out in Article 20 paragraph 2'.⁵¹⁴

Further, the ICC 'should take into account evolving norms of international human rights law that may be applicable', for example, the conditions of detention.⁵¹⁵ Schabas opines that the ICC must avoid a situation where it would be complicit in a punishment that is cruel, inhuman and degrading.⁵¹⁶ He recommends that when 'questions concerning the legitimacy of certain forms of punishment or other treatment arise, the Court ought to consider allowing the intervention as *amici curiae* of non-governmental organizations with recognized expertise, such as Amnesty'.⁵¹⁷ Similarly, consistent with the ICC's rejection of the death penalty and international standards, the state in question cannot inflict capital punishment.⁵¹⁸ This was a consideration in *Katanga*, as war crimes and crimes against humanity are punishable by death in the DRC.⁵¹⁹ In this case, the DRC provided formal written assurances to the ICC that the death penalty would not be sought against Mr Katanga and that any such penalty would not, in any event, ever be carried out.⁵²⁰ Mr Katanga questioned these assurances after a new government took office but the Presidency dismissed this as mere speculation and did not seek new assurances.⁵²¹

510 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3821-Red, Defence Application for Reconsideration of the Presidency Decision pursuant to Article 108(1) of the Rome Statute, 30 January 2019, para 40.

511 *Ibid.*

512 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3833, Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to Article 108(1) of the Rome Statute"', 26 June 2019, paras 32–54.

513 William A Schabas, 'Article 108: Limitation on the prosecution or punishment of other offences' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 2199.

514 *Ibid.*, 2203.

515 *Ibid.*

516 *Ibid.*

517 *Ibid.*, 2204.

518 *Ibid.*, 2203.

519 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3679, Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016, para 28.

520 *Ibid.*

521 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3833, Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to article 108(1) of the Rome Statute"', 26 June 2019, paras 52–54.

Compensation

ICTY AND ICTR

Human rights instruments provide for compensation in cases of wrongful detention, prosecution or conviction.⁵²² Similarly, compensation for acquitted persons is available in a number of domestic jurisdictions.⁵²³ International criminal courts and tribunals have taken various approaches on this issue. The length of international trials, coupled with the gravity of the crimes in question, may create circumstances where, even after an acquittal, a person cannot as easily resume his/her life. However, the legal frameworks of the ICTY and ICTR did not include provisions for compensation. In September 2000, the Presidents of the ICTY and the ICTR separately proposed the inclusion of legal provisions dealing with compensation to persons who may have been wrongfully detained, prosecuted or convicted by the tribunals.⁵²⁴ No such amendments were adopted. Notwithstanding this lack of legislation, Mr Zoran and Mr Mirjan Kupreškić, who had been acquitted on all counts, filed before the ICTY for compensation.⁵²⁵ Citing the lack of provisions, the President stated that it was not possible for the judges to rule on the matter.⁵²⁶

ICTR jurisprudence did provide for compensation in limited circumstances. In *Barayagwiza*, the Appeals Chamber found that the accused's rights had been violated due to the length of time he was provisionally detained before being indicted and the delay in his initial appearance following his transfer to the tribunal. The Appeals Chamber ruled that should Mr Barayagwiza be found not guilty, he should receive compensation, and should he be found guilty, his sentence would be reduced to take into account the violation of his rights.⁵²⁷ A similar decision was made in *Semanza*, owing to the violation of Mr Semanza's right to be informed promptly of the nature of the charges against him.⁵²⁸ Both Mr Barayagwiza and Mr Semanza were found guilty and thus no financial compensation was ordered, but their sentences were reduced.⁵²⁹

Mr Rwamakuba sought compensation from the ICTR on two grounds: the first, a violation of his right to legal assistance, which resulted in a delay in his initial appearance, and the second, a remedy for the 'grave and manifest injustice' he suffered as a result of his lengthy detention and prosecution on

522 Art 9(5) of the ICCPR provides: Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation; Art 14(6) of the ICCPR provides: When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him; Art 5(5) of the European Convention on Human Rights provides that: Everyone who has been the victim of arrest or detention in contravention of the provisions in this article shall have enforceable right to compensation.

523 See, eg, Art 89(1) of The Netherlands Code of Procedural Law ('Wetboek van Strafvordering'); Art 28 of The Netherlands Law on Pre-Trial Detention ('Voorlopige Hechteniswet'). See also, Johan David Michels, 'Compensating Acquitted Defendants for Detention before International Criminal Courts', (2010) 8(2) *Journal of International Criminal Justice*, 413.

524 UNSC 'Letter dated 26 September 2000 from the Secretary-General addressed to the President of the Security Council' UN Doc S/2000/904; UNSC 'Letter dated 28 September 2000 from the Secretary-General addressed to the President of the Security Council' UN Doc S/2000/925.

525 United Nations General Assembly/Security Council (UNGA/SC) 'Ninth Annual Report of the ICTY' (4 September 2002) 57th Session/57th year (2002) UN Doc A/57/379 S/2002/985, para 28.

526 *Ibid.*

527 ICTR, Prosecutor v *Jean Bosco Barayagwiza*, Case ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000.

528 ICTR, Prosecutor v *Laurent Semanza*, Case ICTR-97-20-A, Decision, 31 May 2000.

529 ICTR, Prosecutor v *Jean Bosco Barayagwiza*, Case ICTR-99-52-T, Judgment and Sentence, 3 December 2003, paras 1106–1107; ICTR, Prosecutor v *Jean Bosco Barayagwiza*, Case ICTR-99-52-T, Appeals Judgment, 28 November 2007, paras 1096–1097; ICTR, Prosecutor v *Laurent Semanza*, Case ICTR-97-20-T, Judgment and Sentence 15 May 2003, para 580. Sentence affirmed on appeal.

'false and manipulative evidence'.⁵³⁰ With regard to the latter, the defence cited Article 85(3) of the Rome Statute, stating that, as a multilateral treaty with a high number of ratifications, its provisions are 'arguably highly persuasive with regard to the interpretation of the powers of judges at the ICTR', and further that the provisions applicable to the ICC 'provide significant and actually the only real guidance in the arena of international criminal law as to how to address this matter'.⁵³¹ The Trial Chamber, however, held that the legal framework of the ICTR did not 'provide for the power to accord compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice'.⁵³² Further, while acknowledging the importance of Article 85(3) of the Rome Statute, the Trial Chamber held that at present, customary international law does not provide for a right to compensation for an acquitted person in circumstances involving a grave and manifest miscarriage of justice.⁵³³

However, with regard to the right to legal assistance, the Trial Chamber found that Mr Rwamakuba's right to legal assistance had been violated and concluded the court had the inherent power to award financial compensation, 'in accordance with its obligation to give full effect to an accused's or former accused's right to an effective remedy'.⁵³⁴ Drawing on the jurisprudence of the ECtHR, the Trial Chamber considered, with respect to both pecuniary and non-pecuniary damages, whether the outcome would have been different had Mr Rwamakuba's right to legal assistance not been infringed. It concluded that the defence had not established that the length of Mr Rwamakuba's detention would have been shorter had he been provided with legal assistance, and that there was no 'causal link between the violation found and his alleged loss in earnings, nor between the violation found and any non-pecuniary injury he may have suffered as a result of his detention'.⁵³⁵ The Trial Chamber thus dismissed the claim for financial compensation for a grave and manifest miscarriage of justice.⁵³⁶ However, the Trial Chamber held that Mr Rwamakuba had suffered moral damage as a result of the violation of his right to legal assistance and ordered the Registrar to apologise to Mr Rwamakuba, as well as financial compensation to the amount of \$2,000.⁵³⁷ The Appeals Chamber upheld the decision.⁵³⁸

In another compensation claim at the ICTR, Mr Zigiranyirazo filed a motion requesting compensation for the period spent in detention and for violations of his fair trial rights.⁵³⁹ The Trial Chamber, unlike in *Rwamakuba*, held that Article 85(3) of the Rome Statute 'reflects the current State of customary law with respect to compensation for acquitted persons'.⁵⁴⁰ The Trial Chamber, however, distinguished 'a grave and manifest miscarriage of justice' and 'a more standard error which might also result in an acquittal but no compensation'.⁵⁴¹ Further, the Trial Chamber held that the drafters

530 ICTR, Prosecutor v *André Rwamakuba*, Case ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007.

531 ICTR, Prosecutor v *André Rwamakuba*, Case ICTR-98-44C-T, Application for Appropriate Remedy, 23 October 2006, paras 17 and 22.

532 ICTR, Prosecutor v *André Rwamakuba*, Case ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, para 21.

533 *Ibid.*, para 31.

534 *Ibid.*, para 62.

535 *Ibid.*, para 71.

536 *Ibid.*, para 79.

537 *Ibid.*

538 ICTR, Prosecutor v *Protais Zigiranyirazo*, Case ICTR-9844C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007.

539 ICTR, Prosecutor v *Protais Zigiranyirazo*, Case ICTR-2001-01-073, Decision on Protais Zigiranyirazo's Motion for Damages, 18 June 2012, para 2.

540 *Ibid.*, para 19.

541 *Ibid.*, para 21.

of Article 85(3) did not appear to have intended the provision of compensation for each acquittal occasioned by a miscarriage of justice, rather that ‘such compensation remains most appropriate where there has been a clear violation of a claimant’s fundamental rights as set out in Article 20(4) of the ICTR Statute’.⁵⁴² The Trial Chamber was further of the view that to award compensation in the circumstances of Mr Zigiranyirazo’s case might ‘open the floodgates to an unmanageable host of compensation claims’.⁵⁴³

ICC

Article 85 of the Rome Statute provides that:

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his/her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him/her.
3. In exceptional circumstances, where the ICC finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the RPE, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

Article 85(1) is identical to ICCPR Article 9(5), and Article 85(2) of the Rome Statute is materially identical to Article 14(6) of ICCPR. An important factor in the ICC’s framework is the role of states in executing arrest warrants, meaning that any claim of unlawful arrest and detention might also be brought against a state rather than the ICC.⁵⁴⁴ Article 85(2) of the Rome Statute is also limited to a final decision, meaning that a conviction reversed on appeal would not be open to compensation claims.⁵⁴⁵ However, this circumstance might fall instead under Article 84, which deals with revision of conviction or sentence and provides that if such proceedings conclusively show there has been a miscarriage of justice, the person would be entitled to compensation. Article 85(3) of the Rome Statute has no counterpart in the ICCPR or in other international tribunals’ legal frameworks, and raises the question of what constitutes a ‘grave and manifest’ miscarriage of justice. In *Zigiranyirazo*, the ICTR held that a standard error does not give rise to compensation, implying that additional factors would be required for a miscarriage of justice to rise to the level of grave and manifest.

ICC RPE Rules 173 to 175 provide for a procedure for claiming compensation. In these procedures, a chamber is constituted to consider the request, composed of three judges who have not participated in any earlier proceedings involving the person making the request. The request for compensation

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ Christopher Staker and Volker Nerlich, ‘Article 85: Compensation to an arrested or convicted person; Analysis and interpretation of elements’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck-Hart-Nomos 2016) 2000.

⁵⁴⁵ *Ibid.*

must also be submitted no less than six months after the person is notified of the decision of court concerning the unlawfulness of arrest or detention,⁵⁴⁶ reversal of conviction⁵⁴⁷ or existence of a grave and manifest miscarriage of justice.⁵⁴⁸ This framework has been critiqued for creating a double procedure, where first a decision under Article 85(1), 85(2) or 85(3) is required, which would then be followed by a claim for compensation.⁵⁴⁹

At the ICC, Mr Ngudjolo sought compensation of €906,346 for the material and moral damage suffered on the basis of Article 85(1), that his arrest and detention had been unlawful in that, *inter alia*, his name was not in the referral of the situation in the DRC to the ICC and that he had not been given the opportunity to be heard when the Prosecutor requested the issuance of an arrest warrant.⁵⁵⁰ Additionally, on the basis of Article 85(3), it was claimed that a grave and manifest miscarriage of justice had occurred with regard to the joinder of his case to that of Mr Katanga, the confirmation of the charges against him, and the decision of acquittal.⁵⁵¹ The Trial Chamber found that ‘the filing of a request for compensation must be preceded by a “decision of the Court” stating either that the arrest or detention had been unlawful or that a grave and manifest miscarriage of justice had taken place’.⁵⁵² Further, the Trial Chamber found that ‘a decision of acquittal, in and of itself, does not constitute a grave and manifest miscarriage of justice, and neither does a decision of acquittal automatically render an arrest or detention unlawful’.⁵⁵³ However, citing the interests of justice, the Trial Chamber went on to examine the grounds for the claim.⁵⁵⁴

Drawing from *Zigiranyirazo*, the ECtHR (*Granger v The United Kingdom*),⁵⁵⁵ and some domestic jurisdictions, the Trial Chamber concluded:

‘[...] the fact that “exceptional circumstances” are provided for by Article 85(3) of the Statute, it is the view of the Chamber that a grave and manifest miscarriage of justice, within the meaning of the above-mentioned Article, is a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution. The miscarriage of justice must have given rise to a clear violation of the applicant’s fundamental rights and must have caused serious harm to the applicant. Article 85(3) of the Statute sets a high threshold in this regard and it therefore follows that not every error committed in the course of the proceedings is automatically considered a “grave and manifest” miscarriage of justice.’⁵⁵⁶

546 ICC RPE, Art 85(1).

547 *Ibid*, Art 85(2).

548 *Ibid*, Art 85(3).

549 See Salvatore Zappalá, ‘Compensation to an Arrested or Convicted Person’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002) 1577–1583 (‘[r]ule 173, relies by way of principle on the system of the double procedure. First, the interested person must obtain a decision of the Court affirming that the arrest or detention is unlawful (Article 85(1)), or that the conviction has been reversed on the grounds of a new fact (Article 85(2)) or that there was a grave and manifest miscarriage of justice (Article 85(3)). Moreover, the request shall contain all the elements justifying the request and the amount requested’).

550 ICC, Prosecutor v *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-301-t-ENG, Decision on the ‘Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome’, 10 March 2016, para 21 and 24.

551 *Ibid*, para 7.

552 *Ibid*, para 13. See also ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-1663, Decision on request for compensation for unlawful detention, 26 February 2016, paras 18–19.

553 See n 550 above, para 15.

554 *Ibid*, para 16. See also ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-1663, Decision on request for compensation for unlawful detention, 26 February 2016, para 20.

555 *Granger v The United Kingdom*, App No 11932/86 (ECHR, 28 March 1990) para 26. Where it was determined that the term grave and manifest miscarriage of justice ‘[...] covers such matters as misdirections by the trial judge to the jury or wrong decisions on the admissibility of evidence, as well as breaches of natural justice’.

556 See n 550 above, para 45.

Lastly, the Trial Chamber found that Article 85(3) does not provide for the right to compensation even when a grave and manifest miscarriage of justice has occurred; rather, it is up to the discretion of the court.⁵⁵⁷

Essentially, the ICTR and ICC have interpreted the ‘exceptional circumstances’ wording coupled with ‘grave and manifest’ as requiring circumstances that are above the ordinary. However, Zappalà has argued that ‘the draftspersons used the formula “in exceptional circumstances” more as a wish than as a limitation of the scope of the rule. In other words, it is hoped that “grave and manifest miscarriages” of justice will occur only in exceptional circumstances, but it would seem that in every case of “grave and manifest” miscarriage of justice, some sort of compensation should be foreseen.’⁵⁵⁸

In another compensation claim at the ICC, Mr Mangenda, a national of the DRC, was among four people granted provisional release by the Single Judge prior to trial on Article 70 charges, subject to signing an individual declaration stating their commitment to appear at trial or whenever summoned by the ICC, and indicating the address at which they would be staying.⁵⁵⁹ Mr Mangenda Kabongo was, however, not released. He submitted a request to the Presidency seeking compensation for unlawful detention for a period of nine days following the provisional release decision.⁵⁶⁰ In its reply, the prosecution submitted, *inter alia*, that ‘the Court was under a legal obligation to release Mr Mangenda to a state, and immigration policy remains the sovereign domain of each state, with which the Court cannot interfere’ and that Mr Mangenda’s prolonged detention was also attributable to his refusal of available alternatives for release, including the DRC.⁵⁶¹ The Presidency referred the matter to the Trial Chamber, which held that an address where the persons would stay was a precondition to release.⁵⁶² Having noted Mr Mangenda’s refusal to be transferred to the DRC and the Registry’s detailed account of its diplomatic efforts with the British, Belgian and Dutch authorities in order to accommodate Mr Mangenda’s release preferences, the Trial Chamber deemed continued detention in these circumstances to be not unlawful.⁵⁶³

The largest compensation claim to date, which is yet to be decided as of the time of writing, comes from Mr Bemba, who was acquitted of all charges by the Appeals Chamber in June 2018. Mr Bemba alleged a miscarriage of justice in relation to the period of detention, aggravated damages, legal costs and damage to property in the total sum of €68.8m. In his application, Mr Bemba argued that ‘by definition, a miscarriage of justice is grave and manifest’, and that to suggest that there exists a trivial or unclear miscarriage of justice is contrary to the ordinary meaning of the phrase.⁵⁶⁴

The prosecution argued that Mr Bemba’s situation does not establish a ‘miscarriage of justice’ let alone a ‘grave and manifest miscarriage of justice’ and therefore fails to meet the high threshold set

557 *Ibid*, para 46.

558 See Zappalà (see n 549 above) 1583.

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

560 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-921-Red, Public Redacted Version of Request for Compensation for Unlawful Detention, 1 May 2015, para 1.

561 ICC, Prosecutor v *Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-1663, Decision on Request for Compensation for Unlawful Detention, 26 February 2016, para 13.

562 *Ibid*, para 23.

563 *Ibid*, para 25.

564 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3673-Red2, Second Public Redacted Version of ‘Mr. Bemba’s claim for compensation and damages’, 19 March 2019, para 12.

in Article 85.⁵⁶⁵ Further, citing Salvatore Zappalà⁵⁶⁶ and Gilbert Bitti,⁵⁶⁷ the prosecution argued that the two-stage procedures created by Article 85 require a decision from the chamber as a prerequisite to a compensation claim.⁵⁶⁸ The prosecution further cited the *Rwamakuba* and *Zigiranyirazo* cases, in particular stating that obscuring the distinction between a ‘miscarriage of justice’ and a ‘grave and manifest’ one risks opening the floodgates to an unmanageable host of compensation claims.⁵⁶⁹ In response to Mr Bemba’s claim that the ten-year span of his legal proceedings before the ICC was unreasonable, the prosecution argued that ‘the mere duration of a case cannot, in itself, amount to a grave and manifest miscarriage of justice’.⁵⁷⁰

Mr Bemba’s claim also deals with the issue of asset freezing, management and recovery, discussed below.

Asset freezing

ICTY AND ICTR

The ICTY, ICTR and ICC include specific provisions regarding the freezing of assets. Rule 61 (D) of the ICTY and ICTR RPE states:

‘The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.’

In *Milosević* at the ICTY, the prosecution submitted that freezing of the accused assets may be done for two reasons: ‘for the purpose of granting restitution of property or payment from its proceeds’ and also ‘for the purpose of preventing an accused who was still at large from using those assets to evade arrest and from taking steps to disguise his assets or putting them beyond the reach of the tribunal’.⁵⁷¹ Consequently, the Trial Chamber ordered all Member States of the UN to make inquiries to find out if the accused has any assets located in their territory and, if so, adopt provisional measures to freeze assets of the accused until he/she was taken into custody.⁵⁷²

565 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3680-Red, Public redacted version of ‘Prosecution’s response to Bemba’s claim for compensation and damages’, 6 May 2019, paras 1–2.

566 Zappalà (see n 549 above) 1577–1583.

567 Gilbert Bitti, ‘Compensation to an Arrested or Convicted Person’ in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 627 (‘[d]elegations acknowledged that the trigger for the presentation of a request for compensation was the existence of a prior decision of the Court stating that the arrest or detention was unlawful, or reversing a previous conviction, or releasing the person from custody because there has been a grave and manifest miscarriage of justice’).

568 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3680-Red, Public redacted version of ‘Prosecution’s response to Bemba’s claim for compensation and damages’, 6 May 2019, paras 5–7.

569 *Ibid*, paras 20–21.

570 *Ibid*, para 66.

571 ICTY, Prosecutor v *Slobodan Milošević et al*, Case IT-99-37-I, Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999, para 27.

572 *Ibid*, para 38(5).

At the ICTR, in the case of Mr Kabuga, orders were made requesting different states to freeze the assets of the accused.⁵⁷³ Further, the ICTR Prosecutor, pursuant to Article 40(A),⁵⁷⁴ directly requested French authorities to freeze certain bank accounts of the accused and his family.⁵⁷⁵ Notably, the request was made directly from the Prosecutor to the French authorities with no order from a judge or Trial Chamber.⁵⁷⁶ The French authorities complied.⁵⁷⁷ Mr Kabuga's family appealed and the matter was remitted to a trial chamber.⁵⁷⁸

Applications to seize assets have only been sporadically made at the ICTY and ICTR.⁵⁷⁹ This is a complicated area of proceedings and very little is available in the public record to conclusively state the outcomes of these procedures. This is also a matter of ongoing discussions at the ICC, as will be discussed below, where it has been stated that the ICTY and ICTR did not resort to the measure of asset freezing.⁵⁸⁰

More recently, in *Turinabo et al* before the IRMCT, on 24 August 2018, the Single Judge issued a warrant of arrest against Mr Munyeshuli that directed Rwandan authorities to adopt provisional measures to freeze his assets in Rwanda.⁵⁸¹ After his arrest, Mr Munyeshuli filed a motion requesting an order to release his frozen assets, which was granted.⁵⁸² On 24 June 2019, Mr Munyeshuli's defence requested the Single Judge to: (1) urgently issue a binding order to enforce Rwanda's compliance with the IRMCT's decision to unfreeze his assets; (2) ensure that all assets of Mr Munyeshuli seized and frozen be released; or (3) ask the President to notify the Security Council of Rwanda's failure to cooperate.⁵⁸³ As of the time of writing, the Single Judge had not adjudicated the matter.

It is worth noting the SCSL's procedures for freezing assets, as adjudicated in *Norman et al*. Here, on the basis of a motion to freeze the account of the accused, Mr Hinga Norman, filed by the prosecution, the Single Judge recognised that the SCSL RPE does not envisage a provision similar to Rule 61(D) of the ICTY and ICTR RPE. On that occasion, the judge underlined that the SCSL Statute Article 19(3) authorises the court 'to freeze or forfeit assets of accused persons in a post-conviction rather than a pre-conviction setting'.⁵⁸⁴ Further, the judge set a high threshold for granting an application to freeze assets, with the test being 'whether there is clear and convincing evidence that the targeted assets have a nexus with criminal conduct or were otherwise illegally acquired'.⁵⁸⁵

573 de Meester (see n 219 above) 581.

574 (A) In case of urgency, the Prosecutor may request any State:

(i) To arrest a suspect and place him in custody;

(ii) To seize all physical evidence;

(iii) To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

575 ICTR, Prosecutor v *Félicien Kabuga*, Case Miscellaneous-Kabuga Family-01-A, Decision (Appeal of the Family of Félicien Kabuga against Decisions of the Prosecutor and President of the Tribunal), 22 November 2002.

576 de Meester (see n 219 above) 581.

577 See n 575 above, p 2. See further discussion in *ibid*, 581.

578 See n 575 above, para 4.

579 See further discussion in de Meester (see n 219 above) 581.

580 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-T-376-ENG, p 11, lines 11–15. See also, p 32, lines 20–25 and p 33, lines 1–4.

581 IRMCT, Prosecutor v *Maximilien Turinabo et al*, Case MICT-18-116, Warrant of arrest, order for search and seizure, and order for detention and transfer of Maximilien Turinabo, 24 August 2018.

582 IRMCT, Prosecutor v *Maximilien Turinabo et al*, Case MICT-18-116, Decision on Dick Prudence Munyeshuli's renewed request to release frozen assets, 7 May 2019.

583 IRMCT, Prosecutor v *Maximilien Turinabo et al*, Case MICT-18-116, Urgent motion of Mr Dick Prudence Munyeshuli for an Article 28 binding order and related requests against the Republic of Rwanda to enforce compliance with the Single Judge's Decision of 7 May 2019, 24 June 2019.

584 SCSL, Prosecutor v *Sam Hinga Norman et al*, Case SCSL-2004-14-AR72(E), Norman-Decision on *inter partes* motion by Prosecution to freeze the account of the accused Sam Hinga Norman at Union Trust Bank (SL) Limited or any other bank in Sierra Leone, 19 April 2004, para 10.

585 *Ibid*, para 13.

The ICC's legal framework is considerably different and goes further than the limits set by both the ICTY and ICTR. Article 57(3) (e) of the Rome Statute states:

'In addition to its other functions under this Statute, the Pre-Trial Chamber may: Where a warrant of arrest or a summons has been issued under Article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to Article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.'

Article 93(1)(K) states:

'States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.'

The ICC conducts financial investigations for a number of purposes, including securing an accused's assets for a meaningful award of reparations to victims.⁵⁸⁶ In *Lubanga*, the Pre-Trial Chamber specified that it may, pursuant to Article 57(3) (e), 'seek the cooperation of States Parties to take protective measures for the purpose of securing the enforcement of a future reparation award'.⁵⁸⁷ Similarly, the Trial Chamber in *Kenyatta* ruled that the word 'forfeiture' also encompasses an award for reparations under the Statute.⁵⁸⁸

Another objective of tracing and freezing assets is that these assets may be derived from or linked to crimes within ICC jurisdiction. Additionally, the assets might emerge from a range of other illicit activity.⁵⁸⁹ However, the high threshold set in *Norman et al* requiring a clear and convincing nexus with criminal conduct was not adopted by the ICC. The Trial Chamber in *Kenyatta* held that 'the statutory framework does not require any such nexus to be established when ordering protective measures under Article 57(3) (e)'.⁵⁹⁰ This was reaffirmed in *Bemba et al* with regard to Article 93(1)(K), where the Single Judge ruled that 'Article 93(1)(k) of the Statute does not establish the requirement that "assets" be derived from or otherwise be linked to alleged crimes or offences within the jurisdiction of the Court. The words "of crimes" in Article 93(1)(k) of the Statute refers to "instrumentalities" and not to "property and assets"'.⁵⁹¹

586 ICC, 'Financial Investigations and Recovery of Assets' (1st edn, ICC 2017) 3.

587 ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for Warrants of Arrest, Art 58, Annex II, 10 February 2006, para 148.

588 ICC, *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-931, Decision on the implementation of the request to freeze assets, 8 July 2014, para 12.

589 See n 586 above, 3.

590 ICC, *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11-931, Decision on the implementation of the request to freeze assets, 8 July 2014, para 12.

591 ICC, *Prosecutor v Jean Pierre Bemba Gombo et al*, ICC-01/05-01/13-1485- Red, Decision on the 'Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba, 17 November 2017, para 17.

One issue that has now arisen at the ICC is that of asset management and the consequences of devaluated assets. An informational document prepared by the ICC lists ‘devaluation of assets’ as an area for improvement.⁵⁹² Here, it states, ‘[b]ecause assets are frozen during the entirety of ICC proceedings, their value could significantly decrease by the time they can be sold. Therefore, consultation with States at the very early stage is crucial to avoid the devaluation of assets frozen on behalf of the Court’.⁵⁹³ In Mr Bemba’s claim for compensation, he contends that regardless of the determination about the miscarriage of justice and the consequences thereof, the damage to his assets as a result of the court’s negligence/breach of fiduciary duty requires a remedy.⁵⁹⁴ Mr Bemba argues that this could take the form of financial compensation or the submission of the dispute to arbitration.⁵⁹⁵ Specifically, the claim states that in May 2008, Mr Bemba’s property and assets were seized and frozen with the aim of paying reparations to victims in the CAR.⁵⁹⁶ However, no steps were taken to manage or preserve the value of the assets and, essentially, the Trust Fund for Victims would have inherited a debt upon conviction of Mr Bemba.⁵⁹⁷

A UN Office on Drugs and Crime (UNODC) study on the effective management and disposal of seized and confiscated assets states:

‘The financial burden on the State of the cost of preserving assets, such as storage, valuation and maintenance costs, as well as the costs of compensation and damages claims arising from the depreciation in value of an asset while subject to an interim measure has the potential to bankrupt a nascent asset recovery programme. Failure to take adequate care of an asset to ensure that its economic value is preserved during this phase may well frustrate efforts to compensate victims for their loss and undermine efforts to repair the harm done by criminal conduct. It is therefore increasingly important to ensure that assets are preserved at minimum costs and that they yield maximum return when they are ultimately realized.’⁵⁹⁸

Further, the study notes that ‘there are assets that may cost considerably more to maintain or to keep profitable, such as yachts, aircrafts and businesses’. In this vein, some countries have adopted legislation that deals with ‘perishable’ and rapidly depreciating assets, which includes interim or interlocutory use or sale.⁵⁹⁹ Mr Bemba’s claim provides an example of seizure of rapidly depreciating goods, notably an aircraft that he alleges incurred parking and maintenance debt, and has degraded in condition and ‘is now scrap’.⁶⁰⁰ Mr Bemba alleges negligence/breach of fiduciary duty on the side of the ICC, and seeks a remedy from the ICC.⁶⁰¹

592 See n 586 above, 16.

593 *Ibid.*

594 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3673-Red2, Second Public Redacted Version of ‘Bemba’s claim for compensation and damages’, 19 March 2019, paras 6–9.

595 *Ibid.*

596 *Ibid.*, para 123.

597 *Ibid.*, para 125.

598 ‘Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets’, 23 August 2017 (Open-Ended Intergovernmental Working Group on Asset Recovery, Vienna, August 2017, CAC/COSP/WG.2/2017/CRP.1) 11 www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf accessed 4 July 2019.

599 *Ibid.*, 21–28.

600 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3673-Red2, Second Public Redacted Version of ‘Bemba’s claim for compensation and damages’, 19 March 2019, paras 128–132.

601 *Ibid.*, paras 151–165.

The prosecution argues that Mr Bemba's claim regarding the freezing and mismanagement of his assets cannot fall under Article 85, as the provision is not intended to cover a claim relating to assets.⁶⁰² Further, according to the prosecution, the claim does not show malfeasance on the part of the ICC leading to a grave and manifest miscarriage of justice.⁶⁰³ In effect, the prosecution is of the view that for the claim to fall under Article 85, Mr Bemba would have to show 'malfeasance' or 'serious misconduct', rather than 'negligence'.⁶⁰⁴ The prosecution further argues that Mr Bemba misapprehends the cooperation regime between the ICC and states as one between two states.⁶⁰⁵ In practice, the prosecution contends, the freezing and unfreezing of assets is done pursuant to domestic law and it is therefore up to the 'State to determine what action to take once it is no longer obligated to assist the Court through the freezing of assets'.⁶⁰⁶ In this regard, the prosecution contends that 'it is clear that, at the least, a demarcation of responsibility between the Court and States Parties is appropriate given that it is the States which are equipped with the necessary laws, regulations and mechanisms to carry out the freezing and seizure of assets'.⁶⁰⁷ Lastly, the prosecution argues that the court's legal character is of a private law nature, similar to that of the UN and therefore the ICC must determine whether Mr Bemba's claim is of a private or public nature.⁶⁰⁸

The registry's response deals primarily with the assets claim. It states that though there may be a follow-up to the execution of cooperation requests on freezing or seizure of assets, the duty to manage or preserve the assets is not supported by the ICC's legal framework.⁶⁰⁹ The registry invokes Article 88 of the Rome Statute, which states that 'States Parties shall ensure that there are procedures available under their national law for all the forms of cooperation' including that related to the freezing of assets.⁶¹⁰ This, in the registry's view, means that states are responsible for legislation and any consequence related to the management of frozen/seized assets and potential compensation requests in case of proven mismanagement of these assets.⁶¹¹ It concludes by stating that Article 100 of the Rome Statute would apply for compensation claims, that is, the costs would be borne by the states.⁶¹²

602 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3680-Red, Public redacted version of 'Prosecution's response to Mr Bemba's claim for compensation and damages', 6 May 2019, para 84.

603 *Ibid.* The parties were granted time to give oral responses, to which Mr Bemba took issue with the prosecution's use of 'malfeasance' as a criterion for Art 85, essentially, that the words 'malfeasance', 'malafides' and 'malicious prosecution' are not in the plain wording of Art 85 (ICC-01/05-01/08-T-376-ENG, pp 6-7).

604 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-T-376-ENG, Hearing on Mr Bemba's claim for compensation, p 19.

605 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3680-Red, Public redacted version of 'Prosecution's response to Bemba's claim for compensation and damages', 6 May 2019, paras 92-93.

606 *Ibid.*

607 *Ibid.*, para 94.

608 *Ibid.*, paras 96-102.

609 ICC, Prosecutor v *Jean Pierre Bemba Gombo*, ICC-01/05-01/08-3681-Red3, Public Redacted Version of the 'Registry's Observations on the Defence Compensation Claim', 6 May 2019, para 15.

610 *Ibid.*, paras 27-29. See also Art 88: States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this part.

611 See n 609 above, paras 27-29.

612 *Ibid.* See also Art 100:

1. The ordinary costs for execution of requests in the territory of the requested state shall be borne by that state, except for the following, which shall be borne by the Court:

- (a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
- (b) Costs of translation, interpretation and transcription;
- (c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
- (d) Costs of any expert opinion or report requested by the Court;
- (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
- (f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of para 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.'

Mr Bemba's claim raises novel legal issues for the ICC, which, at the time of writing, had not been adjudicated.

Chapter 4: Future considerations for release at the International Criminal Court

The powers of international criminal courts and tribunals to hold individuals in custody, and to sentence or acquit them, raise a number of issues relating to fairness and the fundamental human rights of the individual. The legal frameworks are drafted to be consistent with internationally recognised fair trial rights and fundamental human rights including the rights to liberty, the presumption of innocence and the right to be tried without undue delay. In addition to the possibility of acquittal, the legal frameworks provide for provisional release during legal proceedings, and include provisions that address the responsibilities of the courts and states for individuals while serving and after the completion of their sentences.

However, as this discussion paper highlights, there have been a number of areas in which the provisions and frameworks have been put in practice in ways that may diminish human rights standards. This discussion paper seeks to encourage reflection on these important issues and with this section, will aim to provide future considerations relating to procedures, practices and legal interpretations at the ICC. ‘The need for the Court to adhere scrupulously to international human rights standards in exercising its functions is beyond question.’⁶¹³ As the Appeals Chamber in *Lubanga* held, ‘article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms.’⁶¹⁴ As highlighted in this paper, there are a number of areas where the application and interpretation of this framework requires clarity and consistency for it to reinforce the rights of the accused and protect the integrity of the proceedings. Finally, when examining release of individuals from international criminal courts and tribunals, the central importance of state cooperation is in sharp relief. Low levels of state cooperation for provisional, conditional and final release can keep individuals *de facto* detained, contrary to their individual and statutory rights.

As outlined below, the legal frameworks practice of international criminal courts and tribunals in relation to provisional release, early release, conditions on release, and asset seizing and forfeiture bear additional examination and discussion.

613 deGuzman (see n 5 above) 947.

614 ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-772 OA4, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2) (a) of the Statute of 3 October 2006, 14 December 2006, para 37.

Generally

1. The low numbers of cooperation agreements for provisional and final release at the ICC highlight the need for increased voluntary cooperation for interim release and relocation of released persons. The ICC should continue its efforts to conclude more agreements of this nature.
2. Likewise, the ICC and States Parties should make continued efforts to increase understanding and share technical information, as well as suggestions for tools to improve cooperation on a domestic level, such as the establishment of a central authority for cooperation with the court.
3. In light of the importance of domestic legislation for facilitating cooperation, additional attention should be given to including specific provisions that will allow cooperation with the court. This will allow for easier handling of cooperation requests in relation to areas such as facilitating a summons to appear and implementing conditions on release.
4. The ICC should further develop resources intended to support consistency in jurisprudence, such as practice directions and the Chambers Practice Manual. For example, a consultation process could identify best practices in relation to provisional and conditional release, including external consultations with former ICC judges and judges from other international criminal tribunals.

Provisional release at the pre-trial and trial phases

5. Jurisprudence at the international tribunals and at the ICC shows that provisional release is more likely to be granted on humanitarian grounds. However, the legal framework of the ICC does not include humanitarian circumstances as an explicit ground for provisional release. The Assembly of States Parties (ASP) should consider codifying humanitarian reasons as grounds for provisional release.
6. In order to protect the rights of the accused and to ensure adherence to international human rights standards, it is essential that the factors weighing for release be applied consistently and with clarity. The provisions codifying these factors should be interpreted in accordance with their ordinary meaning, bearing in mind their object and purpose.⁶¹⁵
7. The issue of conditional release is yet to have the clear parameters needed to be a functional component of provisional release at the ICC. The Appeals Chamber has held that if a chamber is considering conditional release and a state has indicated its general willingness and ability to accept a detained person and enforce conditions, the chamber ‘must seek observations from that state as to its ability to enforce specific conditions identified by the chamber’.⁶¹⁶ Chambers should consider enumerating the conditions they are willing to accept from states, prior to deciding on applications for provisional release.
8. Similarly, with regard to Regulation 51 of the ICC, the existing jurisprudence shows a need to seek observations from the state to which the person seeks to be released, prior to ruling for

615 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 31. ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

616 See n 199 above, para 55.

or against release. Only after obtaining such observations can a chamber ascertain a state's willingness to implement any conditions on release, and at the same time ensure that any risk identified by the ICC, may be mitigated by certain measures short of detention.

Release at advanced stages of proceedings

9. The implications of conditional release on an acquitted person should be further considered. Due to the time it may take to issue a decision on acquittal, followed by the appeals process, the conditions placed on release can, in theory (and in fact in the case of Mr Gbagbo and Mr Blé Goudé) be imposed for long periods of time, which has implications on the rights of the acquitted person. These rights and conditions are further affected by external factors, such as the availability of states willing to accept him/her and impose the conditions.
10. The appeals chamber should consider clarifying the criteria set out under Article 81(3)(c)(i). From the limited jurisprudence of the ICC thus far, it is unclear whether a 'concrete' risk of flight implies a higher standard of proof than that required at the pre-trial and trial phases. Further, the appeals chamber should consider addressing whether there exists a hierarchy of seriousness of offences under the Statute as a general matter. Lastly, the appeals chamber should consider addressing the criteria on which to base a 'probability of success on appeal' to increase the clarity and consistency of interpretation of this provision.

Early release

11. The ICC Registrar has stated in relation to the prospect of resocialisation and successful resettlement of the sentenced person, that the 'ICC Detention Center does not possess the necessary expertise for assessing that criterion' and neither does it 'have the specialist staff with the requisite skills'.⁶¹⁷ There is therefore a need to explore and develop practices in relation to some of the criteria for reduction of sentence. Some guidance may be found in the SCSL practice on early release, which pays particular attention to rehabilitation and reintegration, and thus could provide a useful reference point for improving the capacity of the court to assess these criteria.
12. Another factor that bears scrutiny to determine the best method of assessment is 'whether the early release of the sentenced person would give rise to significant social instability'. Both panels of judges assessing this criterion in the *Lubanga* and *Katanga* cases stated that the information they received had been conflicting.⁶¹⁸ A more thorough case-by-case assessment from the Registrar on each of these factors may support judicial determinations.
13. The court should develop resources on the practice of early release in order to support consistency and transparency. For example, a consultation process could assist with identification

⁶¹⁷ ICC, Prosecution v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3144-Red, Confidential Redacted version of 'Observations on the criteria set out in rule 223 (a) to (e) of the Rules of Procedure and Evidence' (ICC-01/04-01/06-3144-Conf-Exp), 17 August 2015, para 5.

⁶¹⁸ ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3173, Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, 22 September 2015, para 64; ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Mr Germain Katanga, 13 November 2015, paras 75–76.

of best practices, including external consultations with former and current Registrars of other international criminal tribunals.

Domestic trials following release

14. Bringing individuals before international criminal courts and tribunals has long-term implications, even if they are not eventually convicted. Residual issues, such as those brought about by trials in domestic jurisdictions and the application of Article 108, will require significant attention. The legal framework requires a state to transmit certain documents⁶¹⁹ to the presidency when making a request under Article 108. The ICC should consider ensuring that these documents are submitted before ruling for an application made under Article 108.
15. Further, in relation to Article 108 applications, the ICC should consider allowing the intervention as *amici curiae* of non-governmental organisations, particularly where questions concerning the legitimacy of certain forms of punishment or other treatment arise.⁶²⁰
16. Litigation surrounding the DRC's prosecution of Mr Katanga has highlighted the need for assurances that a state's existing death penalty will not apply.⁶²¹ Consistent with the Rome Statute's prohibition of the death penalty, the Court should always ensure that assurances that the death penalty will not apply will be given. Such assurances should be backed by evidence and conform to international standards, and should be renewed in the case of change of government.
17. Should an application under Article 108 be granted, the ICC should monitor the domestic proceedings to ensure that they uphold fundamental principles and do not affect the integrity of the ICC. In this regard, the ICC should monitor the quality, including the fairness of the proceedings, and consider requesting regular reports to reinforce standards of fairness and to ensure adherence of domestic courts to international standards.

Compensation

18. The procedure to claim compensation at the ICC should be clarified. The current procedures appear to require for a request for compensation to be preceded by a decision of the court concerning the unlawfulness of arrest or detention, reversal of conviction, or existence of a grave and manifest miscarriage of justice.⁶²² However, jurisprudence shows that while this double procedure is referred to, trial chambers have gone on to examine the grounds for a compensation claim without a prior decision. It is, however, imperative to establish sound

619 Rule 214:

'1. For the application of article 108, when the State of enforcement wishes to prosecute or enforce a sentence against the sentenced person for any conduct engaged in prior to that person's transfer, it shall notify its intention to the Presidency and transmit to it the following documents:

- (a) A statement of the facts of the case and their legal characterization;
- (b) A copy of any applicable legal provisions, including those concerning the statute of limitation and the applicable penalties;
- (c) A copy of any sentence, warrant of arrest or other document having the same force, or of any other legal writ which the State intends to enforce;
- (d) A protocol containing views of the sentenced person obtained after the person has been informed sufficiently about the proceedings.'

620 Schabas (see n 513 above) 2204.

621 ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3679, Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016, para 28.

622 ICC RPE, Rule 173(2).

practice under the statute and many questions remain undetermined. Such questions include whether a decision on acquittal or a decision terminating proceedings should explicitly state that there has been unlawful arrest, detention or a grave and manifest miscarriage of justice; whether a newly constituted chamber should decide on the matter; and whether the matter would be determined *proprio motu* by the chamber, or following an application from the person intending to seek compensation.

19. Article 85(3) on the compensation to an arrested or convicted person in exceptional circumstances subject to the existence of a grave and manifest miscarriage of justice is a novel provision without a counterpart in human rights instruments. The ICC should consider clarifying the applicability and scope of this provision. The ICC, as a standard-setting institution, is in a position to provide a meaningful precedent by establishing sound law and practice.

Asset freezing, seizure and management

20. The cooperation regime in relation to freezing, seizure and management of assets is in need of further development and clarification, in particular as to the respective roles and responsibilities of the ICC and states, and further, in relation to the preservation of seized assets and the unfreezing of assets subject to the ICC's interim measures.
21. The ICC should continue to develop its practices for the freezing or seizure of property and assets, with reference to established practices and existing guidelines, including the 'UNODC study on the effective management and disposal of seized and confiscated assets', as a guide.⁶²³ The further development of resources in relation to best practices will support consistency in this area.
22. States Parties should also further develop their framework governing the administration and management of seized and frozen assets, and should consider appointing focal points within competent authorities for correspondence with the ICC on these matters.

623 See n 598 above.



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International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
Website: www.ibanet.org