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If piracy suspects are seriously mistreated by the capturing authorities before being handed over to a third State or an international tribunal for trial, would international standards of justice require that the case be dismissed?

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THIS MEMORANDUM IS A PRODUCT OF BAKER & MCKENZIE WORKING IN PARTNERSHIP WITH PILPG AND THE PILPG HIGH-LEVEL WORKING GROUP ON PIRACY

OBJECT AND PURPOSE: Legal memorandum to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help lay the groundwork for a Security Council-created Regional Piracy Court.

ISSUE: If piracy suspects are seriously mistreated by the capturing authorities before being handed over to a third State or an international tribunal for trial, would international standards of justice require that the case be dismissed?

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3. *Ker v. Illinois*, 119 U.S. 436 (1886).

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I. INTRODUCTION

A. Issue

In response to your request that we assist the PILPG High-Level Working Group to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help create a framework for the establishment of a United Nations ("UN") Security Council-created Regional Piracy Court (the "Court"), we have provided analysis on the following question:

> If piracy suspects are seriously mistreated by the capturing authorities before being handed over to a third State or an international tribunal for trial, would international standards of justice require that the case be dismissed?

Our analysis is based on international treaties and conventions, as well as customary international law as set forth through the jurisprudence of international tribunals. Although we researched Kenyan and Somalian domestic law, the scope of this memorandum does not encompass a discussion of these nations' domestic laws.

B. Summary of Conclusion

Most likely not. In theory, international law provides for the dismissal of charges brought against suspects who are seriously mistreated by capturing authorities before being handed over to a third State or an international tribunal for trial. Despite numerous protections in international treaties and conventions against arbitrary or unlawful arrest or detention, international and hybrid tribunals have largely held that they are without jurisdiction to evaluate alleged mistreatment at the hands of State actors, resulting in jurisprudence that often precludes international courts from actually dismissing cases on the grounds of pre-trial mistreatment.

II. FACTUAL BACKGROUND

Kenya is the southern neighbor of Somalia, where the increasing incidence of ship hijackings has plagued maritime traffic. The International Maritime Organization[1] ("IMO") reported that in 2009, there were 48 successful acts of piracy and armed robbery against ships, 204 attempted acts of piracy, 668 crew members taken hostage, and four crew members killed in the Indian Ocean.[2]

Several instances in which suspected pirates have been apprehended and subsequently released exemplify the failure to prosecute problem. In one such case, Dutch naval forces who pursued pirates who attacked a Dutch ship, captured the pirates, freed 20 imprisoned

[1] The International Maritime Organization ("IMO") is the United Nations agency that creates shipping standards and drafts conventions, including the Safety of Life at Sea Convention. The IMO, in which 169 member States participate, was formed shortly after the 1914 sinking of the Titanic. *See* Brief History of IMO, *available at* http://www.imo.org/About/HistoryOfIMO/Pages/Default.aspx (last visited October 12, 2011).

[2] IMO, Reports on Acts of Piracy and Armed Robbery Against Ships, Annual Report 2009, Ref. T2-MSS/2.11.4.1; MSC.4/Circ.152 (Mar. 29, 2010) at annex 2.

Yemeni fishermen, and confiscated the pirates' weapons, were forced to subsequently release the pirates on the grounds that they lacked jurisdiction to detain them.[3]

As a result of jurisdictional limitations and the failure to prosecute problem, governments' efforts to curb piracy have had mixed results. Today, three main naval task forces – Operation Atalanta, Operation Ocean Shield and CTF-151 – operate in the Indian Ocean. Operation Atalanta, the European Union contingent, was created to protect the UN World Food Program's shipments to Somalia and has since expanded its role to take on general anti-piracy efforts. Operation Ocean Shield, NATO's standing maritime group with a mission similar to Operation Atalanta's, fulfills a similar role. CTF-151 represents a wider international effort by a 25-nation coalition. Individual countries, including China, India, Iran, Japan, Russia, and Saudi Arabia, deploy their own navies under national command.[4]

According to The Economist, the obstacles in bringing pirates to justice involve not only jurisdictional hurdles, but the lack of political will to assume the expense of prosecution without adequate proof that successful prosecutions actually deter piracy. As a result, international efforts have focused on persuading regional states, including Kenya, to prosecute and imprison pirates.

The international community applauded when, on June 24, 2010, Kenya announced that it was opening a fast-track piracy court in Mombasa, a major Kenyan port for the international

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[3] *See Clinton Says Releasing Pirates Sends "Wrong Signal,"* CNN News (April 20, 2009) *available at* http://articles.cnn.com/2009-04-20/politics/clinton.pirates_1_somali-coast-maersk-alabama-pirates?_s=PM:POLITICS (last visited October 12, 2011).

[4] *Piracy: No Stopping Them*, THE ECONOMIST (Feb. 3, 2011), *available at* http://www.economist.com/node/18061574 (last visited Oct. 11, 2011).

shipping industry.[5] This favorable development suffered a setback, however, when on November 9, 2010, the high court of Mombasa ruled that Kenya did not have jurisdiction outside of its national waters; which led to the release of the nine Somali suspects accused of piracy in the given case.[6] The Mombasa court based its ruling on a provision in Kenya's penal code, which limited Kenya's jurisdiction to prosecute piracy to incidents occurring in its territorial waters.[7]

In light of the uncertainty created by the court's decision and the growth of incidences of piracy, the UN Security Council passed a resolution (the "UN Security Council Piracy Resolution") proposing to establish a Regional Piracy Court in Arusha, Tanzania (the headquarters of the International Criminal Tribunal for Rwanda).[8] The UN Security Council Piracy Resolution was based on a report by the UN Secretary General's Legal Advisor on Piracy, which reported that 90 percent of pirates captured by national navies were released because "no States were prepared to accept them and no jurisdiction was prepared to prosecute them."[9]

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[5] *Kenya Opens Fast-Track Piracy Court in Mombasa*, BBC NEWS (June 24, 2010), *available at* http://www.bbc.co.uk/news/10401413 (last visited Oct. 10, 2011).

[6] Julia Zebley, *Kenya Court Rules No Jurisdiction over International Piracy Cases*, JURIST (Nov. 9, 2010), *available at* http://jurist.org/paperchase/2010/11/kenya-court-rules-no-jurisdiction-over-international-piracy-cases.php (last visited Oct. 10, 2011).

[7] As reported in an April 22, 2011, email from Michael Scharf to Tom Campbell, this decision was appealed.

[8] Security Council Resolution 1976 (2011). *See* http://www.un.org/News/Press/docs/2011/sc10221.doc.htm.

[9] *See* Security Council Press Release 10164 (Jan. 25, 2011), *available at* www.un.org/News/Press/docs/2011/sc10164.doc.htm (last visited Oct. 10, 2011).

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The questions discussed in this and companion memoranda are intended to assist the Kenyan courts, or possibly the proposed Regional Piracy Court, in addressing piracy and the issues that arise in prosecuting alleged pirates.

III. LEGAL DISCUSSION

This memorandum is premised on the assumption that the Regional Piracy Court is established as: 1) an international tribunal (either through a Security Council mandate or otherwise) or, more likely, 2) an extraterritorial Somali tribunal that applies international law (based on the June 2011 UN Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts (the "June 2011 UN Secretary-General Report")). Under both scenarios, however, the structure of the Court must be such that jurisdiction over piracy is universal and third parties may lawfully seize suspects.

Somali substantive and procedural law is critically out of date.[10] According to the June 2011 UN Secretary-General Report, Somalian criminal and procedural codes are each inconsistent and deficient. Progress on the adoption of adequate legislation is needed to provide a sound basis for piracy prosecutions in Somalia. As such, were the Court established as an extraterritorial Somali court, a framework for judicial decision-making must be established that would ensure international procedures and standards are met.[11]

[10] U.N. Secretary-General, *Report on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts* ("June 2011 UN Secretary-General Report"), ¶ 14, U.N. Doc. S/2011/360 (June 15, 2011) ("June 2011 UN Secretary-General Report") (stating "UNDP and UNODC assessments8 indicate that the criminal and procedural codes across the three regions of Somalia are critically out of date, containing numerous inconsistencies and deficiencies. Only "Puntland" has a piracy law, but this contains a definition of piracy that is inconsistent with the provisions of the United Nations Convention on the Law of the Sea").
[11] June 2011 UN Secretary-General Report, ¶ 68.

Therefore, regardless of whether the Court is established as an international tribunal or as an extraterritorial Somali tribunal that applies international law, the Court will apply international standards of justice. This memorandum accordingly will focus on the application of international, rather than domestic, standards of justice to treatment of accused pirates by capturing authorities.

A. International Treaties and Conventions

The following discussion provides a summary of the international treaties and conventions relevant to the prosecution of piracy. The Universal Declaration of Human Rights ("Universal Declaration"), along with the International Covenant of Civil and Political Rights ("ICCPR") and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), offer broad individual protections under international law. Moreover, the United Nations Convention on the Law of the Sea ("UNCLOS") and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA") provide guidance on the specific subject of piracy. Although none of these documents dispositively addresses the mistreatment question at hand, these documents are individually and collectively instructive. A summary of each is discussed in turn.

1. *Universal Declaration of Human Rights*

The Universal Declaration provides sweeping individual protections under international law. These protections apply to all individuals, including individuals accused, arrested or detained for alleged crimes. Article 9 of the Universal Declaration provides that "no one shall be

subject to arbitrary arrest, detention or exile."[12] Article 5 of the same document provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment[.]"[13] The Universal Declaration does not, however, expressly address rights in the context of alleged piracy.

2. *International Covenant on Civil and Political Rights*

The ICCPR likewise provides broad individual protections under international law. As with the Universal Declaration, however, the ICCPR does not expressly speak to the rights of alleged pirates. The ICCPR does, on the other hand, expressly set forth the rights of all individuals upon arrest and detention. Article 9 of the ICCPR provides:

> 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.[14]

Article 9 continues: "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."[15] Moreover, "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 a trial within a reasonable time or to release."[16] Significantly, Article 9 also provides that *detention* of persons accused of crimes "shall not be the general rule[.]"[17]

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[12] Universal Declaration of Human Rights ("Universal Declaration"), G.A. Res. 217(A) (III), art. 9 (Dec. 10, 1948).
[13] Universal Declaration, Article 5.
[14] International Covenant on Civil and Political Rights ("ICCPR"), G.A. Res. 2200A (XXI), art. 9 (Dec. 16, 1966).
[15] ICCPR, art. 9.
[16] ICCPR, art. 9.
[17] ICCPR, art. 9.

Release may, however, "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."[18] As such, "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."[19]

Article 10 of the ICCPR establishes more specific protections for "all persons deprived of their liberty".[20] Persons accused but not convicted of a crime "shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons."[21] In addition, accused "juvenile persons" must be separated from adults and "brought as speedily as possible for adjudication."[22]

Finally, the ICCPR provides a remedy for individuals subjected to "unlawful arrest or detention."[23] Article 9 states: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[24] However, neither Article 9 nor any other ICCPR article expressly provides victims of unlawful arrest or detention with the remedy of having her or his case dismissed as a result of such unlawful arrest or detention.

[18] ICCPR, art. 9.
[19] ICCPR, art. 9.
[20] ICCPR, art. 10.
[21] ICCPR, art. 10.
[22] ICCPR, art. 10.
[23] ICCPR, art. 9.
[24] ICCPR, art. 9.

3. *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The Torture Convention does not expressly address piracy. The Torture Convention does, however, generically apply to any mistreatment questions associated with the capture, arrest and detention of alleged pirates. Importantly, the Torture Convention places an affirmative duty on states to prevent acts of torture or other cruel and inhuman or degrading treatment or punishment ("CIDT"). The Torture Convention specifically requires signatory states to monitor applicable procedures and rules in order to prevent mistreatment upon arrest, detention or imprisonment. Article 11 of the Torture Convention provides:

> Each State party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.[25]

Article 13, moreover, requires each signatory state to "ensure that any individual who alleges he has been subjected to torture … has the right to complain to and to have his case promptly and impartially examined by its competent authorities."[26] The same Article continues: "Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."[27]

The Torture Convention does not explicitly require dismissal of a given case where an arrestee or detainee has suffered mistreatment at the hands of the authorities. However, Article 15 does require "each state party [to] ensure that any statement which is established

[25] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), G.A. Res. 39/46, art. 11 (Dec. 10, 1984).
[26] Torture Convention, art. 13.
[27] Torture Convention, art. 13.

to have been made as a result of torture shall not be invoked as evidence in any proceedings[.]"[28]

4. *United Nations Convention on the Law of the Sea (UNCLOS)*

UNCLOS provides authority for Kenya to prosecute alleged pirates, but its grant of authority has severe limitations. Under UNCLOS, the act of piracy must occur on the high seas and it must involve two ships. In addition, the country seeking to exercise jurisdiction arguably ought to be the State seizing the suspects. However, a permissive grant of jurisdiction which provides that States "may" seize pirate ships on the high seas under UNCLOS Article 105,[29] read together with universal requirement of states to repress piracy under UNCLOS Article 100,[30] arguably creates a broader prosecutorial authority for states seeking to prosecute those seized outside of their jurisdiction.

As set forth in Baker & McKenzie's Memorandum on Issue #1, UNCLOS expressly defines and criminalizes piracy. Article 101 of UNCLOS defines piracy as:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> > (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

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[28] Torture Convention, art. 15.

[29] United Nations Convention on the Law of the Sea ("UNCLOS"), art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397. Article 105 reads in relevant part: "On the high seas, or in any other place outside the jurisdiction of any State, every State *may* seize a pirate ship or aircraft…" (emphasis added).

[30] UNCLOS, art. 100. This article places an affirmative duty on all states to repress piracy: "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; [or]
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; [or]
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

UNCLOS also expressly grants States the authority to seize and arrest alleged pirates. Article 105 sets forth the parameters within which states can seize and arrest alleged pirates:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.[31]

In addition, UNCLOS Article 107 states that "a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."[32] Article 146, moreover, requires that "necessary measures . . . be taken to ensure effective protection of human life. To this end the Authority shall adopt appropriate rules, regulations and procedures to supplement existing international law as embodied in relevant treaties."[33]

Finally, UNCLOS Article 292 mandates the "prompt release of the vessel or its crew" in situations where "it is alleged that the detaining State has not complied with the provisions

[31] UNCLOS, art. 105.
[32] UNCLOS, art. 107.
[33] UNCLOS, art. 146.

of this Convention[.]"[34] Importantly, however, only the flag state of the captured vessel or detained pirates may apply for release, and the flag state must do so in conjunction with posting a "reasonable bond or other financial security[.]"[35] The flag state may submit the application to "any court or tribunal agreed upon by the parties or, failing such agreement, within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea[.]" [36]

5. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*

SUA provides an alternative basis for states to prosecute piracy and offers a broader grant of authority than UNCLOS in several respects. First, SUA does not require the involvement of two ships, and it is not restricted to acts on the high seas because it includes acts occurring where a ship is navigating to or from the territorial sea of a single state. Second, SUA offers broad prosecutorial jurisdiction to states. SUA applies to offenders found in a state's territory. As a result, SUA can be invoked to prosecute pirates and does not have the limitations posed by UNCLOS as discussed above.

The language of SUA does not appear to be inconsistent with UNCLOS. However, the language of SUA is broader than UNCLOS in that SUA does not contain UNCLOS's express limitations on prosecution of suspects. SUA allows "the master of a ship of a State

[34] UNCLOS, art. 292.
[35] UNCLOS, art. 292.
[36] UNCLOS, art. 292.

Party [to] deliver to the authorities of any other State Party any person who he has reasonable grounds to believe has committed one of the offences set forth [in SUA]."[37]

SUA also provides for protections to those accused of criminal acts, including piracy. Article 7 states:

> Any person [taken into custody] shall be entitled to (a) communicate without delay with the nearest representative of the State of which he is a national or which is otherwise entitled to establish such communication, or if he is stateless person, the State in the territory of which he has his habitual residence, (b) be visited by a representative of that State.[38]

Article 10 of SUA sets forth the specific guarantee to all individual defendants of "fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees by the law of the State in the territory of which he is present."[39]

B. International Jurisprudence

Decisions from international and hybrid tribunals form the body of customary international law, which grants States universal jurisdiction to prosecute pirates based on the doctrine that pirates are universally condemned as enemies of all mankind. Because pirates act without pretense of State authority, any nation has the right to arrest and prosecute pirates in its domestic courts, provided that the accuseds are under the personal jurisdiction of the court.

Regardless of whether the Court is established as an international tribunal or as an extraterritorial Somali tribunal that applies international law, decisions from international

[37] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA"), G.A. Res. 3166 (XXVIII), art. 8 (Dec. 14, 1973).
[38] SUA, art. 7.
[39] SUA, art. 10.

and hybrid courts form the relevant jurisprudence to guide the Court's analysis. As reflected in the *Duch Order of Provisional Detention* (discussed *infra*), international and hybrid courts' expansive jurisdiction typically precludes the dismissal of a case on the grounds of illegal arrest or detention where the arrest or detention would otherwise be illegal under purely domestic law. In addition, although international jurisprudence, including *Prosecutor v. Dyilo* (also discussed *infra*), establishes that charges should be dismissed in cases where a suspect has been seriously mistreated by the capturing authorities before being handed over to a third State or an international tribunal, in practice, no court has ever declined to assert jurisdiction on these grounds.

1. *Prosecutor v. Rwamakuba*

In *Prosecutor v. Rwamakuba*, the International Criminal Tribunal for Rwanda ("ICTR" or "Tribunal") considered whether an allegedly illegal arrest and detention by Namibian authorities violated the defendant's fundamental rights, stripping the ICTR of jurisdiction.[40] The defense alleged that the ICTR prosecutor had submitted to the Namibian authorities a formal request under Rule 40 in the form of a list of suspects, which included the name of the defendant, and that pursuant to this request, the Namibian authorities arrested the defendant on August 2, 1995. On January 18, 1996, the ICTR prosecutor sent a letter to Namibian authorities, which confirmed that "at this moment we do not possess evidence which would entitle us to request the Namibian authorities to detain [the defendant]." The Namibian authorities subsequently released the defendant on February 8, 1996. On October 21, 1998, the defendant was arrested a second time and transferred to the ICTR one day

[40] *Prosecutor v. Rwamakuba* ("*Rwamakuba*"), Case No. ICTR-98-44-T, Decision on the Defence Motion Concerning the Illegal Arrest and the Illegal Detention of the Accused (Dec. 12, 2000).

later. The defendant made his initial appearance before the ICTR on April 7, 1999, 135 days after being taken into the custody of the Tribunal.

The defense argued that, at the time of the arrest of the defendant, the Namibian authorities lacked proof to consider him a suspect and that the failure to issue an indictment against the defendant contradicted the requirements under the ICTR Statute, the Rules of the ICTR, and provisions of international law. The defense relied upon the *Prosecutor v. Barayagwiza* decision of November 3, 1999, in which the ICTR Appeals Chamber addressed the possibility that the Tribunal could exercise constructive custody in cases where a defendant had been detained by a state.[41] In, *Barayagwiza*, the ICTR concluded that the Tribunal could be responsible for alleged illegalities related to the defendant's detention because "under the facts of this case, Cameroon was holding [the defendant] in the 'constructive custody' of the Tribunal by virtue of the Tribunal's lawful process or authority."[42] In *Rwamakuba*, the defense further argued that, during the six-month detention period, the defendant was neither granted assistance of counsel nor permitted to appear before a judge. Finally, the defense argued that the 135-day lapse between the time when the defendant was taken into the custody and when the defendant made his initial appearance before the Tribunal constituted a breach of the defendant's rights under the ICTR Statute, the Rules of the ICTR, and standards of international human rights. The defense argued that the result of these cumulative breaches warranted the loss of the ICTR's jurisdiction over the defendant, resulting in the release of the defendant and the dismissal of all charges brought against him.

[41] *Prosecutor v. Barayagwiza* ("Barayagwiza"), Case No. ICTR-97-19-AR72, Decision, ¶ 61 (Nov. 3, 1999).
[42] *Barayagwiza*, ¶ 61.

In response, the prosecution argued that because it did not circulate or otherwise make public a list of suspects or direct or otherwise cause the defendant's August 1995 arrest, the defendant was not detained at the Tribunal's behest. As a result, the ICTR had no jurisdiction over any alleged irregularities related to the defendant's arrest. The prosecution also submitted that the 135-day delay before the defendant made his initial appearance was attributable to judicial recess and to the defendant's own delay in appointing counsel. As a result, the prosecution disclaimed any responsibility for the delay.

The Court first reasoned that even if the defendant's first detention took place upon the ICTR prosecutor's request, the defendant's arrest and subsequent detention could not be considered *per se* illegal simply on the basis of the defendant's release for lack of evidence against him or the fact that the defendant was subsequently arrested a second time. The Tribunal, however, found that there was no evidence that the Namibian authorities arrested the defendant at the request of the prosecution or notified the ICTR prosecution of the defendant's arrest prior to December 21, 1995. The Tribunal concluded that it lacked jurisdiction over the defendant's detention between August 2, 1995, and December 22, 1995, at the time the Namibian authorities notified the prosecution of the defendant's detention. As a result, the Tribunal could not be held responsible for any alleged violations of the defendant's rights during this period, and challenges to the legality of the defendant's arrest or detention would consequently have to be brought before the Namibian authorities. The Tribunal further found that the prosecution acted diligently to determine whether there was evidence against the defendant between December 22, 1995, when the Namibian authorities notified the prosecution of the defendant's detention, and January 18, 1996, when the

prosecution informed the Namibian authorities that it lacked evidence to detain the defendant.

2. *Prosecutor v. Ngirumpatse*

In *Prosecutor v. Ngirumpatse*, the ICTR considered whether the Tribunal was responsible for alleged illegalities associated with the defendant's detention by Mali authorities where the prosecution had submitted to the Mali authorities a formal request for the defendant's arrest and provisional detention.[43] The defense argued that the prosecution misrepresented to the Mali authorities that it had already instituted proceedings before the Tribunal for the confirmation of the indictment against the defendant and that this misrepresentation was the basis for the defendant's arrest by the Mali authorities. The defense further argued that because the Mali authorities lacked a warrant to arrest the defendant, the arrest was unlawful, and that because the prosecution did not file an indictment in a timely manner, subsequent extensions of the defendant's detention violated the Rules of the ICTR.

In response, the prosecution argued that the defendant's arrest was made pursuant to a larger, single "global indictment" that was before the Tribunal at the time of the request to arrest the defendant and that the request to arrest the defendant was made on the basis of urgency that arose from a risk of flight. The prosecution further submitted that neither the ICTR Statute nor the Rules of the ICTR required an arrest warrant such that the lack of an arrest warrant would vitiate the legality of the arrest.

[43] *Prosecutor v. Ngirumpatse* ("*Ngirumpatse*"), Case. No. ICTR-97-44-I, Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items (Dec. 10, 1999).

In its decision, the ICTR first noted that the Rules of the ICTR provide that "[i]n case of urgency, the Prosecutor may request any State: (i) [t]o arrest a suspect and place him in custody; (ii) to seize all physical evidence," and that the Mali authorities arrested the defendant based on the prosecutor's request.[44] The Tribunal concluded that "[i]t is a sovereign State that executes the request, controls the authorities executing the request, and against whom the person arrested may seek a remedy against the arrest, custody, search, and seizure under the laws of the requested State. The Tribunal is not competent to supervise the legality of the arrest, custody, search, and seizure executed by the requested State."[45] Finally, the ICTR concluded that because neither the ICTR Statute nor the Rules of the ICTR required an arrest warrant, any argument that the arrest, detention, and search were unlawful for lack of warrant was without merit.

3. *Duch Order*

In the *Duch Order of Provisional Detention* ("Order"), the Office of the Co-Investigating Judges ("OCIJ") of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") considered whether the defendant's eight-year detention on a different claim by a separate court (the Military Court of Phnom Penh ("Military Court")) constituted so grave a violation of the defendant's rights under Cambodian and international law so as to taint the proceedings before the ECCC.[46] Under facts partly outside the competence of the ECCC and partly relevant to the exercise of jurisdiction by the ECCC, Duch was placed in provisional detention by the Military Court on May 10, 1999. At the time of the Order, the

[44] *Ngirumpatse*, ¶ 54 (citing Rule 40(A)).
[45] *Ngirumpatse*, ¶ 56.
[46] *Order of Provisional Detention* ("*Duch Order of Provisional Detention*"), Case No. 002/14-08-2006 (Extraordinary Chambers in the Courts of Cambodia July 31, 2007).

defendant had been in provisional detention for over eight years. The ECCC considered whether this eight-year detention so violated international norms that it tainted the proceedings before the ECCC, whose jurisdiction was required to be exercised in accordance with international standards of justice as set forth in Article 12 of the Agreement between the United Nations and the Royal Government of Cambodia dated June 6, 2003.

To evaluate whether the eight year detention violated international standards of justice, the OCIJ considered articles 9(3) and 14(3)(c) of the ICCPR, which provide that any individual arrested or detained for a criminal offense shall be entitled to a trial within a reasonable time period or be released. The OCIJ also referenced *Ker v. Illinois*, in which the Supreme Court of the United States held that the forcible abduction of a United States national from Peru was "no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court."[47] The OCIJ also referenced the ICTR's decision in *Rwamakuba* (discussed *supra*), in which the Tribunal held that it was not responsible for the illegal arrest and detention of a defendant if the arrest and detention did not result from its order, and in *Barayagwiza*, in which the ICTR set forth that in cases of "abuse of process," a tribunal could decline to exercise jurisdiction where, "in light of serious and egregious violations of the accused's rights, [it] would prove detrimental to the court's integrity" and "contravene the court's sense of jurisdiction."[48] Under the standard set forth in *Barayagwiza*, the ICTR discontinued the proceedings, concluding that "[e]ven if fault is

[47] *Ker v. Illinois*, 119 U.S. 436, 444 (1886).
[48] *Rwamakuba*, ¶ 30.

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."

Despite citing this standard, however, the OCIJ concluded that it lacked jurisdiction to determine whether the defendant's prior detention was illegal. The OCIJ cited *Dyilo* (discussed *infra*) for the proposition set forth by the International Criminal Court ("ICC") that any violation of the defendant's rights at the time of his prior arrest or detention could be taken into account in only two cases: (1) where the court acted in concert with the external authorities or (2) where the defendant was the victim of acts of torture or serious mistreatment. The OCIJ reasoned that the fact that the ECCC was part of the judicial system of the Kingdom of Cambodia did not necessitate the conclusion that the ECCC acted in concert with the Military Court. Next, the OCIJ concluded that the ECCC had no means of intervening in the defendant's prior detention before it became operational on June 22, 2007. Finally, the OCIJ considered the gravity of the crimes with which the defendant was charged and concluded that in cases where the defendant was charged with crimes against humanity, the proceedings should be stayed only where the rights of the accused had been seriously affected.

4. *Prosecutor v. Dyilo*

In *Prosecutor v. Dyilo*, the ICC considered the legality of the defendant's arrest and subsequent detention by Congolese authorities pursuant to the ICC's request.[49] The defendant argued that because his arrest and detention were made pursuant to the prosecutor's request, the prosecutor was complicit in the conditions of the defendant's subsequent arrest and detention and should be held responsible for any associated illegalities.

The ICC Appeals Chamber first stated that there were three grounds on which to stay proceedings on the grounds of abuse of process: (1) where there was a delay in bringing the defendant to justice; (2) where there were broken promises to the accused related to his prosecution; and (3) where the accused was brought to justice by illegal or devious means. The ICC cited the judgment of Lord Bridge in *Bennett v. Horseferry Road Magistrates' Court*, which stated that "[w]hen it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of the law demands that the court takes cognizance of that circumstance."[50] The ICC then cited the *Teixera de Castro v. Portugal*, which concerned a case of entrapment by undercover agents, as an example of a case in which the rights of the accused were so seriously breached to render the holding of a fair trial impossible. In *Teixera de Castro*, the European Court of

[49] *Prosecutor v. Dyilo* ("*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 (Dec. 14, 2006).
[50] *Bennett v. Horseferry Road Magistrates' Court*, House of Lords, 3 All. ER (June 24, 1993).

Human Rights concluded that improper conduct by the investigating authorities and the use of evidence resulting therefrom deprived the defendant of a fair trial.[51]

Ultimately, the ICC concluded that "[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defense within the framework of his rights, no fair trial can take place and the proceedings can be stayed."[52] The ICC concluded, however, that "[m]ere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose."[53]

IV. CONCLUSION

Pre-trial mistreatment of suspects is patently contrary to customary international law, but the remedy for this mistreatment is less than clear. In theory, international law provides for the dismissal of charges brought against defendants who have suffered mistreatment pre-arrest or post-arrest and pre-trial. Nothing in the express language of treaties or conventions, however, requires courts to dismiss a case on the grounds of mistreatment. International jurisprudence provides that international and hybrid tribunals *may* dismiss a case where pre-trial mistreatment has occurred. In practice, however, international and hybrid tribunals have disclaimed responsibility, holding that they lack jurisdiction over the mistreatment of suspects by State actors, creating a barrier that has precluded international courts from dismissing cases on the grounds of mistreatment.

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[51] *Teixera de Castro v. Portugal*, App. No. 44/1997/828/1034 (June 9, 1998).
[52] *Dyilo*, ¶ 39.
[53] *Dyilo*, ¶ 42.