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Abstract

This article examines the widely ignored but important issue regarding the provisional arrest and detention of persons suspected of having committed international crimes by international or internationalized courts. The paper examines the pioneer case law and practice of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon, as well as the emerging practice of the permanent International Criminal Court, to evaluate how these courts have generally addressed the rights of these individuals to due process and freedom from arbitrary arrest and detention before prosecutors seek formal charges against them.

The authors argue that while the early international jurisprudence established apparently strong legal standards to preserve the rights of suspects, using doctrines such as abuse of process, these courts have generally failed to offer the meaningful remedies required to resolve manifest violations of such fundamental human rights by the detaining authorities. The article offers preliminary recommendations on how, going forward, the rights guaranteed to suspects allegedly involved in the worst crimes known to law in international(ized) courts may be better protected.

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I. Introduction

Nature abhors a vacuum—so does the law; or rather, so *should* the law. Post-9/11, the existence of legal black holes concerning the protection and enforcement of detainees' rights has attracted almost universal condemnation from the United Nations and various regional human rights courts. Indeed, in its recent report to the United Nations High Commissioner for Human Rights, the United States of America proudly proclaimed that "[w]e start from the premise that there are no law-free zones, and that everyone is entitled to protection under law."[1]

It is thus surprising that the same disapprobation has not been applied to the legal black holes, which have tainted the record of the various ad hoc courts established over the past twenty years to dispense justice to countries that have experienced genocide, serious violations of international humanitarian law, and crimes against humanity. Notwithstanding the fact that some of these courts are established by the U.N. Security Council, acting pursuant to its extraordinary Chapter VII power, they are all powerless to implement their own decisions.[2] They are therefore completely reliant on national authorities or multi-national peacekeeping bodies to arrest and detain suspects and defendants before their transfer to the court in question.

This enforced division of tasks, which arises in part from the state-centric nature of the international legal system, has created ambiguity concerning who is responsible for remedying any violations of a suspect's or defendant's rights, which may have occurred prior to his or her transfer to the relevant international or hybrid court. Indeed, having entrusted national authorities with the apprehension aspects of the criminal justice process, can the tribunals subsequently distance themselves from any violations which may have been committed by those national authorities?

The Universal Declaration on Human Rights provides that no one shall be subjected to arbitrary arrest or detention,[3] and that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[4] This right was enshrined in Article 2 of the International Covenant on Civil and Political Rights.[5] Under that provision, states undertook to ensure that any person whose rights are violated shall not only have an effective remedy, but also to ensure that any person claiming a remedy shall have his or her right thereto determined by competent judicial, administrative, legislative or other authorities, and to ensure that such

1. Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights in Conjunction with the Universal Periodic Review ¶ 82 (2010), *available at* http://www.state.gov/documents/organization/146379.pdf.
2. *See* U.N. Charter Ch. VII (conferring powers on the United Nations Security Council to determine any threats to the peace, breaches of the peace, or acts of aggression and to make recommendations, or decide what measures to take, in accordance with Articles 41 and 42, to maintain or restore international peace and security, with decisions being binding on all U.N. member states pursuant to Article 25).
3. *See* Universal Declaration of Human Rights art. 9, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
4. *Id.* art. 8.
5. International Covenant on Civil and Political Rights, art. 21, G.A. Res. 2200A (XXI), annex, U.N. GAOR, 21st Sess. Supp. No. 16 at 55, U.N. Doc. A/6316 (Dec. 19, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

authorities shall enforce such remedies when granted.[6] However, this right to a remedy before national courts is meaningless if those courts have ceded their jurisdiction over the case to an international or internationalized court. There is also a lingering perception which emerges from the jurisprudence of these courts that, notwithstanding the presumption of innocence, persons accused of the most horrific crimes in the legal lexicon are not so entitled.

Moreover, political realities have inevitably played an unfortunate role in the practical challenges that beset these courts, and the judicial response to such realities. For example, the early promise set out by the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) in the 1999 *Barayagwiza* decision that every victim of a rights violation deserved a remedy[7] was swiftly reined back in the 2000 review decision.[8] It is, of course, difficult to dissociate the latter decision from the Rwandan government threat that it would cease all forms of cooperation with the ICTR if Barayagwiza were to be released.

This Article analyzes the main jurisprudence which has emerged from the different international courts and tribunals regarding provisional arrest and detention. It assesses whether, and if so how well, the courts and tribunals have addressed the lacuna arising from the outsourcing or subcontracting of the incarceration function to national authorities. The specific focus here is on individuals provisionally detained by national authorities, at the request of an international(ized) court, before they are formally charged with any crimes.

The Article proceeds in two parts. Part II focuses on the early as well as more recent practice of the pioneer U.N. international tribunals for the former Yugoslavia and Rwanda. It then discusses provisional detention in the jurisprudence of the mixed courts for Cambodia and Lebanon. Part III draws some conclusions from the review of the legal standards established in the jurisprudence. Keeping in mind that this is largely uncharted area of international criminal tribunal practice, the conclusion offers initial practical recommendations on ways in which the system of provisional arrest or pre-charge incarceration might be improved. Here, the authors draw on the recent and seemingly more progressive jurisprudence from the Special Tribunal for Lebanon which appears to enhance the remedies enjoyed by suspects and defendants whose rights have been violated.

II. Provisional Arrest in International Criminal Justice

A. The Practice of the United Nations Ad Hoc Tribunals

The ICTR experienced fewer difficulties than its counterpart, the International Criminal Tribunal for the former Yugoslavia (ICTY), in apprehending accused, but seemingly more difficulties in conducting investigations and preparing indictments in a timely manner. There have thus been several ICTR cases in which the defendants alleged that they were detained

6. *Id.* art. 2.
7. Jean-Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19, Decision, ¶¶ 72, 76, 88, 112 (Nov. 3, 1999), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf.
8. Jean-Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision on Review and/or Reconsideration (Sept. 14, 2000), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/140900.pdf.

for the tribunal by national authorities, especially during the early part of its mandate.[9] These arrests usually preceded the prosecution's filing of indictments, and their detention and transfer to the seat of the court in Arusha, Tanzania. In the first appellate decision to consider the status of such persons—the landmark *Barayagwiza* appeal decision—the ICTR Appeals Chamber both broadened the notion as to when the Tribunal should assume responsibility for the detention of a suspect by national authorities, and explicitly stated that the defendant would have a right to a remedy irrespective of the author of the violation.[10]

Jean-Bosco Barayagwiza was arrested in March 1996 and held in Cameroon for nineteen months without being informed of the charges against him.[11] Following his transfer to the Tribunal, he was held for a further ninety-six days without making an initial appearance.[12] In relation to the period of detention in Cameroon, the Chamber observed that on February 21, 1997, the Prosecutor had requested the Cameroonian authorities to provisionally detain Barayagwiza under Rule 40 of the Rules of Procedure and Evidence.[13] Under that provision, the Prosecutor may, in cases of urgency, request a state to take provisional measures, including detaining a suspect, if he believes that the suspect might flee from the jurisdiction.[14]

On March 4, 1997, the Tribunal issued an order directing Cameroon to provisionally detain Barayagwiza pending his transfer to the ICTR under Rule 40*bis*. The order further specified that the suspect be temporarily detained within the ICTR detention unit for a maximum of thirty days, and pending the filing of an indictment by the Prosecutor within thirty days. Notwithstanding this order, the indictment against Barayagwiza was not confirmed until October 23, 1997, and the defendant was not transferred to the Tribunal until November 19, 1997.[15]

The ICTR Appeals Chamber noted that whilst Rule 40*bis* specified that a suspect could only be provisionally detained by the international tribunal for a maximum of thirty days (unless the judge extends the provisional detention order for a maximum of ninety days in total), Rule 40 did not set out explicit deadlines as to the length of time which a national authority could provisionally detain a suspect upon a request by the Prosecutor.[16] Citing the principle of effective interpretation, the Appeals Chamber observed that:

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9. *See, e.g.*, Prosecutor v. Juvenal Kajelijeli, Case No. ICTR-98-44-I, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing (May 8, 2000), http://www.unictr.org/Portals/0/Case/English/Kajelijeli/decisions/080500.pdf; Prosecutor v. André Rwamakuba et al., Case No. ICTR-98-44-T, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused (Dec. 12, 2000), http://www.unictr.org/Portals/0/Case/English/Rwamakuba/decisions/121200.pdf. Similar claims were also made in other cases such as those involving Edouard Karemera and Mathieu Ngirumpatse. Most of the suspects were arrested in Cameroon, where twelve to fourteen Rwandans were arrested on April 15, 1996.
10. *Barayagwiza*, Case No. ICTR-97-19, Decision.
11. *Id.* ¶ 51.
12. *Id.* ¶ 67.
13. *Id.* ¶¶ 54–56.
14. *Id.* ¶¶ 5, 7, 10, 30.
15. *Id.* ¶¶ 22, 30–31, 44–45.
16. *Id.* ¶¶ 46–48.

> The purpose of Rule 40*bis* is to restrict the length of time a suspect may be detained without being indicted. We cannot accept that the Prosecutor, acting alone under Rule 40, has an unlimited power to keep a suspect under provisional detention in a State, when Rule 40*bis* places time limits on such detention if the suspect is detained at the Tribunal's detention unit. Rather, the principle of effective interpretation mandates that these Rules be read together and that they be restrictively interpreted.[17]

In order to determine whether the stricter requirements of Rule 40*bis* should be applied, the Appeals Chamber then considered whether Barayagwiza could be deemed to have been detained under the authority of the ICTR during the period he was incarcerated in Cameroon. The Appeals Chamber noted that "but for" the request of the Prosecutor under Rule 40, and the subsequent Rule 40*bis* request for transfer, the defendant would have been released by the Cameroon authorities in February, which is when they had denied Rwanda's request that Barayagwiza be extradited to its jurisdiction for trial.[18] The appellate court concluded that Cameroon was holding the defendant on constructive custody for the international tribunal, and that as such, the ICTR was responsible for the fact that the defendant was being detained, although not for each and every aspect of the conditions of his detention by Cameroonian authorities.[19]

The Appeals Chamber thus applied Rule 40*bis*, and held that the maximum time limit of ninety days had clearly been exceeded.[20] The total length of his detention in Cameroon could also be considered to be unreasonable by human rights standards concerning provisional detention.[21] The Appeals Chamber also found that Barayagwiza's right to be promptly informed of the nature of the charges against him was also violated during this period.[22]

Notwithstanding this detailed analysis concerning the responsibility of the ICTR for his detention in Cameroon, the Appeals Chamber subsequently made the significant finding that under the abuse of process doctrine, according to which a court may decline to exercise jurisdiction over a defendant if to do so would be antithetical to the causes of justice, "it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights."[23] Accordingly, the judges concluded that the abuse of process doctrine could still be triggered if Barayagwiza's detention had been attributable to Cameroon and not the international tribunal.[24] The Appeals Chamber reasoned that "[a]t this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims."[25]

Given these strong statements, it is perplexing that the Appeals Chamber only took into consideration the time periods during which he had been detained in Cameroon pursuant to a

17. *Id.* ¶ 46.
18. *Id.* ¶ 55.
19. *Id.* ¶ 61.
20. *Id.* ¶ 67.
21. *Id.* ¶ 67.
22. *Id.* ¶ 85.
23. *Id.* ¶ 73.
24. *Id.* ¶ 85. The Appeals Chamber concluded that "even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed." *Id.* ¶ 73.
25. *Id.* ¶ 85.

request by the ICTR Prosecutor, and excluded the interim period of approximately nine months during which the Cameroonian authorities continued to detain him pursuant to an extradition request by Rwanda in order to prosecute him for the same alleged crimes. It may be that the judges felt that matter to be outside their jurisdiction, insofar as his detention at the behest of a different authority (Rwanda) does not necessarily translate into responsibility for the Tribunal. On the other hand, while the Prosecutor's request for the suspect to be detained followed only two days after the Rwandan extradition request, which might have been deemed displaced because of the international court's primacy over national jurisdictions, this judicial approach may be criticized on at least two grounds.

First, the ICTR Prosecutor filed his request for detention under Rule 40 the same day that the Cameroon authorities rejected Rwanda's request for extradition.[26] Second, the ICTR Prosecutor appears to have adopted an unhelpful "wait and see approach." With this view, it would seem that the Prosecution was only prepared to step in to claim jurisdiction if the defendant could not be extradited and prosecuted in Rwanda. The timing of the requests suggests a measure of coordination between the national authority and the Prosecutor. And it may be that this is a matter that properly falls within the exercise of prosecutorial discretion, especially if investigations were ongoing and a determination had not been made to pursue this particular defendant. However, it is arguable that such an approach is hardly consistent with the principles of prosecutorial diligence, so eloquently set out in the decision, and that by waiting to assert the ICTR's primacy, the Prosecutor had materially contributed to the length of the defendant's detention in Cameroon.

In its analysis of the scope of the abuse of process doctrine, the Appeals Chamber also concluded that,

> [T]he abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.[27]

In accordance with this finding, the defendant would still have the right to rely on the abuse of process doctrine even if he or she is unable to prove deliberate impropriety or misconduct.

In terms of the appropriate remedy for these violations of the rights of the accused, the Prosecution argued that the accused was entitled to either an order requiring an expeditious trial or credit for any time provisionally served.[28] With respect to the first of the Prosecutor's suggestions, the Appeals Chamber noted that an order for the Appellant to be expeditiously tried would be superfluous as a remedy since the accused is already entitled to an expedited trial pursuant to Article 19(1) of the statute that sets out the fundamental rights of suspects and accused.[29]

Regarding the second suggestion by the Prosecutor, the Appeals Chamber was unconvinced that it could adequately protect the accused and provide an adequate remedy for the violations of his rights, particularly in the event that the accused is acquitted.[30]

26. *Id.* ¶ 7.
27. *Id.* ¶ 77.
28. *Id.* ¶ 102.
29. *Id.* ¶ 103.
30. *Id.* ¶ 103.

Consequently, the Appeals Chamber ordered that the accused be released to Cameroon, and that the order would be with prejudice to the Prosecution (i.e., the Prosecution would be barred from issuing a new indictment against the accused and seeking his re-arrest).[31]

After learning of the decision, the Government of Rwanda threatened to end all cooperation with the ICTR.[32] This would have meant that the Prosecutor would have had serious difficulty to conduct any investigations into international crimes in the territory of Rwanda. The Prosecution therefore filed a request with the Appeals Chamber to review the decision under Rule 119 on the basis that it had "new facts" of a decisive character.[33] The Appeals Chamber had a different composition due to the departure of Judge Kirk Macdonald, whose reasoning appeared to have given great weight to U.S. Supreme Court jurisprudence in the abuse of process context. This newly composed Chamber accepted these new facts and reversed its decision to release the accused.[34]

Regarding the violations that occurred prior to his transfer to the Tribunal, the Chamber attached importance to evidence, which apparently demonstrated that the defendant would have been aware of the nature of the charges against him from May 3, 1996 onwards.[35] There was also evidence that the delays in his transfer to the Tribunal appeared to be attributable to Cameroon.[36] In other words, Barayagwiza was, at most, kept in the dark about the charges against him for a total of eighteen days. The Chamber concluded that the new facts "diminish[ed] the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant."[37] The Appeals Chamber therefore held that the violations were not sufficiently grave to justify the defendant's release, and that it would be adequate to either compensate the defendant if he were to be eventually acquitted, or to reduce his sentence if convicted.[38]

Since the decision was predicated upon its consideration of new facts, as opposed to a reconsideration of the law,[39] the Appeals Chamber did not have the power to reverse its earlier legal findings, which thus remain applicable.[40] However, in expressly attributing its decision to the "new fact" that it was Cameroon, rather than the Prosecutor, that was responsible for the delays in transferring Barayagwiza, the Appeals Chamber appears to be implicitly reversing its earlier finding in the November 1999 decision that it was "irrelevant

31. *Id.* ¶¶ 108, 113.
32. *See* Jean-Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), ¶ 34 (Mar. 31, 2000), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs20000331.pdf.
33. *Id.* ¶¶ 7, 13, 15, 25.
34. *Id.* ¶¶ 74–75.
35. *Id.* ¶¶ 54–55.
36. *Id.* ¶ 58.
37. *Id.* ¶ 71.
38. *Id.* ¶ 75.
39. The Appeals Chamber rejected the Prosecutor's request for reconsideration. *Id.* ¶ 73.
40. The Tribunal has power to review or to reconsider its decisions when a new fact has been discovered which was not known at the time of the proceedings before the Appeals Chamber, and which could have been a decisive factor in reaching the decision. Either the convicted person or the Prosecutor may submit an application for review of the judgment, which in the normal course, is subject to the *res judicata* principle. In this instance, the Tribunal considered that it had the power to review its earlier decision; such review was necessary due to the finality of the decision, the remedy of which was dismissal of the indictment with prejudice against the prosecutor.

which entity or entities were responsible for the alleged violations of the Appellant's rights."[41] The review decision does not address this aspect of the earlier decision, nor does it elaborate as to why the diminishment of the Prosecutor's responsibility concerning the delay in transfer is relevant to the gravity of the violations or the remedy.

It is possible to reconcile the two decisions by concluding that whilst it is not necessary to attribute responsibility to an organ of the Tribunal to either obtain a remedy, or trigger the application of the abuse of process doctrine, the involvement of an organ of the ICTR would be an aggravating circumstance, which could transform an infraction into an egregious violation. Of note, however, is the fact that the Appeals Chamber recognized that the defendant would be entitled to remedies other than release if the standard for release was not met. That said, the decision lacks clarity as to whether the appeals judges considered that the violations constituted an abuse of process (albeit of a less significant kind), but that release was not an appropriate remedy. Another possibility is that they considered that, in light of the diminishment of both the severity of the violations and the involvement of the Prosecutor, there was no abuse of process, but that the defendant was nonetheless entitled to a remedy.

In terms of the continued applicability of the November 1999 decision, subsequent ICTY and ICTR decisions have adopted varied approaches as to whether the legal findings set out in the earlier November 1999 decision should still be considered as valid appellate precedent. For example, in the ICTR *Semanza* case, which involved facts that were virtually identical to the *Barayagwiza* case, the Appeals Chamber determined that there were cogent reasons for departing from the November 1999 decision's interpretation of Rule 40*bis,* and in particular, whether it could be applied to scenarios in which the defendant is physically detained by national authorities instead of the ICTR.[42]

The Appeals Chamber justified its departure on the legislative history of Rule 40*bis* based on the Prosecution submission that the rule had been amended on July 4, 1996—less than two months after its first adoption—to replace the words "30 days *from the signing of the provisional detention order*" with "30 days *from the day after the transfer of the suspect to the detention unit of the Tribunal*."[43] The Appeals Chamber held that this amendment evinced a clear intention that the thirty day maximum time period for the defendant's detention should only commence to run once he or she had been physically transferred to the International Tribunal.[44] The impact of this interpretation on the rights of defendants can be demonstrated by the following discrepancy between the treatment of detainees who were arrested in accordance with the first version of Rule 40*bis* as compared to those who fell under the amended Rule 40*bis* regime.

Before turning to that discussion, it is perhaps appropriate to underscore from the ICTR's First Annual Report to the United Nations that Rule 40*bis* was first adopted at the behest of the Prosecutor, who advocated that there should be a power to provisionally detain suspects prior to the filing of an indictment due to the "difficulties encountered by the Prosecutor in

41. Jean-Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19, Decision, ¶ 73 (Nov. 3, 1999), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf.
42. Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Decision, ¶ 92 (May 31, 2000), http://www.unictr.org/Portals/0/Case/English/Semanza/decisions/310500.pdf.
43. *Id.* ¶¶ 92–95.
44. *Id.* ¶ 97.

conducting his investigation."[45] After the initial adoption of Rule 40*bis*, Judge Lennart Aspergren ordered that four suspects[46] detained by Cameroon be transferred to the Tribunal to be provisionally detained, pending the filing of an indictment by the Prosecutor within thirty days.[47] In light of the continued failure of Cameroon to transfer the defendants to the International Tribunal, two additional thirty day periods of provisional detention were authorized.[48] The third decision, which was issued by Judge Laïty Kama on July 16, 1996 (i.e., after the Rule 40*bis* amendment had been adopted but before it entered into force) emphasized that Bagosora's provisional detention in Cameroon would be extended for a third and final period of thirty days.[49] It is thus apparent that Judge Kama considered the time limits set out in Rule 40*bis* to apply to provisional detention by a national authority.

The Prosecutor eventually filed its indictment against Bagosora eleven days before the expiration of the ninety day deadline. In contrast, after the Rule 40*bis* amendment entered into force, the Prosecutor did not file indictments against Barayagwiza or Semanza until after they had been detained at the request of the Tribunal approximately eight months respectively.[50] The amendment therefore appears to have had the effect of both significantly diluting prosecutorial diligence, and diminishing the right of the defendants to be promptly informed of the nature and cause of the charges against them.

In terms of further discrepancies between the *Semanza* appellate findings and the 1999 *Barayagwiza* decision, the Appeals Chamber emphasized "that in any event, the Tribunal is not responsible for the time that elapsed before the Appellant was transferred to the Tribunal's Detention Facility."[51] The *Semanza* Appeals Chamber also disregarded the *Barayagwiza* dicta that it is irrelevant which entity is responsible for the violations.[52] In any event, the Appeals Chamber found that the defendant's rights had been violated due to the failure to promptly inform him of the charges, and the failure of the Court to dispose of his *habeas corpus* motion.[53] As was the case with the 2000 *Barayagwiza* decision, the Chamber

45. Rep. of the Int'l Crim. Trib. For the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Int'l 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 Jan. and 31 Dec. 1994, ¶ 35,U.N. Doc. A/51/399-S/1996/778, (Sept. 24, 1996) [hereinafter ICTR—First Annual Report], *available at* http://www.unictr.org/Portals/0/English%5CLegal%5CBilateral%20Agreement%5CEnglish%5C9625167e.pdf.
46. They were Théoneste Bagosora, Ferdinand Nahimana, Anatole Nsengiyumva and André Ntagerura.
47. ICTR—First Annual Report, *supra* note 45, ¶ 36.
48. *See* Prosecutor v. Théoneste Bagosora, Case No. ICTR-96-7-D, Decision: Continued Detention on Remand of Théoneste Bagosora, (June 18, 1996), http://www.ictrcaselaw.org/docs/doc15173.pdf.
49. "Considering the requirements set forth in Rule 40 *bis* (D) of the Rules, Considering that the Prosecutor has submitted sufficient reasons to show and justify the need for the continued detention on remand in order to complete his investigations and criminal proceedings against Théoneste Bagosora; Noting that Théoneste Bagosora is still detained by Cameroonian authorities and that his transfer to the Tribunal's Detention Unit has however not yet been implemented despite the Tribunal's decision of 17 May 1996: . . ." *Id.* at 5–6.
50. Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Decision, ¶ 99 (May 31, 2000), http://www.unictr.org/Portals/0/Case/English/Semanza/decisions/310500.pdf; Jean-Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19, Decision, ¶ 9 (Nov. 3, 1999), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf.
51. *Semanza*, Case No. ICTR-97-20-A, Decision, ¶ 101.
52. *Barayagwiza*, Case No. ICTR-97-19, Decision, ¶ 73.
53. *Semanza*, Case No. ICTR-97-20-A, Decision, ¶ 128.

avoided pronouncing whether the violations could constitute an abuse of process, but stated that "any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy."[54]

Despite these relatively strong repudiations of the 1999 *Barayagwiza* findings, the Appeals Chamber performed a remarkable about-face in its 2003 decision in the ICTY *Nikolic* case, and more significantly, in the 2005 *Kajelijeli* Appeals judgment. In *Nikolic*, the Appeals Chamber addressed the following factual allegations: the accused Dragan Nikolic alleged that he had been kidnapped by unidentified individuals in Serbia, who had then transferred him to the Stabilization Forces (SFOR) base in Bosnia, which had jurisdiction to arrest him in accordance with the ICTY arrest warrant.[55] Although the case did not concern pre-arrest incarceration *per se*, the Appeals Chamber had the opportunity to expound on the definition and limits of the abuse of process doctrine.[56]

The appellate chamber first held that before considering whether the actions of the unidentified individuals could be attributed to SFOR, it was necessary to consider whether this type of violation would justify the Tribunal divesting itself of its personal jurisdiction over the accused (and thereby releasing him). The Appeals Chamber reviewed domestic jurisprudence, and concluded that for universally condemned offenses such as genocide, war crimes, and crimes against humanity, violations of state sovereignty would not in themselves justify setting aside personal jurisdiction.[57]

In terms of what violations *would* justify the setting aside of personal jurisdiction, the Appeals Chamber resurrected the 1999 *Barayagwiza* holding that the threshold would be met "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."[58] The Appeals Chamber noted that the 2000 *Barayagwiza* review decision reversed the outcome of the 1999 decision, but underscored that that decision had "confirmed its Decision of 3 November 1999 on the basis of the facts it was founded on."[59]

With respect to whether the defendant needs to attribute the violations to an organ of the Tribunal or an entity associated with it (e.g., SFOR), the Appeals Chamber failed to expressly address the issue. The Chamber did, however, endorse the findings of the Trial Chamber that in terms of scenarios which "may constitute a legal impediment to the exercise of jurisdiction over such an accused . . . [which] would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment."[60] Arguably the use of

54. *Id.* ¶ 125.
55. Prosecutor v. Dragan Nikolic, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest (Int'l Crim. Trib. for the Former Yugoslavia June 5, 2003), http://www.icty.org/x/cases/dragan_nikolic/acdec/en/030605.pdf.
56. *Id.*
57. *Id.* ¶¶ 24–26.
58. *Id.* ¶ 29 (quoting Jean-Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19, Decision, ¶ 74 (Nov. 3, 1999), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf.).
59. *Id.* ¶ 29 n.35 (quoting Jean-Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), ¶ 51 (Mar. 31, 2000), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs20000331.pdf).
60. *Id.* ¶ 28 (quoting Prosecutor v. Dragan Nikolic, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, ¶ 114 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 9, 2002), http://www.icty.org/x/cases/dragan_nikolic/tdec/en/10131553.htm).

the word "certainly" implies that the involvement of SFOR or the Prosecutor would be an aggravating factor, but not necessarily a prerequisite. In contradistinction to the approach followed in ICTR cases, having found that the violations of the defendant's rights were not sufficiently egregious to invoke the abuse of process doctrine, the Appeals Chamber did not then proceed to consider whether the defendant had a right to lesser remedies, such as compensation or a reduction in sentence.

The question as to whether the alleged violations need to be attributed to an organ or entity associated with the Tribunal was much more clearly addressed by the ICTR Appeals Chamber in its 2005 judgment in the *Kajelijeli* case, in which the judges decisively rehabilitated the 1999 *Barayagwiza* decision, and further elaborated on the nature of prosecutorial due diligence.[61] In *Kajelijeli*, the Appeals Chamber found that the defendant had been held in custody by the Benin authorities for ninety-five days prior to his transfer to the ICTR, and that he had been in custody for eighty-five days before being served with an arrest warrant or indictment. For this time period, the defendant should be considered to have been a "suspect,"[62] and as such, was entitled to the protection of the rights enjoyed by suspects under the ICTR Statute and Rules.[63]

In line with the *Semanza* appellate judgment finding that Rule 40*bis* does not apply prior to a defendant's transfer to the Tribunal, the Appeals Chamber noted the lacunae in the rules concerning the manner in which states parties should implement provisional detention requested by the Prosecutor, and the corollary lack of procedural safeguards, such as the right to be promptly informed of the reasons for the arrest, and to be brought before a judge.[64] The Appeals Chamber nonetheless emphasized that whilst "[i]t is for the requested State to decide how to implement its obligations under international law,"[65] in executing the request for provisional detention, "the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person."[66]

The Appeals Chamber instructively delineated the respective obligations of the ICTR Prosecutor and the national authorities. Regarding the ICTR Prosecutor, once it had initiated a case against a defendant, it had an obligation of due diligence, which would translate into a positive obligation to ensure that the defendant's rights were respected.[67] In particular, the Prosecutor must expressly notify the authorities of the detaining state of their duty to bring the suspect promptly before a judge in accordance with the detaining state's "obligation to respect the human rights of the suspect as protected in customary international law, in the

61. Juvénal Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Judgment, ¶ 210 (May 23, 2005), http://www.unictr.org/Portals/0/Case/English/Kajelijeli/judgement/appealsjudgement.doc.pdf.
62. The Chamber referred to the fact that under Rule 2 of the Rules of Procedure and Evidence, a suspect is defined as a "person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction." *Id.* ¶ 217.
63. *Id.*
64. *Id.* ¶ 219.
65. *Id.*
66. *Id.* ¶ 220.
67. *Id.*

international treaties to which it has acceded, as well as in its own national legislation."[68] At a minimum, a judge in the state which is detaining the suspect must:

- communicate the ICTR's request for surrender/transfer to the suspect;
- familiarize the suspect with any charge;
- verify the suspect's identity, and medical status;
- examine any "obvious" challenges to the case barring issues concerning the merits of the case; and
- notify the suspect's consular authorities.[69]

At the same time, the Prosecutor must notify an ICTR judge that the suspect is being detained by national authorities, so that the judge can prepare a provisional arrest warrant and transfer order.[70]

The Appeals Chamber also expounded in detail what is meant by the suspect's right to be informed of the reasons for his or her arrest.[71] This right is triggered as soon as the suspect is arrested at the behest of the ICTR.[72] The appellate chamber observed that under Rule 2 of the Rules of Procedure and Evidence, a suspect was defined as a "person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction."[73] Since Rule 40 only permits the Prosecutor to request the arrest of a "suspect," it follows that the Prosecutor must at that time possess reliable information that tends to show that the person being provisionally arrested committed a crime within the jurisdiction of the ICTR.[74] The appeals judges implied that the suspect must be informed of this evidence in order to challenge whether the conditions for provisional arrest under Rule 40 were met. However, at this point in time, the suspect's rights would not be violated if he was not arrested pursuant to an arrest warrant due to the exigencies of the situation (Rule 40 does not require a judicial order from the ICTR).[75]

In terms of the suspect's status once the Prosecutor had obtained a Rule 40*bis* order from an ICTR judge for transfer and provisional detention, the Appeals Chamber quoted from the 1999 *Barayagwiza* decision, concluding that the suspect's right to be informed of the charges is of paramount importance at this stage for two reasons. First, it " 'counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect' by giving the suspect 'the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings.' "[76] Second, it "gives the suspect information he requires in order to prepare his defence."[77]

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68. *Id.* (footnote omitted).
69. *Id.* ¶ 221.
70. *Id.* ¶ 222.
71. *Id.* ¶ 217.
72. *Id.* ¶ 226.
73. *Id.* ¶ 217.
74. *Id.* ¶ 227.
75. *Id.* ¶ 226.
76. *Id.* ¶ 229 (quoting Jean-Bosco Barayagwiza v. Prosecutor, Case No. ICTR-97-19, Decision, ¶¶ 80–81 (Nov. 3, 1999), http://www.unictr.org/Portals/0/Case/English/Barayagwiza/decisions/dcs991103.pdf).
77. *Id.* (citing *Barayagwiza*, Case No. ICTR-97-19, Decision, ¶¶ 80–81).

Notably, in contrast to the position in the *Semanza* case that the ninety day provisional detention maximum in Rule 40*bis* would not apply to provisional detention by a national authority, the Appeals Chamber relied on the 1999 *Barayagwiza* decision to conclude that provisional detention of a suspect who has not been charged would only be acceptable if it were limited to a maximum of ninety days and the procedural safeguards in Rules 40 and 40*bis* are implemented.[78] The Appeals Chamber also subsequently relied on the 1999 *Barayagwiza* decision's finding that Rule 40 must be construed in a manner which is consistent with the safeguards in Rule 40*bis*. It therefore concluded that:

> [I]t is not acceptable for the Prosecution, acting alone under Rule 40, to get around those time limits or the Tribunal's responsibility to ensure the rights of the suspect in provisional detention upon transfer to the Tribunal's custody under Rules 40 and 40*bis*, by using its power under Rule 40 to keep a suspect under detention in a cooperating State.[79]

In this particular case, the Appeals Chamber ruled that provisional detention in Benin for a period of eighty-five days, without being informed of the charges, and without being brought before a judge, constituted a violation of the defendant's rights.[80] The Prosecution's responsibility was triggered by the fact that they failed to exercise prosecutorial diligence: namely, the Prosecutor failed to make a timely request for the suspect's transfer to the ICTR, and did not request the national authorities to notify the defendant of the evidential basis for considering him a suspect or the nature of any provisional charges.[81]

With regards to the fact that the defendant was not promptly brought before a judge, the Appeals Chamber recognized that the Benin authorities were partially responsible, but nonetheless emphasized that "although the violation is not solely attributable to the Tribunal, it has to be recalled that it was the Prosecution, thus an organ of the Tribunal, which was the requesting institution responsible for triggering the Appellant's apprehension, arrest and detention in Benin."[82] In terms of the defendant's right to a remedy, the Appeals Chamber concluded that since the violations were not egregious in nature, it would not be justified to dismiss the case against the defendant; rather, a more proportionate remedy would be to reduce the defendant's sentence.[83]

This remedy of reducing the sentence to compensate for the violations should be in addition to the reduction granted due to giving the defendant credit for time served in provisional detention in Benin.[84] In this regard, it is notable that the Trial Chamber had granted the defendant sentencing credit for

> periods during which Kajelijeli was detained solely on the basis of the Rwandan warrant of arrest because this warrant was based on the same allegations that form the

78. *Id.* (citing *Barayagwiza*, Case No. ICTR-97-19, Decision, ¶ 62).
79. *Id.* ¶ 233.
80. *Id.* ¶ 231.
81. *Id.*
82. *Id.* ¶ 232.
83. *Id.* ¶ 255.
84. *Id.* ¶ 322.

> subject matter of this trial. In such circumstances, fairness requires that account be taken of the total period Kajelijeli spent in custody.[85]

Although there have not been any further substantive appeal decisions concerning detention by national authorities post-*Kajelijeli*, the ICTY Appeals Chamber has had the opportunity to clarify whether the Prosecutor's direct involvement in the alleged violations is a precondition for the abuse of process doctrine in other contexts. In a decision issued in the *Karadžic* case in relation to the defendant's claim that he had been promised immunity by representatives of the United States government, the ICTY Appeals Chamber held that the Trial Chamber had erred in rejecting the applicability of the abuse of process doctrine on the grounds that the United States' representative was a third party who was not connected to the ICTY.[86] The Appeals Chamber also upheld the defendant's argument that the jurisprudence of the ICTY does "not introduce a dual standard for the abuse of process doctrine, depending on the nature of the entity which carried out the alleged misconduct."[87] In any case, irrespective of which entity is responsible for perpetrating the violations, the defendant must still establish that he suffered serious mistreatment or that the violations were egregious.[88]

In a subsequent decision issued on February 10, 2010 in *Seselj*, the ICTY Appeals Chamber expressly adopted the 1999 *Barayagwiza* finding that "the abuse of process doctrine does not require the identification of the party responsible for the alleged violations of the accused's rights."[89] The appeals judges further clarified that

> [O]nly two situations may be considered as constituting a serious and egregious violation of the accused's rights: (i) where a fair trial for the accused is impossible, usually for reasons of delay; and (ii) where the trial of the accused is marred by procedures which contravene the court's sense of justice.[90]

On the basis of the jurisprudence above, pre-transfer violations could arguably fall under either of these two categories: keeping the defendant in provisional detention for an unreasonable length of time could trigger the first category of abuse of process, irrespective of which entity was responsible for the delay; alternatively, if the ICTY or ICTR Prosecutor were to deliberately abstain from requesting the suspect's transfer to the Tribunal in a timely manner for reasons of prosecutorial strategy (i.e., because the Prosecutor is aware it has insufficient evidence to confirm an indictment and needs more time to gather evidence against the suspect), this could potentially trigger the second category. The defendant may even be entitled to sentencing credit for detention which has not been requested by the

85. Juvénal Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 966 (Dec. 1, 2003), http://www.unictr.org/Portals/0/Case/English/Kajelijeli/judgement/031201-TC2-J-ICTR-98-44A-T-JUDGEMENT%20AND%20SENTENCE-EN_.pdf.
86. Prosecutor v. Radovan Karadžic, Case No. IT-95-5/18-AR73.4, Decision on Karadžic's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 12, 2009), http://www.icty.org/x/cases/karadzic/acdec/en/091012.pdf.
87. *Id.* ¶ 47.
88. *Id.*
89. Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, ¶ 20 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 10, 2010), http://www.icty.org/x/cases/seselj/tdec/en/100210a.pdf.
90. *Id.* ¶ 21.

Tribunal, if the factual basis for his detention is similar to the allegations set out in the court's subsequent indictment.

B. The Emerging Practice of the International Criminal Court

The International Criminal Court (ICC) is founded on complementarity: the notion that the permanent ICC is a court of last resort which will only exercise jurisdiction over cases if national courts are inactive, unwilling or unable to do so themselves. At the same time, as is the case with other international courts and tribunals, the ICC is dependent on national authorities to implement its judicial decisions and orders. This dependence raises the practical catch-22 that, on the one hand, the ICC is assuming jurisdiction over a case because the national authorities are either unable or unwilling to conduct the investigation in a fair and impartial manner, but on the other hand, the ICC is dependent on the very same national authorities to execute key steps of the judicial process. Importantly, this includes, for example, the initial arrest and transfer of suspects and defendants. It is therefore not surprising that many of the cases before the ICC may have had less than perfect records as concerns the fairness and impartiality with which the defendant was treated by national authorities. It is questionable, however, whether this political reality should inform the prosecutorial and judicial approach taken by the Court towards such violations.

The dependency of the ICC on states is further heightened by the fact that unlike the ICTY and the ICTR, the ICC does not ordinarily possess Chapter VII enforcement powers,[91] and can thus only request assistance from states which have ratified or acceded to the Rome Statute. The difficulty of translating a treaty-based cooperation agreement into effective enforcement action against potentially dangerous persons was illustrated very early on at the ICC by the failure of the Uganda government, and perhaps more pointedly by surrounding countries, to enforce the arrest warrants against Joseph Kony and other members of the Lord's Resistance Army. Even worse difficulties have arisen in the situations of Sudan and Libya, which were Chapter VII referrals. It is therefore not surprising that for the next two cases, the Prosecutor decided to target two persons who had already been arrested and detained by the authorities of the Democratic Republic of Congo (DRC).

Thomas Lubanga Dyilo was placed under house arrest by DRC authorities in 2004. Subsequently, both Thomas Lubanga Dyilo and Germain Katanga, who are allegedly associated with opposing militia/political parties, were initially arrested by the DRC authorities in connection with the killing of peacekeepers attached to the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUC) in March 2005. Although the DRC authorities eventually charged other persons with this killing, both Lubanga and Katanga were kept in detention by the national authorities for

91. It is a matter of debate among scholars whether this changes when the Security Council has referred a situation to the ICC in accordance with Chapter VII of the U.N. Charter and Article 13(b) of the Rome Statute. S*ee, e.g.*, Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INTL. CRIM. JUST. 315 (2009) (arguing international customary laws on immunity for heads of state do not apply where an international criminal court exercises jurisdiction) *and* Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INTL. CRIM. JUST. 333 (2009) (arguing a removal of immunity by the Security Council violates international customary law).

alleged responsibility for genocide, war crimes, and crimes against humanity taking place before 2004.

The DRC authorities remained in contact with the ICC Prosecutor throughout this time period, and informed them that no investigative moves were being taken against Lubanga.[92] In this connection, the ICC does not have an equivalent to the ICTY/ICTR Rule 40—the Prosecutor does not explicitly possess the power to formally request national authorities to provisionally detain a suspect, pending the issuance of an arrest warrant by the Court. At the same time, the Statute and Rules do not prohibit the Prosecutor from informally communicating such a wish to national authorities.

In January 2006, the ICC Prosecutor filed an application for an arrest warrant against Lubanga.[93] In terms of the timing of the application, the Prosecutor noted that under DRC law, the defendant had a right to be brought before a judge within twelve months of his initial arrest. The ICC Prosecution was therefore concerned that "the apparent absence of investigative acts performed since the arrest of Thomas LUBANGA DYILO [would provide] sufficient legal basis for that judge to authorize his release."[94] The Pre-Trial Chamber eventually granted the application, and, subsequent to his transfer to the ICC, the defense challenged the jurisdiction of the court and sought the defendant's release on the basis that his arbitrary detention in the DRC constituted an abuse of process.[95] The defense also argued in the alternative, that even if the violations were not sufficiently grave to warrant the cessation of the proceedings, the Chamber should nonetheless grant an appropriate remedy. For instance, in its submission, the Chamber should take into consideration his prior detention in the DRC when considering his eligibility for provisional release.[96]

On appeal,[97] the Appeals Chamber held that while the Statute and Rules did not explicitly provide for any legal basis under which the proceedings could be stayed due to an abuse of process, Article 21(3) of the Statute mandate that the Chamber apply the provisions of the Rome Statute in a manner that is consistent with internationally recognized human rights norms.[98] The appeals judges referred to the overriding obligation under human rights law to ensure that the proceedings as a whole were fair, and concluded that "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial."[99]

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92. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006, ¶ 32 (Oct. 26, 2006), http://www.icc-cpi.int/iccdocs/doc/doc243795.pdf.
93. *Id.*
94. *Id.* ¶ 33 (quoting Prosecutor's Further Information and Materials, ¶ 13, Jan. 25, 2006) (alteration in original).
95. *Id.*
96. *Id.* ¶¶ 53–58.
97. The Pre-Trial Chamber rejected the challenge on the basis that the defense had failed to establish either that the defendant had suffered from an egregious violation of his rights amounting to torture or serious mistreatment, or that there had been concerted action between the DRC authorities and the ICC Prosecution.
98. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (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, ¶ 36 (Dec. 14, 2006), http://www.icc-cpi.int/iccdocs/doc/doc243774.pdf.
99. *Id.* ¶ 37.

Accordingly, "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed."[100]

Regrettably, the ICC Appeals Chamber did not clearly delineate what type of circumstances would render it impossible to have a fair trial. For example, it is possible that the defendant could suffer egregious violations of his rights in connection with his arrest and detention by national authorities. The subsequent proceedings conducted before the ICC might nonetheless be conducted in a fair manner. Would it be possible to conclude that the proceedings as a whole were fair, or would the earlier violations taint the fairness of the entire trial? The ICTY/ICTR jurisprudence is clearer in this respect as it specifies that the courts will consider the violations to constitute an abuse of process either if it is no longer possible to convene a fair trial, or the violations have contravened the tribunal's sense of justice.

The judgment is also opaque concerning whether the defendant must prove that the violations of his rights can be attributed to the ICC itself. The Appeals Chamber notes that the defense had failed to demonstrate that the Pre-Trial Chamber's conclusion that there was no concerted action between the DRC and the ICC Prosecutor was erroneous, but the Appeals Chamber does not then clarify whether it was actually necessary for the defense to prove the existence of concerted action.[101] In this regard, the Appeals Chamber does not squarely address the issue of due diligence, which is separate from the issue of responsibility. Although obviously not binding at the ICC in a technical sense, there was no consideration of the ICTR *Kajelijeli* appeals decision which would have been instructive. The judges failed to take up the issue of whether the Prosecution, even if it had not been involved in the violations of the defendant's rights, had a positive obligation to minimize these violations, for example, by applying for the defendant's arrest warrant in a timely manner.

Finally, and perhaps even more egregiously, the decision does not consider whether the defendant should have been entitled to an alternative remedy—for example, a reduction in sentence, or compensation as is required by Article 85(1) of the Rome Statute, which provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[102] The Appeals Chamber simply notes that "the crimes for which Mr. Lubanga Dyilo was detained by the Congolese authority were separate and distinct from those which led to the issuance of the warrant for his arrest."[103] Since other provisions of the Statute, which address the relationship of ICC proceedings to domestic proceedings, refer to "conduct" and not "crimes,"[104] it is unfortunate that the Appeals

100. *Id.* ¶ 39.
101. *Id.* ¶ 42.
102. *See* Rome Statute of the International Criminal Court art. 85, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], *available at* http://www.unhcr.org/refworld/docid/3ae6b3a84.html.
103. *Lubanga*, Case No. ICC-01/04-01/06 (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, ¶ 42.
104. For example, Article 20, which sets out the principles concerning *ne bis in idem*, refers to "conduct": "No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct . . . ." Rome Statute, *supra* note 102, art. 20(3).

Chamber appears to have adopted a narrower requirement that the defendant must prove that there is a correlation between the specific crimes underlying the domestic proceedings and those of the ICC. In some cases, it may be impossible for the defendant to prove such a correlation.

For example, Lubanga had not been detained by the Congolese authorities for any specific crimes, which was itself a violation of his right to be informed of the nature of the charges for which he had been detained. In the absence of any details concerning the factual basis for his detention in the DRC, it would be difficult for him to draw a specific correlation between the national proceedings and the ICC charges. It is also apparent that the DRC authorities considered that the transfer of the defendant to the ICC effectively closed the proceedings in the DRC.[105] As such, absent any possible remedial action through regional or international human rights complaint processes, the ICC would be the only court before which the defendant would be entitled to seek a remedy in connection with his allegations of arbitrary detention.

The failure of either the Pre-Trial Chamber or the Appeals Chamber to discuss the notion of due diligence within the context of the rights of suspects who have been apprehended and detained by national authorities is particularly disappointing given that the Pre-Trial Chambers have a record of actively policing the investigations of the Prosecutor in order to enforce the rights of putative victims.[106] It is also arguable that, by failing to set out standards of prosecutorial due diligence and effectively looking the other way, the Appeals Chamber placed its imprimatur on the practice of detaining possible ICC suspects in domestic prisons indefinitely or until such time that the Prosecutor decided to file an application for an ICC arrest warrant against the suspect in question.

The impact this had on the proceedings is exemplified by the decision of the Prosecutor not to apply for an arrest warrant against Germain Katanga until June 25, 2007, even though the Prosecution was aware that he had been in detention since March 2005. In this case, there was a clearer correlation between the domestic proceedings and the ICC case, as demonstrated by the fact that the ICC Prosecution was relying on statements taken by national authorities from the defendant whilst he was in detention.[107] Nonetheless, the question whether the defendant should have a remedy for the alleged violations of his rights was never addressed on the merits, as the Pre-Trial Chamber held that the defense had filed its application too late (even though there is no deadline for abuse of process motions in the

105. The Auditor General closed the proceedings in order to avoid *ne bis in idem* and transferred all the case file documents to the ICC Prosecutor. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006, ¶ 31 (Oct. 26, 2006), http://www.icc-cpi.int/iccdocs/doc/doc243795.pdf.

106. For example, at the same time that the Pre-Trial Chamber was considering the application of the Prosecution for an arrest warrant against Lubanga, the Pre-Trial Chamber issued a landmark decision in the DRC situation to the effect that victims had a right to participate in the investigations stage of the proceedings. Situation in the Democratic Republic of the Congo, No. ICC-01/04, Public Redacted Version: Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS (Jan. 17, 2006), http://www.icc-cpi.int/iccdocs/doc/doc183441.PDF.

107. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Public Redacted Version: Decision on the Confirmation of Charges, ¶¶ 79–99 (Sept. 30, 2008), http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf.

Statute or Rules, and the Chamber had not set a specific deadline for filing the motion).[108] This decision to dismiss the application on procedural grounds was narrowly upheld by the Appeals Chamber.[109] There are, however, two very powerful and well-reasoned dissenting opinions from Judges Kourula and Trendafilova concerning the effect of such a decision on the defendant's right of access to a court and right to an effective remedy.[110]

More recently, in the case involving former Ivorian President Laurent Gbagbo, the accused requested a stay of proceedings in a preliminary motion challenging the ICC's jurisdiction. He argued that because his fundamental fair trial rights were violated by Ivorian authorities, between the period of his arrest on April 11, 2011 and his transfer to the Court on November 29, 2011, the Pre-Trial Chamber should decline to exercise its jurisdiction and order a permanent cessation of the proceedings against him.[111] He claimed, *inter alia*, that he had been arbitrarily arrested, detained, and tortured by the national authorities and that the Prosecutor, who was in contact with those entities, was effectively complicit in his mistreatment insofar as she could have but failed to request the Ivory Coast to end the grave violations of his rights.[112]

In its decision, the ICC Pre-Trial Chamber ruled that, although this aspect of Gbagbo's motion did not in fact constitute a valid jurisdictional challenge, it would still exercise its jurisdiction to hear the matter given the seriousness of the defense allegations and the Pre-Trial Chamber's inherent power to stay proceedings in cases of abuse of process.[113] The judges then examined the merits of the defense motion but concluded that the Ivorian authorities had not detained the defendant at the ICC Prosecutor's behest or that of another organ of the Court.[114] This implied that, had that been the case, the Pre-Trial Chamber would have likely assessed the role that the ICC entity played in impacting the defendant's rights through the action of the national authorities. Indeed, the judges ruled that the defense failed to proffer relevant evidence substantiating the claim that the ICC Prosecutor had something to do with Gbagbo's arrest, charge, and detention in his home country. They observed that

108. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Public Redacted Version of the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp), (Dec. 3, 2007), http://www.icc-cpi.int/iccdocs/doc/doc827868.pdf.

109. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 10, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" (July 12, 2010), http://www.icc-cpi.int/iccdocs/doc/doc907224.pdf.

110. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 10, Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings," Dissenting Opinion, (July 12, 2010), http://www.icc-cpi.int/iccdocs/doc/doc914982.pdf.

111. Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision on the "Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute Filed by the Defence for President Gbagbo (ICC- 02/11-01/11-129)," ¶¶ 10, 68, 76 (Aug. 15, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1454492.pdf.

112. *Id.* ¶¶ 68–76.

113. *Id.* ¶¶ 88–90.

114. *Id.* ¶ 97.

even the defense had conceded that these steps had no apparent link to the proceedings before the Court because they related to economic crimes.[115]

Presumably, if the arrest had been attributable to an ICC organ, some type of remedy would have accrued if the judges determined that there had been a serious violation of his rights. In contrast, when the Prosecutor actually requested that the national authorities arrest him, the Chamber observed that the suspect's rights, including the fundamental ones to be informed of the charges against him and to be brought before a national judge, were respected. This took place only four days from the date of transmission of the Court's official request that the Ivorian authorities effect his arrest—the moment from which they would consider that he had been detained pursuant to the ICC Prosecutor's—and therefore the Court's—authority.[116]

Unfortunately, upon appeal of the decision denying a stay of proceedings, the Appeals Chamber dismissed Gbagbo's request for a reversal of the Pre-Trial Chamber *in limine*.[117] The presiding judge determined that the impugned decision, which was not a decision about jurisdiction pursuant to Article 82(1)(a) of the Rome Statute, could have only been appealed with leave of the Pre-Trial Chamber which the defense never sought and obtained as required by Article 82(1)(d).[118]

In its recent Gbagbo decision, in which it invoked procedural irregularities to dismiss the defense appeal, the Appeals Chamber denied itself the opportunity of clarifying the ambiguities in its earlier decisions, for example, whether it would be necessary for the defense to establish the existence of concerted action between the ICC and the national organ, and if so, the degree of violation that would be required for the purposes of triggering the imputation of responsibility to the ICC organ. Indeed, it is notable that other courts, for instance the ECCC in the *Duch* case which will be discussed below, had interpreted the *Lubanga* decision to support a broad form of responsibility for pre-transfer violations of the defendant's rights. The Pre-Trial Chamber decision in *Gbagbo*, which showed sensitivity to the human rights of the defendant, also arguably follows this broad tend.

C. The Practice of the Extraordinary Chambers in the Courts of Cambodia

The first suspect to be arrested by Cambodian authorities in connection with the alleged crimes committed by the Khmer Rouge became the unfortunate victim of the protracted bureaucratic wrangling between Cambodian and U.N. officials concerning the legal details for establishing a tribunal to prosecute these alleged crimes. The defendant Kaing Guek Eav (alias "Duch") was arrested by Cambodian authorities in May 1999 pursuant to an arrest warrant issued by the Military Court.[119] The Law on the Establishment of the Extraordinary

115. *Id.* ¶¶ 97–98.
116. *Id.* ¶ 102.
117. Prosecutor v. Laurent Koudou Gbagbo, Case No. ICC-02/11-01/11 OA 2, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, ¶¶ 101, 106 (Dec. 12, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1526463.pdf.
118. *Id.*
119. Prosecutor v. Kaing Guek Eav alias "Duch," Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal against Provisional Detention Order of Kaing Guek Eav Alias "Duch," ¶ 13 (Dec.

Chambers in the Courts in Cambodia (ECCC Law) entered into force on August 10, 2001, but the Court was not yet physically established at that point in time.[120] From 2002 until 2007, the Military Court issued orders for his detention based on the ECCC Law. On July 30, 2007, the defendant was physically transferred to the ECCC Detention Unit pursuant to an order of the ECCC co-investigating judges.[121] The defendant was thus held in detention by national authorities for more than eight years prior to the commencement of his case before the ECCC.

The defense argued that this prior detention violated Article 9 of the International Covenant on Civil and Political Rights (ICCPR),[122] and should be imputed to the ECCC judicial authorities. The investigating judge should therefore have taken this time period into consideration when determining whether it was appropriate to order his continued provisional detention.[123] The defense did not, however, seek the termination of the case on this basis.

The co-investigating judges dismissed the arguments on the grounds that the ECCC had no jurisdiction to consider the legality of his detention prior to the establishment of the ECCC.[124] On appeal, the Pre-Trial Chamber held that it would only be able to take into account violations of Article 9 of the ICCPR if "the organ responsible for the violation was connected to an organ of the ECCC, or had been acting on behalf of any organ of the ECCC or

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3, 2007), http://203.176.141.125/sites/default/files/documents/courtdoc/PTC_decision_appeal_duch_C5-45_EN_0_0.pdf.

120. *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Oct. 27, 2004, NS/RKM/1004/006, *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

121. This procedural history is recounted at paragraphs 2–4 of the Trial Chamber's Decision on Request for Release, dated June 15, 2009. Prosecutor v. Kaing Guek Eav alias "Duch," Case File No. 001/18-07-2007/ECCC/TC, Decision on Request for Release, ¶¶ 2–4 (June 15, 2009), http://www.haguejusticeportal.net/Docs/Court%20Documents/ECCC/Duch_Decision_on_Request_for_Release.pdf.

122. ICCPR, *supra* note 5, art. 9.

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Id.

123. *Duch*, Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal against Provisional Detention Order of Kaing Guek Eav Alias "Duch," ¶ 13.

124. *Id.*

in concert with organs of the ECCC."[125] The Pre-Trial Chamber then proceeded to examine the relationship between the ECCC and domestic authorities, in particular, the Military Court that had ordered the defendant's arrest. The Chamber observed that the applicable law before the ECCC did not give the ECCC jurisdiction over actions by domestic courts.[126] There were also several distinctions between the ECCC and domestic courts, for example, the ECCC Chambers were composed of both national and foreign judges, whom would not be eligible to sit in Cambodian courts.[127]

Of greater relevance, the Chamber also emphasized that the ECCC should be considered to be an independent entity from the Cambodian court system: decisions of the ECCC cannot be reviewed by any court outside its structure, and there is no corresponding right for the ECCC to review decisions made by domestic courts.[128] The Chamber ultimately concluded that the co-investigating judges did not err in excluding this period of detention from their consideration as to whether it was necessary to order the continued detention of the defendant under Rule 63(3) of the Internal Rules.[129] The defense resurrected the issue before the Trial Chamber in conjunction with a request for release, in which the defendant further requested that his prior detention be taken into consideration for sentencing purposes, and that this should include a reduction to compensate him for the violation of his rights.

The Trial Chamber confirmed the Pre-Trial Chamber's finding that the ECCC was a specialized court which operated independently from the Cambodian court system.[130] The Chamber therefore held that neither the fact that the Military Court had cited ECCC law in its detention order, nor the fact that it had issued an order terminating the case subsequent to the defendant's transfer to the ECCC demonstrated that there was any continuity between the acts of the Military Court and the ECCC.[131]

In contrast to the finding of the Pre-Trial Chamber that the ECCC would only have jurisdiction to rule on these alleged violations if they could in same way be attributed to the ECCC, the Trial Chamber noted its obligation to apply its internal rules in a manner consistent with international standards set out in human rights conventions. The judges also considered the jurisprudence of international courts, and surmised that "[e]ven if a violation of the Accused's right cannot be attributed to the ECCC, international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of his prior detention."[132] The Chamber expressly cited the 1999 *Barayagwiza* decision in support of this conclusion.[133]

125. *Id.* ¶ 15.
126. *Id.* ¶ 17.
127. *Id.* ¶ 18.
128. *Id.* ¶¶ 18–19.
129. *Id.* ¶ 23.
130. Prosecutor v. Kaing Guek Eav alias "Duch," Case File No. 001/18-07-2007/ECCC/TC, Decision on Request for Release, ¶¶ 10–11 (June 15, 2009), http://www.haguejusticeportal.net/Docs/Court%20Documents/ECCC/Duch_Decision_on_Request_for_Release.pdf.
131. *Id.* ¶¶ 13–14.
132. *Id.* ¶ 16.
133. *Id.*

Later in the decision, the Chamber made a valiant attempt to reconcile the disparate jurisprudence of the ad hoc Tribunals and the ICC concerning the relationship between the defendant's right to a remedy and the abuse of process doctrine. The Chamber firstly cited a 2000 ICTR *Rwamakuba* Trial Chamber decision to the effect that violations of a defendant's rights will only be attributed to the tribunal if there has been concerted action between it and the national authorities.[134] However, even if there has been no concerted action, the Trial Chamber found that the abuse of process doctrine constitutes an additional safeguard, in that the Court may be required to decline to exercise jurisdiction over the defendant if there have been fundamental breaches of the rights of the accused that rendered a fair trial impossible, or serious mistreatment, irrespective of the identity of the authority of the violations.[135]

Finally, the Chamber noted that even if the violations did not reach the standard of an abuse of process, in accordance with the case law of the ICTR Appeals Chamber, the defendant might still have a right to a remedy other than termination of the case for violations committed by the national authorities.[136] This right to a remedy was generally addressed at the sentencing stage, and was comprised of sentencing credit for both the time which the defendant had spent in detention by the national authorities, and additional credit to separately compensate for the violations.[137] If the defendant was acquitted, he would have to seek compensation before national authorities.

In examining the facts, the Trial Chamber held that under Cambodian law, the defendant could only be detained for a maximum of three years for genocide, war crimes, and crimes against humanity.[138] In addition, the case file revealed a lack of investigative activity and a lack of factual reasoning in the detention orders.[139] The Military Court also applied several laws on a retrospective basis.[140] The Chamber therefore concluded that the defendant's prior detention violated both Cambodian law, the defendant's right to trial within a reasonable time, and his right to be detained in accordance with the law.[141]

In terms of appropriate remedies, the Chamber made two main observations. First, if the defendant had been tried by the Military Court, he would have been entitled to sentencing credit for the time during which he was detained pursuant to the orders of the Military Court.[142] Second, the defendant had been detained by the Military Court for "investigation of allegations broadly similar to those being considered in this trial."[143] The Chamber therefore decided that the defendant should be granted sentencing credit for the entire duration of his

134. *Id.* ¶ 32 (citing Prosecutor v. Rwamakuba, Case No. ICTR-98-44-T, "Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused," ¶ 30 (Dec. 12, 2000).
135. *Id.* ¶ 33 (citing Prosecutor v. Barayagwiza, Case No. ICTR-97-19, Decision, ¶ 73 (Nov. 3, 1999); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, 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, ¶¶ 30, 37 (Dec. 14, 2006).
136. *Id.* ¶ 35 (citing *Barayagwiza*, Case No. ICTR-97-19, Decision (Nov. 3, 1999).
137. *Id.* ¶ 37.
138. *Id.*
139. *Id.* ¶ 20.
140. *Id.*
141. *Id.* ¶ 21.
142. *Id.* ¶ 28.
143. *Id.*

detention under the authority of the Military Court.[144] In its final judgment, the Trial Chamber also assessed that he should be granted a reduction in sentence of five years in order to separately compensate him for the violations of his rights which had occurred during this time period.[145]

Although the Co-Prosecutors neither objected to nor appealed this aspect of the Trial Chamber's sentence and its disposition, in their February 2012 judgment, the Supreme Court Chamber of the ECCC reviewed the issue *ex proprio motu* as a question of law.[146] It deemed this appropriate as they amended Duch's sentence upwards. The judges then discussed the matter and determined that the Trial Chamber had misconstrued the law when it held, on the basis of an erroneous interpretation of the ICTR jurisprudence, that Duch could be entitled to a remedy even in 1) the absence of violations attributable to the ECCC and 2) in the absence of a showing of abuse of process.[147]

To the contrary, after a review primarily of the *Barayagwiza*, *Semanza*, *Kajelijeli*, and *Rwamakuba* decisions discussed above, the majority ruled that the Trial Chamber should have rejected the defendant's request for a remedy. It explained that at least some form of responsibility should accrue to the ECCC for such a measure to be justified.[148] In the final analysis, it explained, the ICTR case law establishes that "violations of human rights must either constitute an abuse of process or be attributed to the Tribunal in order to grant the accused a remedy, and also that such remedies have always been granted in connection to failures by the Prosecutor or another organ of the Tribunal."[149]

However, in a lucid partial dissenting opinion, Judges Klonowiecka-Milart and Jayasinghe argued that the majority's adoption of ad hoc tribunal case law and application to the ECCC context was both unnecessary and inappropriate. In particular, the majority had failed to take into account the legal character of the ECCC as a hybrid court in respect of which there was "shared responsibility" distinct from the standalone nature of the ICTY and the ICTR which therefore enjoyed some distance from national jurisdictions.[150] The Cambodia situation was different and raises a separate question as to whether a hybrid court ought to be held accountable for the actions of the domestic system in instances where the former benefitted from the actions of the institutions associated with the national jurisdiction.[151] In Duch's case,

144. *Id.*
145. Prosecutor v. Kaing Guek Eav alias "Duch," Case File No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 680 (July 26, 2010), http://www.ivr.uzh.ch/institutsmitglieder/kaufmann/Projekte/ECCCMonitoringProgram/Berichterstattung/Case001TrialJudgementEn.pdf.
146. Prosecutor v. Kaing Guek Eav alias "Duch," Case File No. 001/18-07-2007-ECCC/SC, Appeals Judgment, ¶ 389 (Feb. 3, 2012), http://www.cambodiatribunal.org/sites/default/files/documents/Case%20001%20Appeal%20Judgement%20FINAL%20EN.pdf.
147. *Id.* ¶¶ 390, 395.
148. *Id.* ¶ 398.
149. *Id.*
150. *See* Prosecutor v. Kaing Guek Eav alias "Duch," Case File No. 001/18-07-2007-ECCC/SC, Partially Dissenting Joint Opinion of Judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe, ¶ 7 (Feb. 3, 2012), http://www.cambodiatribunal.org/sites/default/files/documents/Case%20001%20Appeal%20Judgement%20FINAL%20EN.pdf.
151. *See id.*

according to the dissenters, this was due to his detention by the military authorities. They then advanced several factors, all of which militated in favor of granting a remedy to the defendant in that particular case. The key considerations included (i) the extent to which the sentencing court is integrated into the domestic system; (ii) the nexus between the violation and the proceedings before the sentencing court; (iii) the gravity of the violation, which must rise to a violation of fundamental rights; (iv) whether an appropriate remedy is within the jurisdiction of the sentencing court; and (v) whether granting the remedy would frustrate the mandate of the sentencing court by, for example, requiring the immediate release of the defendant.[152]

Based on an analysis of these factors, the partially dissenting judges concluded that the ECCC was obligated to consider its responsibility for the Military Court's detention of Duch before his transfer to ECCC custody. Ultimately, they considered it more compatible with international human rights law for the tribunal to grant the sentencing reduction and imprison him for thirty years instead of increasing his sentence to life imprisonment. Importantly, the dissent recognized that the defendant would otherwise have been left without a remedy even in the face of a flagrant violation of his rights.[153]

D. The Practice of the Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) shares some of the same attributes of the preceding courts and tribunals, in particular, its dependence on national authorities for arresting and transferring suspects to the court's custody. Moreover, as was the case with the ECCC, the national authorities took action against specific suspects before the tribunal was fully operational, with a view to eventually transferring the suspects to the STL. Four Lebanese generals—Messrs. Jamil Mohamad Amin El Sayed, Ali Salah El Dine El Hajj, Raymond Fouad Azar and Mr Mostafa Fehmi Hamdan—were detained on August 30, 2005.[154]

The early jurisprudence and practice of the STL has, however, departed from its institutional antecedents in that all the organs—the Prosecutor, President, Pre-Trial Judge and Defence Office—have proactively taken measures to ensure that there were no gaps concerning the enforcement of the suspects' rights. For instance, they seem to have tried to ensure that the suspects' rights concerning the conditions of detention were respected (even though they were not physically within the custody of the Tribunal), that the suspects were not arbitrarily detained, and that they be accorded a remedy for any violations of their rights.

As concerns the defendant's protection against arbitrary detention, on March 25, 2009, the Prosecutor filed a request that the Pre-Trial Judge order the Lebanese authorities to defer to the competence of the STL, and to hand over the results of the investigations and the list of

152. *Id.* ¶ 8.
153. *Id.*
154. Application by the Prosecutor to the Pre-Trial Judge under Article 4(2) of the Statute and Rule 17 of the Rules of Procedure and Evidence, No. OTP/PTJ/2009/001 (Special Trib. for Lebanon Mar. 25, 2009), http://www.stl-tsl.org/en/the-cases/miscellaneaous/filings/other-filings/office-of-the-prosecutor/application-by-the-prosecutor-to-the-pre-trial-judge-under-article-42-of-the-statute-and-rule-17-of-the-rules-of-procedure-and-e.

detained persons to the STL.[155] The Pre-Trial Judge granted this request on March 27, 2009, and further ordered the Lebanese authorities, in accordance with Rule 17, "to continue to detain those persons held in Lebanon in connection with the case from the time of the Prosecutor's receipt of the results of the investigation by the Lebanese authority and the copy of the Lebanese court records until the issuance of a decision by the Pre-Trial Judge."[156]

On April 15, 2009, the Pre-Trial Judge issued an order which held that although the four detainees were physically detained by the Lebanese authorities, they should nonetheless be considered to be detained under the authority of the STL as of April 10, 2009, which was the date that the Lebanese authorities transferred the results of their investigation.[157] At the same time, the Pre-Trial Judge established a stringent deadline (April 27, 2009) by which the Prosecutor was to file a reasoned application as to whether he requested the continued detention of the four suspects.[158]

On April 21, 2009, in response to an application by the Defence Office, the President issued an order that considered the conditions of detention of the four suspects, namely the fact that they were being segregated from all other detainees (which amounts to de facto isolation) and had been denied the right to privileged communications with their counsel.[159] The President noted that the Tribunal's Rules of Detention only applied to persons who were physically detained by the Tribunal, and as such, were formally inapplicable in light of the fact that the suspects were detained in Lebanon. The President nonetheless opined that "the Tribunal must be able to exercise some form of supervision over their detention. Without such supervision by the Tribunal, the rights of the detained persons may be gravely compromised and they may be left without any effective remedy against a potential violation of their rights."[160] Notably, the President cited the *Kajelijeli* appeals judgment in support of this proposition.[161]

The President therefore relied on his general obligation under Rule 32(2) to supervise conditions of detention, and his power under Rule 101(G), which allows the President to request the modification of conditions of detention for persons detained outside of the Host State (i.e., the Netherlands).[162] He therefore ordered the Lebanese authorities "to ensure that the right of the detained persons to freely and privately communicate with their counsel be

155. *Id.*
156. Antonio Cassese, Guido Acquaviva, Mary Fan & Alex Whiting, INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY 44 (2011), (citing Order Directing the Lebanese Judicial Authorities Seized with the Case of the Attack against Prime Minister Rafiq Hariri and Others to Defer to the Special Tribunal for Lebanon, Case No. CH/PTJ/2009/01 (Special Trib. for Lebanon Mar. 27, 2009), http://www.stl-tsl.org/en/the-cases/miscellaneaous/filings/orders-and-decisions/pre-trial-judge/ordonnance-portant-des-saisissement-en-faveur-du-tribunal-special-pour-le-liban-de-la-juridiction-libanaise-saisie-de-laffaire-de).
157. Order Setting a Time Limit for Filing of an Application by the Prosecutor in Accordance with Rule 17(B) of the Rules of Procedure and Evidence, Case No. CH/PTJ/2009/03 (Special Trib. for Lebanon Apr. 15, 2009), http://www.stl-tsl.org/en/the-cases/miscellaneaous/filings/orders-and-decisions/pre-trial-judge/ordonnance-portant-fixation-du-delai-de-depot-de-la-requete-du-procureur-en-application-de-larticle-17-paragraph-b-du-reglement-de.
158. *Id.*
159. Order on Conditions of Detention, Case No. CH/PRES/2009/01/rev (Special Trib. for Lebanon Apr. 21, 2009), http://www.worldcourts.com/stl/eng/decisions/2009.04.21_In_the_Matter_of_El_Sayed.pdf.
160. *Id.* ¶ 10.
161. *Id.* ¶ 10 n.7.
162. *Id.* ¶ 11.

fully implemented," and "to terminate the regime of segregation of the detained persons and to ensure that, in keeping with any security regime deemed appropriate, the detained persons be allowed to communicate with each other upon request, for a period of two hours per day."[163]

In response to the deadline set by the Pre-Trial Judge for the Prosecutor to request the continued detention of the four suspects, the Prosecutor filed a motion, in which he informed the Pre-Trial Judge that the information which was currently available was insufficiently credible to warrant the indictment of the four suspects.[164] The Prosecutor noted that under the Rules, a suspect could not be detained for more than ninety days unless an indictment was confirmed against the suspect, and therefore requested that the suspects be released immediately.[165] The Pre-Trial Judge granted the request.[166]

Not surprisingly, given the fact that he had been kept in detention without being charged for four years, one of the released suspects, Mr. Jamil El Sayed, subsequently attempted to obtain a remedy in domestic courts under Lebanese laws concerning libelous denunciation and arbitrary detention. In order to sustain such a claim, and in light of the fact that the investigative files had been transferred to the STL, Mr. Sayed filed a request before the Tribunal to obtain information concerning the circumstances of his initial detention by Lebanese authorities.

In the Pre-Trial Judge's decision, the judge held that whilst neither the Statute nor the Rules provide for an explicit right to access the documents concerning a person's detention, the power to grant access to such documents should be considered to fall within the implicit powers of the Tribunal, as the request was closely connected to the subject-matter jurisdiction of the Tribunal, and it would be consistent with the "interests of fairness of the proceedings and good administration of justice."[167] The Judge further emphasized that since the Lebanese authorities' deferral to the competence of the court on April 10, 2009, the STL was the sole court with jurisdiction over the events in question, and the only court with access to the documentation.[168] Moreover, if the Tribunal were to find that it did not have jurisdiction over the request, "the Tribunal would deprive the Applicant of any possibility to have his basic rights vindicated by a judge. It would thus exclude the Applicant from the right to effective judicial protection."[169]

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163. *Id.* at 11–12.
164. Submission of the Prosecutor to the Pre-Trial Judge Under Rule 17 of the Rules of Procedure and Evidence, Case No. CH/PTJ/2009/004 (Special Trib. for Lebanon Apr. 27, 2009), http://www.haguejusticeportal.net/Docs/Court%20Documents/STL/STL_Reasoned%20submission%20as%20filed_270409.pdf.
165. *Id.* ¶ 22.
166. Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06 (Special Trib. for Lebanon Apr. 29, 2009), http://www.haguejusticeportal.net/Docs/Court%20Documents/STL/Order-Regarding-the-Detention-of-Persons-Detained-in-Lebanon.pdf.
167. Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed Dated 17 March 2010 and Whether Mr. El Sayed Has Standing before the Tribunal, ¶ 32, Case No. CH/PTJ/2010/005 (Special Trib. for Lebanon Sept. 17, 2010), http://www.worldcourts.com/stl/eng/decisions/2010.09.17_In_the_Matter_of_El_Sayed.pdf.
168. *Id.* ¶ 34.
169. *Id.* ¶ 35.

The Pre-Trial Judge thus concluded that the Tribunal had jurisdiction over the request, and furthermore, that the applicant had standing to request the relief sought from the Tribunal even though he was no longer a party to the proceedings. Having determined these threshold issues, as of writing, the judge is receiving observations from the Prosecutor and the Applicant concerning the merits of his request for access to the case file. In November 2010, the Special Tribunal also amended its Rules of Procedure and Evidence to provide that anyone who has been "illegally arrested or detained under the authority of the Tribunal as a result of a serious miscarriage of justice, . . . may file a request to the President for compensation or other appropriate redress within six months of the issuance of the final judgment or decision."[170]

III. Conclusion and Recommendations

It is encouraging that the jurisprudence of the different courts and tribunals has gradually evolved in a positive manner, towards recognition that "the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person,"[171] and that any violations of the defendant's rights requires a remedy even if the threshold for release has not been met. According to the above jurisprudence of the different courts, the position of a defendant, who has been arbitrarily detained by national authorities, may be summarized as follows.

First, if the Prosecutor/investigating authority is aware that a person suspected of crimes falling under the jurisdiction of the court/tribunal had been arrested by national authorities, they have a positive duty to notify the court/tribunal, and inform national authorities of their duty to ensure that the rights of the defendant are respected.[172] Second, once the Prosecutor has requested the arrest of the defendant or assumed jurisdiction over the case, even if the defendant is detained by national authorities and not at the seat of the court, the defendant should not be detained for more than ninety days prior to the issuance of an indictment. Third, the court will likely find that there has been an abuse of process if the violations of the defendant's rights have rendered it impossible to have a fair trial. Fourth, the court will also be likely to find that there has been an abuse of process if the procedures have been tainted to such an extent that it offends the court's sense of justice. Fifth, the defendant does not need to establish the existence of concerted action between the organs of the court and the national authorities, but such concerted action could be an aggravating factor, or it could be the factor which offends the court's sense of justice, which places the violation in the second category of abuse of process.

Sixth, in order to trigger the abuse of process doctrine or to justify the release of the defendant, the violations must be egregious. The ICC has held that the severity of the violations is not necessarily relevant—what is more relevant is whether it is possible to

170. Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 170(D), *entered into force* Mar. 20, 2009, *available at* http://www.stl-tsl.org/images/RPE/RPE_EN_February_2013.pdf.

171. Juvénal Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Judgment, ¶ 220 (May 23, 2005), http://www.unictr.org/Portals/0/Case/English/Kajelijeli/judgement/appealsjudgement.doc.pdf.

172. The ICTY has not pronounced on this issue, but would presumably follow the ICTR. The Pre-Trial Judge at the STL has exercised this role, and the ICC and ECCC have not set out any due diligence standards as concerns pre-transfer detention.

convene a fair trial.[173] Seventh, even if the threshold for an abuse of process has not been met, the defendant will still have a right to a remedy for any violations of his rights. Eighth, if the defendant is convicted, the defendant will be entitled to sentencing credit for the time for which he was detained at the request of the court/tribunal, and also any time for which he was detained in connection with "broadly similar allegations," even if the court/tribunal had not requested his detention. Finally, in addition to credit for time served, the defendant is also entitled separately to a reduction of his or her sentence as a remedy for the violation itself. Article 85(1) of the Rome Statute provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[174] It is not clear whether the right to compensation will only include financial compensation or could also include a sentence reduction if the defendant is convicted. The broader interpretation, which enables this right to include both the possibility of a financial award and reduction in jail term, ought to be preferred.

At the same time, notwithstanding the above, it is also possible to discern the following relatively more negative trends. First, the courts have been highly influenced by the realities of state/international cooperation, which weakens the likelihood that they would offer strong remedies to a defendant whose rights have been violated. Second, the imposition of rigid procedural and evidentiary requirements can render the right to a remedy illusory. Third, whilst the courts have not explicitly required the defendant to demonstrate concerted action between the international/hybrid court and national authorities, the absence of such concerted action is likely to impact the court's assessment as to whether the violation is linked to the proceedings before the court, and whether the violation is sufficiently grave to warrant a remedy. Fourth, the practice of the courts in granting the defendant a reduction in sentence as a remedy is unlikely to have any deterrent effects against the Prosecutor or national authorities pursuing such practices in the future. Fifth, as recognized by the 1999 *Barayagwiza* decision, financial compensation cannot compensate an acquitted person for the loss of family life which he or she has experienced whilst being arbitrarily detained. It is therefore disappointing that the ICC in particular has not established any standards of prosecutorial diligence which would minimize the possibility of such violations occurring in the future.

In light of the above analysis and conclusions, the authors therefore propose the following recommendations:

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173. Rome Statute, *supra* note 102, art. 85(1).

174. In the Lubanga Appeals Chamber judgment of December 14, 2006, the ICC Appeals Chamber found that the Pre-Trial Chamber's focus on the severity of the violations was irrelevant:

> As may be discerned from the principles identified in the decision of the Pre-Trial Chamber as relevant to stay of proceedings, a broader standard was adopted than the one warranted in law in that it failed to require the specific consideration of whether a fair trial remained possible in the particular circumstances of the case. The findings of the Pre-Trial Chamber to the effect that the appellant was not subjected to any ill-treatment in the process of his arrest and conveyance before the Court sidelines the importance of the precise ambit of the test applied as a guide to the resolution of this appeal.

Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (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, ¶ 40 (Dec. 14, 2006), http://www.icc-cpi.int/iccdocs/doc/doc243774.pdf.

- If the Prosecutor becomes aware that national authorities have detained a person who could be considered a suspect falling under the respective international court/tribunal's jurisdiction, she should inform the national authorities of its duty to ensure that the rights of this suspect—as set out in national legislation, applicable treaties, and customary international human rights law—are respected.
- Pre-Trial Chambers should monitor and uphold the rights of suspects during the investigative phase. While there is a risk that this could be seen as stepping on prosecutorial turf, the Chamber should request the Prosecution to notify the judges if any investigative targets are being detained by national authorities, with a view to monitoring whether the proceedings are being conducted with due diligence.
- Although the potential subjects of the Prosecution's investigations will generally be confidential, as demonstrated by the STL, internal defense offices can also play a role in monitoring the rights of suspects prior to their transfer to the court/tribunal in question, and petitioning the Chamber to take appropriate measures.
- In the absence of any applicable statutory provisions, the court, which has the duty to ensure that the processes before it comply with international fair trial standards, should clearly inform the defense in advance of the procedural requirements and deadlines for filing an application seeking a remedy for violations of their rights which have occurred prior to their arrest/detention. Where such procedural time limitations impact negatively on the suspect's rights, under the relevant rules, the fundamental fair trial guarantees under the Statute and under human rights law would mandate that discretion be exercised to favor upholding the rights of the suspect or accused.
- The court should also ensure that the defense has adequate time and resources to prepare such an application. The court should monitor the Prosecution's disclosure obligations to ensure that any information concerning the relationship between the Prosecution and national authorities which might be relevant to such an application is disclosed, and is not unduly withheld due to security reasons. In accordance with human rights jurisprudence,[175] if any information concerning the defendant's claim is within the custody of the state and the state refuses to disclose this information, or the state has provided the information to the Prosecution on condition of confidentiality and refuses to lift the

175. Velásquez-Rodriguez v. Honduras, Merits, Judgment Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 135 (July 29, 1988). See also Ipek v. Turkey, 2004-II Eur. Ct. H.R. (extracts), ¶¶ 111–13 (2004); Orhan v. Turkey, Application No. 25656/94, Judgment, ¶ 266 (Eur. Ct. H.R. June 18, 2002) ("It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations . . . ."). *See also id.* ¶ 274.

confidentiality vis-à-vis the defense—the court should draw the appropriate inferences of fact in favor of the defendant.

- When evaluating whether the defendant's rights have been violated, the court should adopt a defendant-centric inquiry: the primary emphasis should be on whether the defendant's rights have been violated, rather than requiring the defendant to establish wrongdoing or responsibility on the part of an organ of the tribunal as a preliminary step. Prosecutorial/tribunal wrongdoing should be an aggravating factor rather than a prerequisite.
- Even if the violation in question does not meet the requisite threshold to justify a stay of the proceedings and the release of the defendant, the Chamber should also consider whether it is appropriate to grant alternative remedies.
- It is questionable whether the severity of the alleged crime that the defendant has been charged with should be a deciding factor in determining the appropriate remedy. As stated by the ICC Appeals Chamber—"a fair trial is the only means to do justice"[176]—this maxim holds true irrespective of whether the defendant has been charged with petty crimes or genocide—the "crime of crimes."[177] If the violations have compromised the fairness of the judicial process, the proceedings should be stayed. Moreover, whilst the objective of eliminating impunity is a laudable raison d'être for these courts, it should also be borne in mind that arbitrary arrest and detention can be so egregious in nature and impact on an individual as to attract the moral and legal condemnation that we may properly call crimes against human rights. The remedy provided by the court must therefore be effective in deterring the Prosecutor/national authorities from engaging in such practices in the future.
- The courts/tribunals should also bear in mind that if the defendant is acquitted, financial compensation cannot fully compensate a person for the loss of his or her family life which he or she may have experienced during the period of arbitrary detention. For this reason, the court should include a period of domestic detention in its calculation concerning whether the defendant has been detained for an unreasonable length of time and should therefore be provisionally released. Similarly, if the defendant is convicted, this period of time should automatically be included in the credit for time served which is deducted from the sentence. Such credit is a right, however, and not a remedy for the violation itself. The defendant should therefore be granted a separate remedy in addition to a sentencing credit, for example, financial compensation or a further reduction of sentence.

176. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, 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, ¶ 37 (Dec. 14, 2006), http://www.icc-cpi.int/iccdocs/doc/doc243774.PDF.

177. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Sentence (Oct. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/ak81002e.pdf.