-Male Captus Bene Detentus?-

Human Rights and the Transfer of Suspects to International Criminal Tribunals

Vakgroep: Europees en Internationaal Publiekrecht.
Begeleiders: Mr. A.L.M. de Brouwer en Prof. Mr. W.J.M. van Genugten.

-Male Captus Bene Detentus?-

Human Rights and the Transfer of Suspects to International Criminal Tribunals

Christophe Paulussen
Faculty of Law, Tilburg University
The Netherlands

-August 2004-

Picture on cover (SFOR training in arresting a so-called PIFWC (Person Indicted For War Crimes)) found at http://www.nato.int/sfor/indexinf/155/p12a/t02p12a.htm

"a criminal court should not be concerned solely with accurate fact-finding or, to put it another way, the determination of the 'truth'. A court also has a duty to protect the moral integrity of the criminal process."

(Andrew L.-T. Choo, 'International kidnapping, disguised extradition and abuse of process', 57 *The Modern Law Review* (1994) p. 629.)

Table of Contents

Table of Abbreviations

AA	*Ars Aequi*
ACHPR	African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982), entered into force 21 October 1986
ACHR	American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 *U.N.T.S.* 123 entered into force 18 July 1978
ADRDM	American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948)
AJIL	*American Journal of International Law*
All ER	*All England Law Reports*
ARACHR	Arab Charter on Human Rights, adopted by the League of Arab States, reprinted in 18 *Hum. Rts. L.J.* 151 (1997)
Art(t).	Article(s)
BBE	Bijzondere Bijstands Eenheid [Special Support Unit]
DD	*Delikt en Delinkwent*
Doc.	Document
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 *U.N.T.S.* 222, entered into force 3 September 1953
ECHR	European Court of Human Rights
ed(s).	editor(s)
e.g.	exempli gratia [for example]
EJIL	*European Journal of International Law*
EofC	Elements of Crimes
ESCOR	Economic and Social Council Official Records
et al.	et alii [and others]
etc.	et cetera [and so on]
et seq.	et sequitur [and further]
FRY	Federal Republic of Yugoslavia
G.A.	General Assembly
Hum. Rts. Comm.	Human Rights Commission
Hum. Rts. L.J.	*Human Rights Law Journal*
Ibid.	Ibidem [In the same place]
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. G.A.O.R. Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 *U.N.T.S.* 171, entered into force 23 March 1976
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICTY	International Criminal Tribunal for the former Yugoslavia

ICTR	International Criminal Tribunal for Rwanda
i.e.	id est [that is]
IFOR	Implementation Force
ILC	International Law Commission
I.L.M.	*International Legal Materials*
IMTs	International Military Tribunals
IRRC	*International Review of the Red Cross*
KFOR	Kosovo Force
LJIL	*Leiden Journal of International Law*
NATO	North Atlantic Treaty Organisation
NJCM-Bulletin	*Nederlands Juristen Comité voor de Mensenrechten-Bulletin (Nederlands Tijdschrift voor de Mensenrechten)*
No(s).	Number(s)
N.Y.U. J. Int'l L. & Pol.	*New York University Journal of International Law & Politics*
O.A.S.	Organization of American States
OAU	Organization of African Unity
O.R.	Official Records
OTP	Office of the Prosecutor
para(s).	paragraph(s)
PCIJ	Permanent Court of International Justice
p(p).	page(s)
Res.	Resolution
Rev.	Revised
RM Themis	*Rechtsgeleerd Magazijn Themis*
RPE	Rules of Procedure and Evidence
RTLM	Radio Télévision Libre des Mille Collines
SAS	British Special Air Service
S(ec.)C	Security Council
SFOR	Stabilisation Force
SG	Secretary-General
Supp.	Supplement
Tri. Ch.	Trial Chamber
UDHR	Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948)
UNTAES	United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium
U.N.T.S.	*United Nations Treaty Series*
Vol.	Volume
Wash. U. J.L. & POL'Y	*Washington University Journal of Law and Policy*

Chapter 1: Introduction

1.1 General introduction

> The men in the first car had almost given up hope. They saw the bus stopping but didn't think anything would happen. All of a sudden Kenet noticed someone walking at the side of the road. It was too dark to make out who it was. "Someone's coming," he said to Gabi, "but I can't see who it is." A few seconds later, in a whisper that sounded to him like a shout, he exclaimed, "It's him!" Gabi's heart leapt with excitement. He threw a hurried glance at his men to check that they were all in position. Eli picked out the approaching figure immediately, but it took Gabi another fifteen seconds. Meanwhile, Klement was turning the corner into Garibaldi Street. Kenet hissed in Gabi's ear, "He's got one hand in his pocket – he may have a revolver. Do I tell Eli?" "Tell him," Gabi answered. "Eli," Kenet whispered, "watch out for a gun. He's got his hand in his pocket." Klement was standing right in front of the car. "Momentito," Eli said and sprang at him. Panic-stricken, Klement stepped back. In their practice exercises Eli had used the method called sentry tackle, seizing the man from behind and dragging him backward, but Kenet's warning about the gun forced him to change his tactics. He pounced on Klement to bring him down, but because Klement had stepped back Eli's leap brought them both crashing to the ground. As he fell, Klement let out a terrible yell, like a wild beast caught in a trap.[1]

This extract tells in detail 'le moment suprême' of the kidnapping of Ricardo Klement, which took place in Buenos Aires, Argentina on 11 May 1960. Klement, a man better known as Adolf Eichmann, was seized by (individuals linked to) Israel's Secret Service the *Mossad* who brought the German Nazi war criminal to Israel where the man in charge of implementing the "Endlösung der Judenfrage" was to face justice.

One of the defense strategies of Eichmann and his councels Dr. Robert Servatius and Mr. Dieter Wechtenbruch was to declare that the District Court of Jerusalem should divest itself from jurisdiction because Eichmann had been abducted from Argentina. The accused of one of the

[1] Harel 1975, pp. 165-166.

most interesting trials from the 20th century declared with respect to his abduction: "I was assaulted in Buenos Aires, tied to a bed for a week and then drugged by injections in my arms and brought to the airport in Buenos Aires; from there I was flown out of Argentina."[2] In his argumentation, Eichmann referred to the dictum 'ex iniuria ius non oritur'[3] which means that no right (in this case: jurisdiction) can be derived from a wrong (in this case: the abduction).[4]

Although the judges of the District Court of Jerusalem (and in appeal the judges of the Supreme Court of Israel) did not deny the kidnapping itself, they were nevertheless not impressed by the argument and applied another Latin maxim[5]: 'male captus bene detentus'. This literally means 'badly captured, well detained' and approves the trial of a defendant whose capture is surrounded by improper circumstances. It is this principle which is at the center of this research.

1.2 Formulation of the problem and objective of the research

The maxim 'male captus bene detentus' represents the doctrine that a court may exercise jurisdiction over an accused person regardless of the circumstances in which that person has come into the jurisdiction of that court. The emphasis of the maxim (see the word 'male' which means 'badly') is hereby on arbitrary circumstances, situations in which normal procedures have not been followed. Very often, writers who have dealt with the problem pay most of their attention hereby to the action which made the subsequent transfer to the court possible, i.e. the apprehension of the suspect (see for example the topic of state-sponsored abductions). This is very logical, given the fact that 'captus' only means 'capture'. Notwithstanding this, I will use a broader concept of 'male captus' meaning arbitrary situations *surrounding* the apprehension, which does not refer only to the apprehension itself, but to an arbitrary detention or extradition following the apprehension as well. However, this all has the same effect, namely that a suspect

---

[2] See http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-120-03.html
[3] See Shaw 2003, p. 98.
[4] Strijards 2003, pp. 754-755.
[5] Ibid., p. 755. See for more details: District Court of Jerusalem, Judgment of 12 December 1961, para. 41, see http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-007.html; Supreme Court of Israel, Judgment of 29 May 1962, para. 13, see http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Appeal/Appeal-Session-07-05.html and http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Appeal/Appeal-Session-07-06.html

will argue that because of these 'male captus'-circumstances, the profiting court should not be able to exercise jurisdiction over him.[6] By using the word 'profiting', I want to exclude cases where the 'male captus' situation and the trial itself have nothing to do with each other. There has to be some kind of 'cause and effect'-link between the 'male captus' situation and the fact that the court is able to hear the 'victim' of that 'male captus' situation.

Although one could argue that e.g. an unlawful apprehension of a suspect should be seen separately from the exercise of jurisdiction of a court (and thus that a 'male captus' situation should not form a bar to the actual trial where a suspect can enjoy all the rights to a fair hearing he is entitled to), the first meaning sounds more legitimate to me; it namely appears that 'male captus bene detentus' does not pay much attention to the rights of the accused *in general*, during the *whole legal process*, which is a far broader concept than the mere idea of a fair hearing inside the walls of the courtroom.[7] In the end, the whole trial (which starts with an indictment and the arrest of the suspect and not with the moment the suspect walks into the courtroom) should be fair. The idea of a fair trial (or what in common law is called a due process) covering the whole judicial process, is noticed by Costi who writes that several international human rights treaties, statements and adoptions of resolutions by UN organs, such as the General Assembly[8], the Working Group on Arbitrary Detention of the Human Rights Commission[9] and the International Court of Justice[10] illustrate the emergence "of some kind of international due process of law. The obligation of a state to provide procedural and substantive guarantees should include the arrest process and the treatment of the victim prior to his appearance before the judge."[11]

Although there are some examples before national courts where the (idea behind the) adage was rejected, its 'national' status still remains uncertain since history has shown as well that the legal balance between the arguments of the suspect (against the in his eyes unlawful

---

[6] For convenience's sake and since it seems that most of the suspects/alleged criminals are male persons, I will use the words 'he' and 'his' when the sex of the person to which I refer is not clear. However, it should be mentioned that - in order not to lapse into generalisations - the feminine words 'she' and 'her' could and should be read into these words as well.

[7] One could hereby think of the general right to a fair and public hearing by an independent and impartial tribunal established by law. More specific rights 'within the courtroom' are the right to have the free assistance of an interpreter or the right to examine the witnesses against him.

[8] UN GA Res. 47/133 (1992) reproduced in (1993) 32 *ILM* 903.

[9] Report of the Working Group on Arbitrary Detention, UN ESCOR, Hum. Rts. Comm., 50th Session. UN Doc. E/CN.4/1994/27 (1993).

[10] *Case Concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3.

[11] Costi 2003, p. 77.

circumstances on the one hand) and the arguments of the prosecutor (in favor of trying the alleged criminal on the other hand) has been in the advantage of the latter as well. The most famous example is probably the already mentioned *Eichmann* case.

The advent of the ICTY, the ICTR and the ICC[12], which has placed 'male captus bene detentus' in another perspective and in another level of interaction (between international criminal tribunals and states instead of between states only) has possibly brought another uncertainty: the few cases that have dealt with the issue seem to show that the idea behind the rule is going to be upheld to a certain extent. If it is true that the rule has in fact not been abandoned, it's interesting to discover the reasons hereof, especially since the tribunals are seen by many as model institutions with respect to the promotion of international human rights in all its aspects. This should include the ones of the suspect as well.

The formulation of the problem is thus as follows: to what extent will 'male captus' situations during the phase before the actual transfer of the suspect to the tribunal have effect on the latter's criminal procedure? What value do the tribunals give to human rights in this legal gray border-area of national and international law in which the tribunals depend for their enforcement on mainly national authorities? In short (and to come back to the maxim): what is the exact legal status of 'male captus bene detentus' in the system of the international criminal tribunals and is the outcome to be seen as satisfactory in light of the presumptive exemplary role these tribunals play in the support of international human rights?

1.3 Short overview of the approach

Although the main focus of this research is to discover the exact legal status of 'male captus bene detentus' in the system of the international criminal tribunals, it is clear that the maxim cannot be understood properly if no attention is firstly paid to the origin and the idea behind this maxim. Furthermore, in order to fully comprehend the different situations which will appear when dealing with case law, an extensive explanation of possible 'male captus' situations, contra-arguments

[12] Although it would also be interesting to inquire into the matter how the hybrid tribunals (such as the one in Sierra Leone where trials commenced in June 2004) would deal with 'male captus bene detentus', I will focus in this research only on the ICTY, ICTR and ICC.

and defenses against these practices including remedies for the victim of such infringements is necessary. All these general issues will be dealt with in the next chapter.

In chapter three, the 'performance' of the maxim on the domestic level, i.e. where the rule is discussed before national courts, will be analyzed. It is to be hoped that knowledge on the argumentations made in this inter-state context, in which 'male captus bene detentus' appeared for the first time, will help in making a good assessment of the several points of view in the context of the tribunals. Most attention will of course be paid to the cases themselves although reactions from doctrine will be used as well in order to create the most complete set of arguments pro or contra a certain position.

The latter and new context in which 'male captus bene detentus' has appeared - before international criminal tribunals - will be addressed in chapter four. In this target-context, the exact formulation of this Master's thesis' problem will hopefully find its answer(s).

This research will end with chapter five where the inquiry will be summarized and concluded.

Chapter 2: 'Male captus bene detentus'

2.1 Introduction

If one tries to find the origin of the rule 'an sich', i.e. the four words 'male captus bene detentus'[13], there is a good possibility one will have a rude awakening: its origin is namely fairly untraceable. However, since the maxim stands for a legal reasoning or factual behavior that could nicely (and concisely) be incorporated in the Latin words its reasoning is easier to find. If one considers the following quote, it is quite understandable why maxims as such (instead of the legal arguments or practice they incorporate) are not used too often in important legal texts:

> It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and disqualifications to them are more important than the so-called rules.[14]

However, maxims often incorporate and summarize what writers write, what judges judge and what states do. As such, they indirectly refer to the sources that determine the rules in the international community. One could think in particular to the primary source 'international custom, as evidence of a general practice accepted as law' and 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.[15] Since the most important goal of this research is to find out the exact legal status of 'male captus bene detentus' in this international legal context (to be precisely: in the context of the international criminal tribunals), it is still justified and necessary to continue on this academic journey in search of the roots and meaning of the maxim. Even if the

[13] Attention has been paid as well to different textual versions of the maxim, including: 'mala captus bene detentus', 'male captus bene iudicatus' and 'male captus bene detitus'.
[14] See Garner 1999, p. 1615, citing James Fitzjames Stephen in his 1883 *History of the criminal law of England* (p. 94, n. 1).
[15] See Art. 38 (1) of the Statute of the International Court of Justice which is widely recognized as the most authoritative statement concerning the sources of international law.

tribunals are governed by their own specific rules, the context in which they operate deserve attention.

2.2. A first glance at the roots and meaning of 'male captus bene detentus'

2.2.1 The first cases

Although the idea behind the maxim has probably been utilized before[16], one of the earliest legal texts I could find in which the legal reasoning was used, dates back from 1829. In that year, the case *Ex Parte Susanna Scott*[17] appeared before the most ancient of English courts, the Court of King's Bench.

Susanna Scott was charged in England with the crime of perjury. A British police officer, in executing an arrest warrant issued by Lord Chief Justice Tenterden, apprehended her in Brussels where Scott appealed to the British Ambassador in Belgium. However, he refused to intervene. The police officer subsequently brought her to England, where an order was issued for her imprisonment pending her trial. She then filed an application for her release by way of *habeas corpus*.[18] Lord Chief Justice Tenterden dismissed the application, saying:

> The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, *or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them* [Italics ChP].[19]

---

[16] See Strijards 2001 B, p. 93 et seq. where he discusses the rule with respect to the abduction of Okey, Corbet and Barkestead in 1662.

[17] *Ex parte Susanna Scott* (1829) 9 *B. & C.* 446; 109 *E.R.* 106.

[18] A writ of *habeas corpus* (which literally means "you have the body") is a legal mandate to a prison official ordering that a prisoner be brought to the court so that it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody.

[19] See footnote 17 (Quotation and facts from the case found at http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-007.html).

This almost 200-years old quote shows the legal argument that a court will not inquire into the circumstances under which the suspect has been brought before it. In this case, the apprehension by a foreign police officer was challenged. Thus, notwithstanding the possible unlawful circumstances in which the arrest took place, the court to which the defendant has been brought still has jurisdiction to try the accused. This situation could thus be translated as: although a (possible) bad (i.e. unlawful) capture, there is still a good detention (more general: right to try or jurisdiction). Hence the expression: 'male captus bene detentus'.

In 1867, in his summing up to the jury in the case *R. v. Nelson and Brand*, Lord Chief Justice Alexander Cockburn made it absolutely clear in a more educational analysis on the idea of the rule that the possible unlawful circumstances in which the accused was apprehended were simply not the court's problem and thus were not be examined:

> Suppose a man were to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not got an extradition treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay his hands upon him, and from which he could easily reach the sea, got him on board a ship and brought him before a magistrate, the magistrate could not refuse to commit him. *If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said, 'Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him*' [Italics ChP].[20]

2.2.2 Two principles, one field of tension

The principles of human rights and criminal-law enforcement are mutually dependent. The protection of human rights relies in part on an effective system of criminalizing and punishing

[20] Quotation found at http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-007.html

violations of human rights. Similarly, a system of law enforcement depends on the legitimacy of a system which protects humanity and group and individuals' rights.[21]

The quotations dating back from 1829 and 1867 show that the mere physical presence of a person before these courts was sufficient to confer jurisdiction to the latter. The judges clearly favored a rule giving them full power concerning jurisdiction to try the defendant, hereby paying no attention whatsoever to the circumstances prior to the actual trial (which in fact made it possible for the courts to judge the accused in the first place). In these first cases, the always-present 'balance check' (see the just cited quotation above) in criminal law between the arguments of the accused on the one hand and the arguments of the prosecutor on the other hand was with respect to these possible unlawful pre-transfer circumstances undoubtedly in the advantage of the prosecutor. The field of tension between the rights of the suspect to complain about the matter at hand and the idea of effectiveness (in making it possible to convict criminals) was thus actually not that 'tense' at all.

The idea that the prosecutor should have this advantage is especially alive when the real bad guys or (in a more sophisticated manner defined) the 'hostes humani generis' (enemies of human mankind) are involved: suspects of having committed international crimes such as crimes against humanity, war crimes and genocide.[22] This is obviously of great importance for the international criminal tribunals' context, which deals with nothing but these international crimes. It seems that in such cases, people do not really matter *how* the suspect is brought before a court, as long as he *is* brought there. Even when the suspect is brought to court with help of - for example – the method of abduction. This idea in a way undermines the already mentioned legal principle 'ex iniuria ius non oritur', which means that no right can be derived from a wrong. According to the authoritative *Oppenheim's International Law*, this principle is well established in international law[23] and - contrary to 'male captus bene detentus' - recognized as a legal principle as meant in Article 38 (1) of the Statute of the International Court of Justice.[24] Notwithstanding the importance of the latter maxim, the first cases which dealt with possible

[21] Paust et al. 1996, p. 435.
[22] Especially in these so often called 'war on terrorism'-times, this concept could receive a new impulse.
[23] Jennings and Watts 1992, p. 184.
[24] See Shaw 2003, p. 98.

'male captus' situations in the context of a suspect which was brought from one jurisdiction to another clearly supported 'male captus bene detentus'.

2.3 Further delimitation and definitions

2.3.1 Introduction

Now that a rough sketch of the maxim has been given, it is perhaps good to delimitate the problem even more precisely. Furthermore, more exact definitions will be given about important terms which have already been reviewed rapidly in the previous pages and which will reappear in the following chapters. I will hereby use the 'very original' and fictive situation that a suspect is hiding in State A and is wanted by State B or by an international criminal tribunal.

2.3.2 What kinds of situations are involved?

1. Transfer from one jurisdiction to another

This research will only address the transfer of a suspect from one jurisdiction to another. I hereby want to exclude purely national cases, i.e. where the defendant was for example captured in a possible unlawful way by authorities of a certain country in order to face criminal charges in a court of the same state, for this situation has nothing to do with the framework of *international* criminal law and thus with this Master's thesis.

Chapter three will deal with the situation where State B-authorities or private individuals from State B (possibly with the help of local authorities of State A) get hold of the in State A residing suspect and subsequently transfer him to the jurisdiction of State B, where he will stand trial. The best-known example is probably the (state-sponsored) cross-border abduction/kidnapping. These kinds of situations are seen from the perspective of State B, which in fact gets the suspect himself by penetrating the jurisdiction of State A or by using tricky methods to make sure that the suspect leaves State A. However, it is also possible that State B

receives the suspect by an act of State A contrary to normal procedures. One could hereby think of disguised extradition - I will come back to these specific situations below.

Chapter four will deal with possible unlawful situations where the suspect, residing in State A, is brought into the jurisdiction of the international criminal tribunal by the following methods:

1) The authorities of State A or private individuals get hold of the suspect and transfer him to (authorities related to) the tribunal.

2) The authorities of State B or private individuals (possibly with the help of local authorities of State A) capture the suspect and transfer him to (authorities related to) the tribunal. Like in chapter three, both the perspectives from the 'active' State B (when the latter gets the suspect himself) and the 'passive' State B (when it receives the suspect from State A) should be taken into account.

3) The authorities related to the tribunal (officials from the Office of the Prosecutor (OTP) itself or (military) entities such as UNTAES and SFOR[25]) seize the alleged criminal and transfer him to the tribunal.

In the abovementioned situations, the role of private individuals (in contrast to official state authorities) has been briefly addressed. The question rises what the consequence is of conduct of these individuals. After all, such conduct is normally not considered to be an act of a state. Of interest hereby is Article 11 of the ILC's 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts'.[26] This article, which is called 'conduct acknowledged and adopted by a State as its own' reads: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."

[25] These entities will be discussed in more detail in chapter 4.

[26] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission on the work of its Fifty-Third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), chapter IV.E.1. See also UN GA Res. 56/83 and http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf

What this means exactly can be read in the commentary of Article 11[27], which uses the *Case Concerning United States Diplomatic and Consular Staff in Tehran*[28] to illustrate the matter. This case dealt with the seizure of the U.S. Embassy in Tehran and its personnel by militants. The ICJ stated that the "approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State."[29] Another interesting (and probably by now familiar) case, used in this commentary, is the *Eichmann* case. "Security Council resolution 138 of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina."[30]

The following passage clarifies what should be understood exactly with the phrase 'acknowledges and adopts':

> article 11 may cover cases in which a State has accepted responsibility for conduct of which it did not approve, had sought to prevent and deeply regretted. However such acceptance may be phrased in the particular case, the term 'acknowledges and adopts' in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.[31]

Such 'acknowledgment and adoption' might be express (see the *Case Concerning United States Diplomatic and Consular Staff in Tehran*) or it might be inferred from the conduct of the state.[32] In doctrine, some writers use this (what I will call) 'adoption-doctrine' to enlarge the scope of responsibility for states that are faced with a 'male captus' situation. Costi shows for example that a private kidnapping does in principle not engage the responsibility of the state but that "continued custody of the abducted individual and the ensuing prosecution does in fact entail ratification of the abduction by the state and the latter assumes responsibility for the violation of the sovereignty and integrity of the state of refuge."[33]

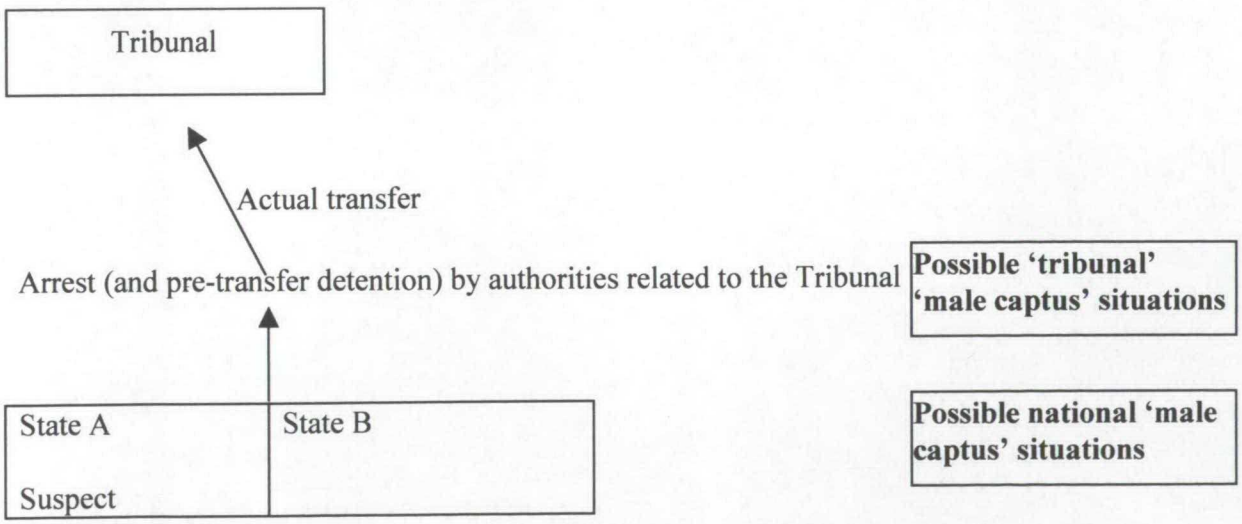
---

[27] See http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf
[28] *Case Concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3.
[29] Ibid., at p. 35, para. 74.
[30] See http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf
[31] Ibid.
[32] Ibid.
[33] Costi 2003, p. 63.

It will be interesting to see what role this topic of adoption will play within this research. Do countries follow this rule and how will international criminal tribunals react when a suspect is for example kidnapped by private individuals not related to the tribunal (or 'closer' to its organisation, by a military force present in the area) and then brought to OTP officials? This issue is of course of importance for the tribunals since they are dependent on other entities when it comes to enforcement-operations: the tribunals do not have their own police power.

2. *'Male captus' situations*

Moreover, this inquiry will only deal with the most obvious 'male captus' situations which can be defined as arbitrary circumstances surrounding the arrest of the suspect before he is actually transferred to another jurisdiction. "Especially in cases where there exists a great political interest to try a case (...)"[34] (for example when dealing with 'hostes humani generis'), people will not hesitate to use other methods than the formal procedures when the latter have been proven ineffective. With respect to the for this thesis most important context, the one of the tribunals (which will be discussed in chapter four), the following scheme could be clarifying:



The 'male captus'-situations can be categorised as follows:

[34] Frowein 1994, p. 176.

1) **Possible national 'male captus' situations**. This category can be divided in two subcategories. The first is the situation where State A, before bringing him into the power of the authorities related to the tribunal, gets hold of the in the same state residing suspect, after having used possible arbitrary methods such as an unlawful arrest (for example when disproportional force has been used in order to apprehend the person) or when the exact transfer proceedings in general have not been followed, hereby in a way using a sort of disguised extradition, see below. The second and more complicated subcategory is the situation where State B first gets hold of the suspect originally residing in State A after methods circumventing normal procedures between states have been used and then subsequently brings the suspect into the power of authorities related to the tribunal. Although it is possible that State A does not cooperate with a tribunal and that State B, as a reaction, for example abducts the suspect residing in State A and subsequently transfers him to that tribunal, it is very probable that this situation will not occur too often. However, every possible option should be mentioned here.

2) **Possible 'tribunal' 'male captus' situations** can be defined as situations in which the authorities related to the tribunal (and thus not the national states) were themselves involved in a possible unlawful arrest/detention of the suspect before the actual transfer to the tribunal took place. One could hereby think of an unlawful arrest (e.g. by luring) or a pre-transfer detention which clearly is in violation of certain human rights. Which exact human rights can be violated will be discussed below. Since the tribunals are seen as model institutions in the promotion of human rights, it is to be hoped that these 'tribunal' 'male captus' situations will not occur (too often).

Both the national 'male captus' situations and the 'tribunal' 'male captus' situations can create the state of affairs that a suspect will claim that the actual transfer to and jurisdiction for the tribunal is unlawful since the preceding circumstances (the national and/or 'tribunal' 'male captus' situations) should be considered as unlawful. This is comparable with the so-called 'fruits

of the poisonous tree'-doctrine[35], which in fact has almost the same meaning as the already discussed maxim 'ex iniuria ius non oritur': no right can be derived from a wrong.

The three most important 'male captus' situations (kidnapping, luring and disguised extradition[36]) have already been briefly mentioned in this thesis. I will now give some more information about the three concepts, which appeared for the first time within the national context. Since of this national context-origin (and in order not to make it too complicated), I will now analyse kidnapping, luring and disguised extradition only within the context between states. However, since the target-context of this thesis is the one of the tribunals, it must be borne in mind that these concepts can and will come back within the tribunals' context as illustrated in the scheme above as well.

Kidnapping/abduction in the context of international criminal law (i.e. extraterritorial kidnapping/abduction) can be defined as the situation where individuals from State B penetrate the territory of State A, without the latter's consent[37], and seize a wanted suspect, who will then be brought to State B. Especially state-sponsored kidnappings/abductions have been the subject of many disputes since these kinds of situations clearly violate international law:

> This rule is firmly rooted in the principle of respect for territorial sovereignty and integrity of other states and in the ensuing obligation of non-intervention in the internal and external affairs of another state. A long-standing practice confirms that such exercise of sovereign powers beyond the state's boundaries is contrary to international law and could a priori engage the international responsibility of the abducting state.[38]

Rayfuse shows that kidnapping not only violates international law but personal human rights as well: "State-sponsored kidnapping has also been held by international adjudicatory

---

[35] See Rayfuse 1993, p. 894: The 'poison fruit' doctrine has been used "as an exclusionary remedy, whereby illegally obtained evidence is inadmissible before the court." See also Rule 95 of the ICTY and ICTR RPE (Rules of Procedure and Evidence) "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.", Mann 1989, p. 414 and Knoops 2002, pp. 251-253.

[36] See also Van der Wilt 2004, p. 276 et seq.

[37] See for more information about 'consent' in this context Mann 1989, p. 409 et seq.

[38] Costi 2003, p. 61.

organs to be a violation of the fundamental rights to liberty and security of the person and freedom from arbitrary arrest."[39] She hereby refers to cases such as *Canon Garcia v. Ecuador*[40], considered by the UN Human Rights Committee and *Stocké v. Germany*[41], considered by the European Commission and Court of Human Rights. (More information about the human rights perspective will be given in the next paragraph.) Nevertheless these condemnations, "government-sponsored abductions still continue to hit the headlines".[42] Especially in the United States, abductions seem more easily accepted than in other states.

Luring, in contrast to kidnapping/abduction, does not implicate a flagrant violation of the sovereignty of State A since the persons who are after the suspect in principle do not penetrate the territory of State A itself[43] but get hold of the alleged criminal 'only' by using deceit, fraud and tricks to lure the individual from the country of his residence to a location where there is jurisdiction to arrest the suspect. Furthermore, luring will normally not entail as much force as kidnapping/abduction does. It thus seems less objectionable than abduction. However, although these differences, "most countries do not distinguish between abduction by fraud and abduction by force."[44] This is probably so because the arrest of a 'male captus' suspect is in both cases obtained by fraudulent means. There is one important exception within these luring-condemnations: the United States, which "has consistently upheld the legitimacy of the practice of luring, contrary to the beliefs of many other nations throughout the international community."[45]

Disguised extradition is the situation where State A in fact extradites the suspect to State B whereas there is no formal extradition treaty or the treaty at hand does not cover the crime involved. One could hereby think of deportation or expulsion, deliberately applied in order to circumvent the safeguards of extradition procedures.

---

[39] Rayfuse 1993, pp. 891-892.
[40] *Canon Garcia v. Ecuador*, 5 November 1991, UN Doc. CCPR/C/43/D/319/1988.
[41] *Stocké v. Germany*, *E.C.H.R.* Ser. A, No. 199.
[42] Costi 2003, p. 59.
[43] This is not always the case as will be shown in the *Dokmanovic* case (see chapter four).
[44] Scharf 1998, p. 372.
[45] Paust et al. 1996, p. 426. See also p. 436: the XVth Congress of the International Penal Law Association (September 1994) where a resolution on the Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperation in Criminal Proceedings was adopted, stated: "Abducting a person from a foreign country *or enticing a person under false pretenses to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognised as a bar to prosecution* [Italics ChP]."

Although it is frequently stated that these kinds of circumventions should not be used, it is "comparatively rare that courts have been called upon to verify whether this is lawful or not."[46] It seems very difficult for a suspect to prove 'détournement de pouvoir' (abuse of power). After all: the fact that someone is wanted abroad, does not mean that he cannot be deported, even if his extradition is impermissible; this would namely provide offenders a right of residence.[47] This, including the possible argument of State A that it has a duty existing in customary international law, to either extradite or prosecute the suspect, even without an extradition treaty (this is the extensive meaning of the maxim 'aut dedere aut iudicare' which will be dealt with in more detail below) makes it very difficult for a suspect to win the case in this 'male captus' situation.[48]

It is important to understand that it is always dangerous to make schemes and categories since reality does not let itself lay down in these kinds of abstract figures. History shows that it is always a certain mishmash of situations that is involved. That is why it is very well possible that a certain category will not be discussed as plainly as one would expect. Schemes and categories only try to give some sort of hold with respect to this difficult legal problem.

2.3.3 Which defenses could a victim of 'male captus' situations use?

Depending on the circumstances, a victim of a 'male captus' situation could argue the following defenses[49]:

1) There has been a violation of the sovereignty of the state in which the suspect resided

2) There has been a violation of his personal human rights

3) There has been a violation of the rule of law

Ad 1

[46] Frowein 1994, p. 179.
[47] Van der Wilt 2004, p. 285.
[48] See also Van der Wilt 2004, p. 285.

One of the most important characteristics of a state is its independence, its sovereignty. The independence of states implies both rights and duties; on the one hand, a state has the right to exercise jurisdiction over its territory but on the other hand, there is a duty not to intervene in the internal affairs of other sovereign states (except in cases of legitimate self-defense[50]). Although the precise content of 'the internal affairs of a state' is "open to dispute and (...) in any event a constantly changing standard"[51], it is agreed that it is not possible to exercise police powers, as being a form of the use of force, inside the territory of another state without consent of that state. The following authorative cases confirm this: in the *S.S. Lotus* case, the Permanent Court of International Justice (PCIJ) held that "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State."[52] In the *Corfu Channel* case, the successor of the PCIJ, the International Court of Justice (ICJ), recognized that "between independent States, respect for territorial sovereignty is an essential foundation of international relations."[53] The ICJ ruled again on this topic in the 1986 *Military and Paramilitary Activities* case where it stated that "the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference".[54]

The best example of this 'state sovereignty-violation' defense was probably put forward by Eichmann, who alleged that his abduction was in violation of the sovereignty of Argentina, where he was living at the moment of his capture. It is a typical defense having its origins in the 'youth' of modern international law when it "concerned itself exclusively with the relationship between states".[55] States were at that time the only real actors in the international community and state sovereignty was the most important principle governing this system of inter-state law. "States were sovereign, independent entities with exclusive jurisdiction over their own internal affairs. Non-interference in the affairs of other states was the order of the day."[56] Individuals by contrast were not the subjects, but mere objects of international law and therefore, when a

---

[49] See Van Sliedregt 2001 B, p. 75 et seq.
[50] See Shaw 2003, p. 604. See also Knoops 2002, p. 254 et seq.
[51] Shaw 2003, p. 191.
[52] *S.S. Lotus* case *(France v. Turkey)*, 7 September 1927, 1927 PCIJ (Ser. A) No. 9, at 18.
[53] *Corfu Channel* case (United Kingdom v. Albania), 9 April 1949, 1949 ICJ Rep. 4, at 35.
[54] *Military and Paramilitary Activities* case (Nicaragua v. United States of America), 27 June 1986, 1986 ICJ Rep. 14, at 106, para. 202.
[55] Goldstone 1996, p. 1.
[56] Ibid.

situation of abduction arose, the more obvious and personal defense concerning the violation of human rights of the accused were not relied upon. The only possible advantageous consequence for a suspect in 'Eichmann's era' resulting from the state sovereignty-violation argument could be the fact that the injured state (the state whose sovereignty had been violated) was (and still is) entitled to obtain reparation for the infringement. This reparation, besides to e.g. a claim for damages, could in fact constitute the "return of the abducted individual to the state of refuge."[57] However, with respect to Eichmann (and it would seem that this could be the case with other 'enemies of human mankind' as well), this kind of reparation was not granted.

The defense of the violation of state sovereignty has been paid less attention ever since, because of the decreasing importance of the concept in the intermingled world of today. This is especially so within the new context of the tribunals which in fact have the power to intervene in purely domestic situations, albeit that both the ICTY and ICTR have more supranational powers than the permanent ICC (see chapter four).

Ad 2

It could be possible that the state where the 'male captus' situation took place conspired in, consented to or later condoned the action on its territory. This consent, "in advance or by later acquiescence, would cure the violation of its territory and its autonomy, but a state cannot waive a violation of the individual's human rights without his (her) consent".[58] The human rights defense became accepted with the emerging role of the individual on the international plane. Eichmann for example, who mainly argued that the abduction violated the sovereignty of Argentina, should not even have tried to assert that his personal human rights were violated. International law at that time was not yet that far that human rights could also be relevant within the inter-state context.[59] However, while it is true that international law has traditionally been the law of a society made up almost exclusively of sovereign national states, it is now "becoming the law of a planetary community of which all human beings are members".[60] Human rights treaties have played and still play a very important role within this development. "With the emerging recognition and development of international standards of human rights, the prime focus increasingly shifts from

[57] Costi 2003, p. 62 and Jennings and Watts 1992, p. 388.
[58] Henkin 1995, p. 259.
[59] See Strijards 2003, p. 755.

the respect of the sovereignty and territorial integrity of the state to that of the protection of the rights of the person."[61] With respect to 'male captus' situations, one could think of several practices against which a suspect wants to be protected, especially the more serious situations such as (forcible) abduction which may involve "a degree of physical abuse, some restraint on the freedom of movement and a threat to personal integrity".[62]

As set out above, a major role in the development of international human rights standards, which can protect suspects against these kinds of practices, is granted to human right treaties, and although there is no international treaty explicitly recognizing an individual human right against (forcible) abduction or irregular transfer, "such a right has been read into the provisions of regional and international human rights instruments relating to the right to liberty and security of the person and to protection against torture or other degrading treatment."[63]

The following scheme tries to give an overview of articles in the different and more generally[64] drafted regional and international human right treaties on which a suspect of the aforementioned 'male captus' situations could try to rely and which more or less define the rights as mentioned above (right to liberty and security of person and protection against torture or other degrading treatment) and the rights of protection against arbitrary arrest or detention.

	Liberty/security	**Torture**	**Arbitrary arrest/detention**
UDHR[65]	Art. 3	Art. 5	Art. 9

[60] Bassiouni and Wise 1995, p. ix.
[61] Costi 2003, p. 68.
[62] Ibid.
[63] Ibid., p. 69.
[64] N.B.: there are of course specific treaties which deal with one or more particular right(s), such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, an inquiry into all these instruments would drift us away too much from the subject of 'male captus bene detentus', which even may not even involve torture (or another specific violation). That's the reason why I only want to touch upon the more general treaties here.
[65] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). See http://www1.umn.edu/humanrts/instree/b1udhr.htm

ICCPR[66]	Art. 9	Art. 7	Art. 9
ECHR[67]	Art. 5	Art. 3	Art. 5
ACHR[68]	Art. 7	Art. 5	Art. 7
ACHPR[69]	Art. 6	Artt. 4, 5.	Art. 6
ARACHR[70]	Artt. 5, 8.	Art. 13	Art. 8

The scheme clearly shows that the international human rights on which a victim of (the more serious) 'male captus' situations could rely, at least exist on paper around the globe. Since these rights are also guaranteed by many states[71], it could mean that states have implemented these international rights into their own legislation because they truly believe these rights should be of binding legal effect (opinio iuris). It could therefore be argued that these rights are evidence of customary international law.[72] Human rights protection relating to less serious situations, such as disguised extradition, can be read in Articles 9 UDHR[73], 13 ICCPR[74], 5 ECHR[75], 7 ACHR[76], 6

[66] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 *U.N.T.S.* 171, *entered into force* 23 March 1976. See http://www1.umn.edu/humanrts/instree/b3ccpr.htm

[67] European Convention for the protection of human rights and fundamental freedoms, 213 *U.N.T.S.* 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. See http://www1.umn.edu/humanrts/instree/z17euroco.html

[68] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 *U.N.T.S.* 123 entered into force 18 July 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). See http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm

[69] African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982), *entered into force* 21 October 1986. See http://www1.umn.edu/humanrts/instree/z1afchar.htm

[70] Arab Charter on Human Rights, adopted by the League of Arab States, reprinted in 18 *Hum. Rts. L.J.* 151 (1997). See http://www1.umn.edu/humanrts/instree/arabhrcharter.html

[71] See Rayfuse 1993, p. 891.

[72] Ibid.

[73] "No one shall be subjected to arbitrary (…) exile."

ACHPR[77] and 8 ARACHR[78]. Since it can be argued that most (if not all) of these rights are evidence of customary international law, it is not necessary (if one looks at the domestic context) that a certain treaty has been enacted into the domestic legislation or that the treaty is self-executing. "Where the right relied on is a customary one an individual is entitled to plead that right before the domestic courts and to have the courts uphold that right."[79] (Whether this means that a suspect will have its right enforced *in practice* is another important question which is beyond the scope of this thesis.) International criminal tribunals have accepted that international human rights treaties are applicable to them as well if they are part of customary international law or codifications of general principles of law (see chapter 4).

There is another reason of the importance of these developing international standards, e.g. in additional protocols: they may (and should) lead to a more complete system of international law which not only provides minimum international human rights standards in purely domestic cases but also in cases where the suspect has been transferred from one jurisdiction to another. Only such as system could effectively prevent the possible unfortunate situation that a suspect, brought from one jurisdiction to another, becomes the victim of a legal vacuum.[80] "It is imperative that the defendant receives the full protection of human rights instruments and should not be the victim of the fragmentation of the criminal procedure over two or more jurisdictions."[81] However, since a right not to be subjected to kidnapping/abduction, luring and disguised extradition is still spread out over several provisions, it could be recommended that a new right should be drafted against these kinds of situations where there is a transfer from one jurisdiction to another.

Ad 3

---

[74] "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law (…)".

[75] "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."

[76] "No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."

[77] "No one may be deprived of his freedom except for reasons and conditions previously laid down by law."

[78] "Everyone has the right to liberty and security of person and no one shall be arrested, held in custody or detained without a legal warrant."

[79] Rayfuse 1993, pp. 892-893.

[80] For more information about the negative effects of two overlapping legal systems, see Sjöcrona and Orie 2002, pp. 18 and 270.

With this rather general defense, the idea of formal justice is meant. For example, when "existing legitimate procedures to bring an accused to trial have been circumvented or disregarded by the executive authorities"[82], courts have found the rule of law to be violated. This defense could thus for example be used by a suspect who has been the victim of a disguised extradition, since the latter "occurs in the absence of respect for the rule of law and extradition legislation".[83] The rule of law defense has been created as well to make it possible for courts to "set their face against unlawful government behaviour"[84] and to "create an example for society to respect the law."[85] One can understand that this defense is thus quite broad and in a way has not only a procedural side. The rule of law defense is often coupled to the concept of 'abuse of process': a court has "the *discretionary* power to stay the criminal proceedings on the ground that these proceedings *will* amount to an abuse of its own process."[86] The words in italics are important: a possible abuse of process will not automatically lead to the conclusion that the court has no jurisdiction to try the case. This will be decided by the court itself.

As both arguments 2 (human rights) and 3 (rule of law) "are closely connected to each other"[87] (after all: an abuse of process will undoubtedly violate the suspect's human rights), they will often be discussed together in this research. Most attention will hereby be paid to the human rights issue, as the title of this Master's thesis also clarifies.

2.3.4 Possible remedies

When discussing the possible remedies that result from a 'male captus' situation, one could make a distinction between the injured state (the state of refuge) and the individual.

The injured state of course can (and will) only ask for a remedy when there has been an abduction/kidnapping. After all, luring will in principle not violate the sovereignty of the country of refuge while disguised extradition is only possible with the active help of that country. In case

---

[81] Sluiter 2001 B, p. 156.
[82] Van Sliedregt 2001 B, p. 78.
[83] Costi 2003, p. 68.
[84] Van Sliedregt 2001 B, p. 78.
[85] Ibid.
[86] Ibid.
[87] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 106. See http://www.un.org/icty/nikolic/trialc/decision-e/10131553.htm.

of abduction/kidnapping, State A can ask for release and repatriation or return of the suspect (and even the extradition of the persons involved in the operation) but less advantageous forms of reparation (at least for the suspect) are possible as well such as an apology or a payment of damages.

It can be stated that a victim of a 'male captus' situation should be able to ask for reparation in each 'male captus' situation since in all these cases, his personal human rights have been violated. When it is found that the suspect's human rights are seriously violated (especially when the prosecutor is involved in these violations), the most appropriate reparation will of course be the dismissal of the indictment and the subsequent release and repatriation of the suspect. If the trial continues (for example when the violations are not that serious) his sentence could be reduced. An appropriate remedy could also be financial compensation.

Although these remedies could be used with respect to -say- 'ordinary' criminals, it is doubted whether in practice they will be applied in the exact same way to hostes humani generis as well. For example, the *Eichmann* case showed (besides the power of political pressure on the international plane) the fact that a suspect accused of an international crime will not always get what he has asked for (and what he was maybe entitled to); Argentina requested the return of Eichmann and eventually took the matter to the United Nations, where the Security Council condemned the kidnapping and requested Israel to make appropriate reparation.[88] "The nature of the appropriate reparation was not specified and the matter was eventually settled with the issue of a joint communiqué by Argentina and Israel in which they both resolved to regard the matter as closed."[89]

Of interest hereby is how wrongs are redressed in the context of the international criminal tribunals. The tribunals in fact have the same sort of remedies: release, reduction of the sentence and compensation. To begin with the last one, Beresford explains that the remedy of compensation for victims of unlawful arrest or detention, which is not only codified in many criminal jurisdictions but in international human rights treaties[90] (and in the ICC Statute, see chapter four) as well, is not included in the Statutes of the ICTY and ICTR.[91] This

[88] Security Council Res., 23 June 1960, UN Doc. S/4349.
[89] Rayfuse 1993, p. 890.
[90] See for example Article 9 (5) of the ICCPR, Article 5 (5) of the ECHR (and in more general terms Article 63 ACHR).
[91] Beresford 2002, p. 628.

notwithstanding the fact that concern for personal liberty is reflected in the Statutes of the two ad hoc tribunals and their RPE (Rules of Procedure and Evidence).[92] The two presidents of the international criminal tribunals therefore asked the UN Secretary-General in September 2000 to amend the Statutes to enable the tribunals to award compensation to victims of such 'male captus' situations. It must be stated however that compensation will only be paid when the conduct that gave rise to the violation "was legally imputed to the Tribunals".[93]

In the ICTR-case of *Barayagwiza* (see chapter four as well), who was accused of having committed serious international crimes and whose pre-transfer detention could be regarded as arbitrary, the Appeals Chamber decided that the suspect was to be released, due to the serious violations of his personal human rights. The actual release nonetheless took never place: the prosecutor found new facts which made the Appeals Chamber decide that release was not the appropriate remedy. Instead, the sentence (which was originally life imprisonment) was to be reduced. The Trial Chamber eventually sentenced Barayagwiza to 35 years in prison.

[92] Ibid., p. 631.
[93] Ibid., p. 640.

Chapter 3: The national context

3.1 Introduction

This chapter will deal with the 'performance' of the maxim on the domestic level, i.e. where the rule is discussed before national courts. As mentioned in the previous chapter (see its introduction and the scheme in 2.3.2): in order to be able to understand the problems present in the 'target'-context, the one of the tribunals, it is important to look at the national level first, where the maxim appeared originally. This chapter will start with giving some information about general concepts which come into play when State B wants to get hold of a suspect residing in State A (3.2). After that, the most important cases before national courts dealing with the problem of 'male captus bene detentus' will be discussed (3.3). Some attention will hereby be paid to international courts, not being international criminal courts, which have dealt with domestic 'male captus'-situations, such as the European Court of Human Rights. This chapter ends with a conclusion (3.4).

3.2 Some general concepts

3.2.1 Introduction

Re-imagine my 'very original' fictive situation of a person residing in State A and wanted by State B. The reasons for the desire of State B in trying the hiding fugitive can be endless: the suspect could have murdered a citizen of State B in State C, he may have robbed a bank in State B, he even might be suspected of being responsible for a mass killing of civilians during a war in State D. It is clear that in the first two cases, State B has a clear interest in trying the suspect. There is an obvious 'liaison de droit' or legal interest for State B in trying the suspect. After all, in the first case, a citizen of State B is involved whereas in the second case the crime has taken place in State B itself. In the third case however, the interest might initially be less clear.

Nevertheless, it is accepted in international law[94] that all states, as being members of the international community, have an interest in trying a suspect accused of having committed international crimes such as crimes against humanity, war crimes and genocide. It follows from the previous that State B has an interest in all three cases. When State B wants the suspect residing in State A to be tried, it can do two things:

1) It can ask State A to try the suspect
2) It can try the suspect itself

The first option seems the easiest solution since the suspect is already residing in State A. Nonetheless, besides the fact that State B will not always ask State A to do this since of the former's own (social and) public interest in having the trial in State B, it is very well possible that State A - when asked by State B - does not want to try the suspect itself. Furthermore, it may be so that State A simply cannot try the suspect because of its failing law system, for example by not having created the necessary legal requirements to be able to try a person suspected of having committed these crimes. If State A does not want, or is unable to try the suspect itself, it is up to State B to propose that its judges shall try the suspect. However, if it wants to do that, State B must not only have judicial (in particular: criminal) jurisdiction to try the suspect, it must have the suspect in its power as well (the latter is called in personam jurisdiction[95]). In the beginning of this thesis, I wrote about courts that should or should not divest themselves of jurisdiction in 'male captus' situations. With this general term 'jurisdiction', both abovementioned concepts of jurisdiction are meant; it is only when courts have the possibility to try a suspect (because the court has judicial jurisdiction and because it has the suspect in its power) that the question

[94] See for example the 'Final report on the exercise of universal jurisdiction in respect of gross human rights offences', International Law Association, Committee on International Human Rights Law and Practice, London, 2000 (see http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf), p. 3: "Justice requires that there should be no safe haven for the perpetrators of such crimes. Domestic courts and prosecutors bringing the perpetrators to justice are not acting on behalf of their own domestic legal system but on behalf of the international legal order. The increasing exercise of universal jurisdiction in respect of gross human rights offenders is a reflection of the smaller world in which we live in which people feel affronted not merely by crimes committed within their own territories or against their own fellow citizens but also by heinous crimes perpetrated in distant states against others. They therefore regard it as appropriate that the machinery of justice in their state is used to bring the perpetrators to trial.". The preamble of the ICC Statute even states that "it is the *duty* of every State to exercise its criminal jurisdiction over those responsible for international crimes" [Italics ChP].

[95] See Bassiouni 1986, p. 410.

whether a court *should* exercise these powers comes forward. Unlawful pre-trial circumstances that took place before the suspect came into the power of a certain state can make it happen that, although a court has legal and actual power to try a suspect, it still will not exercise these powers. If on the contrary a court does not divest itself of its jurisdiction in these kinds of cases, then the maxim 'male captus bene detentus' is relied upon.

3.2.2 Judicial jurisdiction

State jurisdiction, of which criminal jurisdiction is a subcategory, "concerns essentially the extent of each State's right to regulate conduct or the consequences of events."[96] Both international and domestic law are hereby involved since the former "determines the permissible limits of a state's jurisdiction in the various forms it may take, while the latter prescribes the extent to which, and manner in which, the state in fact asserts its jurisdiction."[97] State jurisdiction may be achieved by means of legislative[98], judicial or executive action. The last two categories will be dealt with in this research. While executive jurisdiction will be discussed in the next paragraph (when dealing with in personam jurisdiction), attention will now be paid to the category of judicial jurisdiction and to the subcategory of criminal jurisdiction in particular. Judicial jurisdiction means the authority of courts of a particular state to try cases. There are four main principles categorising possible jurisdiction claims.

> Although it is usual to consider the exercise of jurisdiction under one or other of more or less widely accepted categories, this is more a matter of convenience than of substance. There is, however, some tendency now to regard these various categories as parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states.[99]

---

[96] See Jennings and Watts 1992, p. 456.
[97] Ibid., pp. 456-457.
[98] This jurisdiction deals with the legislative branch of a government and means the authority of a particular State to apply its laws to particular wrongful or criminal acts.
[99] Jennings and Watts 1992, p. 458.

The *territoriality principle*[100] governs the primary basis of jurisdiction over crime and means that a state should be able to exercise jurisdiction over crimes (allegedly) committed in whole or in part within its territory. This is even so where the alleged criminals are foreign citizens. The principle is a "logical manifestation of a world order of independent states and is entirely reasonable since the authorities of a state are responsible for the conduct of law and the maintenance of good order within that state."[101]

Besides to territorial jurisdiction - the standard basis for jurisdiction - countries can have jurisdiction for crimes that occurred abroad as well. This is known as extra-territorial jurisdiction. In these kinds of cases, jurisdiction is based on another connection than the territory of the state.

The *nationality principle*[102] is the link between the sovereign state and its people and can be seen as twofold: a state can claim jurisdiction over nationals who have committed crimes anywhere in the world (active personality principle) and it can claim jurisdiction to try an alien for crimes committed abroad affecting one of its nationals (passive personality principle). The basis for the latter jurisdiction is not widely accepted.[103]

The *protective principle* affords states "jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular state concerned."[104] A good example of such an act is terrorism.

The *universality principle* finally makes it possible for a state to claim jurisdiction over criminal cases where in principle there exists no direct link with that state. Here, jurisdiction is purely based on the nature of the crimes involved, which are regarded as particularly offensive to the international community. One could hereby think of war crimes, crimes against humanity and genocide. The philosophy behind this principle, which in fact has the same meaning as the rule 'aut dedere aut iudicare', which will be discussed below, is that certain suspects should not be able to hide in what is called 'safe havens': countries that offer a suspect a place were he will not be bothered, countries where the authorities do nothing in terms of prosecuting their inhabitants suspected of having committed an international crime. The safe havens-argument, which can be used for both the universality principle and the rule of 'aut dedere aut iudicare' is especially

[100] See the already discussed *Lotus* case (1927 PCIJ (Ser. A), No. 9) for more information on the nature of territorial sovereignty in relation to criminal acts.
[101] Shaw 2003, p. 579.
[102] See the *Nottebohm* case (ICJ Reports, 1955, pp. 4, 23; 22 *ILR*) for more information on the concept of nationality.
[103] Blakesley 1999, p. 40.

convincing with respect to the already mentioned 'hostes humani generis' which are in fact the 'target-suspects' of international criminal tribunals (which do nothing but trying suspects accused of international crimes such as crimes against humanity, war crimes and genocide). Whether the category of universal jurisdiction can be expanded to include support for international terrorism is open to question.[105] However, "it is possible that international terrorism may in time be regarded as a crime of universal jurisdiction."[106]

3.2.3 In personam jurisdiction

Suppose that State B has jurisdiction, using one of the principles mentioned above. In order to make an actual trial possible, State B must not only have the legal means to try the suspect, it must get hold of the alleged criminal as well (in personam jurisdiction).[107] The essential question is *how*. After all (and as discussed earlier): State B only has enforcement (executive) power within its own territory. It is thus a breach of international law for a state to send its agents into the territory of another state (without that state's permission) to apprehend suspects.[108] In these kinds of situations, the method of extradition, which constitutes the most important and oldest[109] aspect of the broader notion of mutual legal assistance between states in criminal matters (and which is formed principally by a network of treaties[110]) is normally relied upon. "Extradition designates the official surrender of a fugitive from justice, regardless of his consent, by the authorities of the State of residence to the authorities of another State for the purpose of criminal persecution (...)."[111]

When State A does not want or cannot try the suspect while having the will to extradite, it might still be possible that State B will not get hold of the accused. A reason could be that there is

---

[104] Shaw 2003, p. 591.
[105] Ibid., p. 595.
[106] Ibid., p. 602. See also Blakesley 1999, pp. 72-73.
[107] Some countries claim that a trial "in absentia", i.e. where the suspect does not need to appear before the court in order to get convicted, is possible as well. However, I will focus on the more accepted legal thought that "in absentia" trials are in violation of Art. 14 (2) (d) ICCPR especially since the international criminal tribunals all explicitly forbid such trials, see Articles 21 (4) (d) ICTY Statute, 20 (4) (d) ICTR Statute and 63 (1) ICC Statute.
[108] See Jennings and Watts 1992, p. 388.
[109] See Bassiouni 1986, p. 405: "International extradition has existed for over three thousand years and has been evidenced by the early practices of the Egyptian Pharaohs, the Chaldeans, the Chinese, and the Greeks."
[110] Henkin 1995, p. 250.
[111] Stein 1995, p. 327.

no extradition treaty between the two states or that the extradition treaty at hand does not cover the crime involved. Furthermore, traditional extradition-conditions like "exclusion of nationals", "double jeopardy" and "immunity of prosecution" may be a reason not to be able to extradite. When State A has the will to extradite while it has no legal method available, there is a chance that State A will use the method of disguised extradition. It could hereby use the already briefly addressed rule 'aut dedere aut iudicare' to its benefit by saying that this obligation can be based on customary international law; the rule, dating back to Grotius, means that State A has an obligation either to try international offenders before its own courts or to surrender them for trial before a foreign (or international) court. Although the obligation exists in several treaties, a foundation in customary international law[112] could mean that if State A cannot prosecute the suspect itself, it has an obligation to extradite him to State B, even if no extradition treaty exists or if the existing treaty does not cover the crime. This in fact equals to disguised extradition.

Another situation: if State A is involved in the mass killings for which the suspect has been accused[113], it will not want the suspect to be tried at all, hereby hoping that if no action is taken, people will forget what has happened. In these situations, State A will refuse extradition. When State A cannot or does not want to prosecute or extradite and State B is very eager to try the suspect itself, the latter might come up with the methods of luring and kidnapping in order to get hold of the suspect. State B could hereby use the same arguments that were used by State A when I wrote about disguised extradition and 'aut dedere aut iudicare': it could say that there should be no safe haven for certain suspects, that certain suspects must always face justice and thus that, when the opposite is happening, the end justifies the means: *how* those suspects are brought into the courtroom is irrelevant as long as they *are* brought there. As discussed earlier, this argument may seem especially understandable in case of persons suspected of the most serious crimes (hostes humani generis). State B could argue that with respect to these crimes[114], there exists a duty on State A to either prosecute or extradite the suspect. If State A does not follow this rule, State B could assert that, State B has a moral and even legal obligation to make sure that there will be no such safe haven in the world for the suspect and thus that State B is

[112] There is discussion whether this is so or not, see Bassiouni and Wise 1995.
[113] Especially international crimes such as a mass killing on civilians seems very difficult to commit without any sort of state-involvement.
[114] See Bassiouni and Wise 1995, p. 20 et seq.

justified in capturing and trying the suspect itself, even without the permission of State A and even by using arbitrary methods.

What to think about these practices which circumvent normal procedures and whereby the maxim 'aut dedere aut iudicare' is in fact extensively interpreted? I do not think the legal argumentation, supporting this interpretation, is valid. Even if one argues that an 'aut dedere aut iudicare'-obligation does not only exist in treaties but in customary international law as well, I believe that the rule only gives a 'prosecute or extradite'-duty to the country in which the alleged criminal is residing and only with respect to certain serious crimes. Nothing more, nothing less. The rule to my opinion does not permit the use of unlawful methods such as kidnapping and disguised extradition which not only violate international law and certain procedures but personal human rights as well. This is a fortiori so with respect to practices used by State B (luring and abduction) since the rule 'aut dedere aut iudicare' only obligates State A to do something (and thus does not address State B).

3.3 National leading cases

3.3.1 Introduction

Although I have addressed the new role of the individual on the international plane and the accompanying rights deriving from human rights treaties and although it is true that international criminal courts have accepted to be bound by certain international human rights treaties, individuals still have a limited 'locus standi' before international bodies, such as the instances that supervise these human rights treaties. Furthermore, "some of the international bodies may only make remarks and their views lack binding force".[115] In most cases therefore, an individual will make his complaints with respect to possible 'male captus' situations before domestic courts where his chances are much better (albeit that there can also be domestic problems with respect to international treaties, not being evidence of customary international law, such as the fact that a state is not a party to the treaty at all or that it has implemented the treaty wrongly). These

[115] Costi 2003, p. 76.

situations, where national courts ruled on the matter of 'male captus bene detentus', will be discussed in this chapter. Some cases which appeared before an international court not being an international criminal tribunal and which dealt with domestic 'male captus' situations will be analyzed as well.

There are several national cases worth citing with respect to this topic. However, since there is an enormous amount of material available, I have made a selection of the most leading cases which keep reappearing in doctrine. All the different 'male captus'-situations (abduction/kidnapping, luring and disguised extradition) will be addressed in this selection. The cases have been categorised in time (rather than in the often used distinction between common and civil law traditions). I hope that this kind of approach will make it possible to see new developments more easily.

3.3.2 The first cases

As already discussed in chapter one, the very first cases, dating back from the 19th century and dealing with the maxim 'male captus bene detentus', clearly showed that judges would not inquire into the (possible unlawful) circumstances in which the suspect was brought before their courts. The argumentation in these British cases was followed in U.S. practice by the Supreme Court's[116] judgement in the 1886 *Ker v. Illinois*-case.[117]

After being indicted in Illinois for larceny and embezzlement from a Chicago bank, American national Frederick M. Ker escaped to Lima, Peru. Agent Julian from the Pinkerton Detective Agency was sent to South-America "with a valid warrant to obtain physical jurisdiction over him, pursuant to the extradition treaty in force between the two countries."[118] However, since Chile was occupying Peru at the time, Julian was unable to deliver the warrant to the Peruvian authorities. As a consequence, the agent, without consulting the U.S. Department of State, kidnapped Ker and delivered him to the Illinois authorities. Ker of course contested the

[116] Since several American cases will be discussed in this thesis, it may be useful to give a mini-overview (found at http://www.barthokriek.nl/juridisch/appendix.html) of the American law system: in the U.S., there are three sorts of courts at the state level (Trial Courts, Intermediate Courts of Appeal and State Supreme Courts) and three sorts of courts at the federal level (97 District Courts, 11 Circuit Courts of Appeal and one Supreme Court).

[117] U.S. Supreme Court, *Ker v. People of State of Illinois*, 119 U.S. 436 (1886), see http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=119&invol=436 for more information.

jurisdiction on the grounds that he was denied due process of law and that the agent's conduct and the ensuing prosecution had violated the extradition treaty.

The U.S. Supreme Court, rejecting his arguments, held that

> *The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud to this country, could be made available to resist trial in the state court for the offense now charged upon him, is one which we do not feel called upon to decide*; for in that transaction we do not see that the constitution or laws or treaties of the United States guaranty him any protection. There are authorities of the highest respectability which hold that *such forcible abduction is 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 offense, and presents no valid objection to his trial in such court* [Italics ChP].[119]

In short, the Supreme Court hereby stated that due process is not denied if the party has received a fair trial in the United States and if no American laws have been broken. This clearly can be seen as the old and more strict interpretation of the concept of fair trial, which I contest (see also 1.2): although it may be so that Ker has received a fair hearing, it is questionable whether he has received a fair trial in general. The judges furthermore felt that no violation of the extradition treaty had occurred since the kidnapping took place outside the terms of the said treaty and without the permission of the U.S. Government. This can also be seen as an old-fashioned way of looking at a 'male captus' situation: notwithstanding the exact treaty provisions, there has been a kidnapping, a wrong that should in some way be repaired. Just like the British, the Americans were also of the opinion that any unlawful circumstance (this could include a forcible abduction) prior to the actual trial is not a reason for a court to divest itself from jurisdiction in trying the suspect.

It should be mentioned however that not every case in this first period followed the rule. In France for example, "early case law shows that courts have been rather reluctant to apply the maxim *male captus bene detentus*."[120]. In the 1933 *re Jolis* case[121], the 'Tribunal Correctionel

---

[118] Costi 2003, p. 79.

[119] See footnote 117. See also Wilske 2000, pp. 258-259.

[120] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 91.

d'Avesnes' held that the arrest in Belgium and the subsequent abduction to France of a French citizen by French agents was in violation of international law. As a consequence, the court released the person.

3.3.3 The cold war era

More than half a century after the Supreme Court of the U.S. had delivered its judgement in the *Ker*-case, the highest American court had to decide the *Frisbie v. Collins*-case.[122] These two cases, together called the Ker-Frisbie doctrine, form the basis of the American version of 'male captus bene detentus'.[123] Since the *Frisbie* case dealt with a purely domestic case (the suspect was brought from one American state to another), I will not treat this case in depth (see my delimitation in the beginning of this research). However, since Ker and Frisbie are often mentioned together, I will here cite the best-known quotation of the latter case. "This court has never departed from the rule announced in *Ker v. Illinois*, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'."[124] *Ker-Frisbie*'s 'balance check' was thus based on the idea (probably influenced by the policy of efficiency) that trying criminals is more important than the exact rule of law. Knoops admits that "the rule of law in certain circumstances is sacrificed to the benefit of *realpolitik*."[125] Although the *Ker-Frisbie* doctrine has been followed by courts afterwards[126], it got a lot of criticism from doctrine[127], where the main argument was that the rule only serves to encourage circumvention of the law and approves unlawful behaviour in the pre-trial phase.

---

[121] *Re Jolis*, Tribunal Correctionel d'Avesnes, 7 *Ann Dig* 191 (1933-1934).
[122] *Frisbie v. Collins*, 1952, 342 U.S. 519. See also Wilske 2000, p. 261 et seq. and http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=342&invol=519
[123] See Wilske 2000, p. 261 and Bassiouni 1999, p. 253.
[124] See *Frisbie v. Collins*, 1952, 342 U.S. 519. See also Wilske 2000, p. 261 et seq. and http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=342&invol=519
[125] Knoops 2002, p. 249.
[126] See Wilske 2000, p. 263, note 66, where he uses an interesting quotation of a judge (in the case *Garcia-Mora*, Ind. L.J. 32 (1957), 427, 437) irritated by the followers-mentality of these courts. "It seems that the courts have simply fallen into the habit of repeating, parrotlike, that a court does not care how a defendant comes before the court, without thinking whether such a rule is sound on principle."
[127] See Wilske 2000, p. 263.

'Male captus bene detentus' was also upheld by Israeli courts in the introductory case of this Master's thesis: the *Eichmann*-case of 1961. Argentina initially objected the kidnapping. This led to the adoption of a Security Council Resolution[128] in which the Council condemned the kidnapping and requested Israel to make appropriate reparation. However, it did not require the return of Eichmann to Argentina. The two countries subsequently settled their dispute. One important feature of this trial which differs from the already discussed ones is that Eichmann can be seen, due to his atrocious and international crimes, as a real enemy of human mankind.[129] This cannot be said about for example Susanna Scott (perjury) and Ker (larceny and embezzlement). Should the 'quality' of the suspect make a difference and if so, to what extent? The idea that the 'male captus' situation of an enemy of human mankind should always be 'decoupled' from his subsequent trial is called the 'Eichmann exception'.[130] It's a very interesting theory for this research, since suspects appearing for international criminal tribunals may in principle be considered to fall as well within this category. However, I believe that this idea should not be supported since it violates the basic ideas of justice. When a wrong (for example an abduction violating a person's human rights) has been done, it should always be repaired. Only then a court is in my opinion entitled to try a suspect. After all: no right can be derived from a wrong ('ex iniuria ius non oritur'). In the words of Swart: "persons suspected or accused of international crimes should be no less entitled to respect for their basic individual rights than any other suspects or accused."[131] Although I believe this is the first appropriate step in doing justice, the second step concerns the reparation itself; this could be adapted according to the 'quality' of the *convict* (not the 'quality' of the *suspect*): the seriousness of the crimes involved could then determine the most appropriate reparation.

In the 1974 *United States v. Toscanino* case, the first cracks in the fundament of the American doctrine of 'male captus bene detentus' seemed to appear. Francisco Toscanino, an

---

[128] Security Council Res., 23 June 1960, UN Doc. S/4349.

[129] Some authors even believe that Eichmann was súch an enemy of human mankind that the case should not play a role within the 'male captus' discussion *at all*, see Mann 1989, p. 414. "This was so extreme, so unique, so horrendous a case that a court which had jurisdiction because the man stood before it could not possibly be expected not to exercise it or even ask whether it should be exercised."

[130] See also Shaw 2003, p. 605 who states, when discussing the concept of 'male captus bene detentus' that a "distinction may be drawn as between the cases depending upon the type of offences with which the offender is charged, so that the problem of the apprehension interfering with the prosecution may be seen as less crucial in cases where recognised international crimes are alleged." See further Scharf 1998, p. 381 and Van der Wilt 2004, p. 279.

[131] Swart 2001, p. 201.

Italian citizen, was kidnapped in Uruguay and brought to Brazil where he was detained and tortured for nearly three weeks before he was abducted to the United States. All this took place at the behest of United States officials. In America, he was charged and convicted for drug related crimes. Since the United States had not attempted to use normal extradition proceedings in order get hold of Toscanino, the Court of Appeals for the Second Circuit held:

> Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court[132] [footnote added, ChP], we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield. Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.[133]

Although this ruling rejects the classical view of (the) *Ker*(-Frisbie doctrine), *Toscanino* only has a limited scope. "The judgement has (…) been narrowed down to instances where agents representing the government committed a "cruel, inhuman and outrageous treatment" (…)."[134] The torture suffered by Toscanino is worthy to quote since it illustrates the level of outrageous conduct necessary to invoke the exception to (the) *Ker*(-Frisbie-doctrine).

> (…) denial of sleep and nourishment for days at a time, forced walks for excessive hours accompanied by kicking and beating him when he could not longer stand, pinching his fingers with metal pliers, flushing alcohol into his eyes and nose and forcing other fluids up his anal passage, and finally, attaching electrodes to his extremities and genitals.[135]

While I believe this case is a good step forward (in a case of extreme torture such as this, a bar to jurisdiction could well be the only appropriate solution, especially with respect to 'normal'

---

[132] Cases *Rochin v. California* (1952) and *Mapp v. Ohio* (1961) which held that evidence obtained through brutality could not serve as the basis for a conviction. See Margulis-Ohnuma 1999, p. 195.
[133] *United States v. Toscanino*, 500 F 2d 267 (1974), at 275.
[134] Costi 2003, p. 87. See also *U.S. ex rel. Lujan v. Gengler* where it was noted that the rule in Toscanino was limited to cases of 'torture, brutality and similar outrageous conduct' (Shaw 2003, p. 605).
[135] Paust et al. 1996, p. 429.

criminals like the drug dealer Toscanino), I do not agree with the fact that the torture has to be committed by government agents in order for a court to divest itself of jurisdiction. If someone has been tortured, this wrong has to be repaired by the profiting court, regardless of who committed that wrong.

Four years later, another Court of Appeals (this time one in New Zealand) distanced itself from the more traditional approach of 'male captus bene detentus' when it was faced with a case of disguised extradition in the *R. v. Hartley* case[136]; a New Zealand citizen, accused of murder, was arrested in Melbourne and returned to New Zealand in the absence of an extradition process. The court, using its discretionary power to stay the case (as it considered the conduct of the police to be an abuse of power) noted, in the words of Judge Woodhouse:

> And in our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. (...) *But this must never become an area where it will be sufficient to consider that the end has justified the means*. The issues raised by this affair are basic to the whole concept of freedom in society [Italics ChP].[137]

In 1987, the same reasoning was found back in the Australian case of *Levinge*.[138] An Australian citizen was arrested in Mexico by agents of the latter country and brought to the United States "in what seemed to be a co-ordinated effort of Mexican and United States agents".[139] He was extradited from the U.S. to Down Under, where the Court held that it had "a right to stay proceedings in order to prevent an abuse of process by the executive or to protect the integrity of the court processes. This, however, according to the Court, should be done only where the executive had been a direct or indirect party to the unlawful conduct."[140] Since this was not proven, the Court did not stay the proceedings.

---

[136] *R. v. Hartley* case, [1978] 2 *NZLR* 1999.
[137] Quotation cited in *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 88.
[138] *Levinge v Director of Custodial Services*, 9 *N.S.W.L.R.* 546.
[139] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 89.
[140] Ibid.

In the 1988 *Yunis* case[141], the United States' position on luring as being a legitimate alternative to extradition (see paragraph 2.3.2) was addressed. Yunis, a Lebanon citizen, was lured out of his homeland, arrested in international waters off the coast of Cyprus, and forcibly transferred to the United States to face charges of hostage taking and aircraft piracy.[142] Yunis' counsel claimed that not only the government's actions contravened its extradition treaty obligations with Lebanon and Cyprus but that it used excessive and outrageous force during the arrest as well. The Court however held that individuals, alone, are not empowered to enforce extradition treaties. Therefore, the issue of the possible extradition treaty violations did not have to be looked at. With respect to the circumstances surrounding his arrest, it stated that the government's actions did not rise to the level of "outrageousness" that "shock the conscience" and thus did not violate defendant's due process rights.[143]

3.3.4 The most recent cases

In 1991, the (then still existing) European Commission on Human Rights and the European Court of Human Rights had to decide a clear case of luring. In *Stocké v. Federal Republic of Germany*, a fugitive businessman accused of fraud was persuaded by an individual who acted privately (but with the promise by German authorities of a reduced term of imprisonment for non-related crimes) to fly in a private jet from Strasbourg to Luxembourg regarding an alleged business proposition. The police was informed that the plane would make an unexpected stop in Germany where Stocké was arrested upon landing.[144]

Although the European Court acknowledged that state-sponsored abduction and luring breach the individual's right to liberty and security (Article 5 of the European Convention on Human Rights), it judged that in this case, it was not proven that unlawful activities had been committed by German authorities. Although this decision, made by an authorative and often-cited judicial organ, is an important step forward in the development of human rights law, it is a pity that the topic of adoption was not addressed: even if it could not be proven that state officials

[141] *United States v. Yunis*, 681 F. Supp. 909 (D.D.C. 1988), rev'd on other gds., 859 F.2d 953 (D.C. Cir. 1988). See Paust et al. 1996, p. 428 et seq.
[142] See Paust et al. 1996, p. 426 et seq.
[143] Ibid., p. 427.

gave active assistance to the 'male captus' situation, it could be argued that the state, by prosecuting the victim of such a situation, ratified the 'male' of the private individual.

In 1992, one of the most well known cases with respect to 'male captus bene detentus' was decided by the U.S. Supreme Court: the *Alvarez-Machain* case.[145]

> In February 1985, an American drug agent named Enrique "Kiki" Camarena Salazar disappeared from his station in Guadalajara, Mexico. His body, along with that of his Mexican pilot, Alfredo Zavala, was found several weeks later, nude, tortured, and burned. Nineteen people including a prominent local politician and several Mexican police officers were indicted in the United States for conspiring to murder Special Agent Camarena.[146]

One of the accused, the Mexican citizen Dr. Humberto Alvarez-Machain, was seized out of his medical office in Guadalajara on 2 April 1990 by a group of armed men with Mexican police identification. These men, local bounty hunters contracted by American drug enforcement agents investigating the murder of Camarena, subsequently brought him to Texas. Thus, no formal extradition request was made. Mexico immediately protested the abduction from its territory (as a violation of both its sovereignty and the extradition treaty between the two states) while Dr. Alvarez challenged the jurisdiction of the District Court. Like the defendant in *Ker*, Alvarez alleged that the abduction violated due process. There were some important differences however[147]: in contrast to *Ker*, Mexico now protested vigorously and repeatedly through diplomatic channels. It even requested the return of the accused to Mexico. Furthermore, the level of U.S. Government involvement seems to be greater than in *Ker*, where the kidnapping was carried out by a private detective.

Both the District Court and the Court of Appeals for the Ninth Circuit supported the arguments of Alvarez, ruling that its jurisdiction was rendered defective by Mexico's protests and the fact that the extradition treaty between Mexico and the United States was violated by the forcible abduction. As one can see, more attention was hereby paid to the inter-state level than to the personal human rights of the suspect. However, the U.S. Supreme Court disagreed in "a

---

[144] Facts taken from Costi 2003, p. 71.
[145] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). See Rayfuse 1993, p. 882 et seq.
[146] Margulis-Ohnuma 1999, p. 147.
[147] Ibid., p. 165 et seq.

surprisingly curt judgment"[148], finding that despite the Mexican protest, the fact that the abduction may have been shocking and a possible violation of general international law, "the treaty itself did not explicitly forbid kidnapping and thus had not been violated".[149] The issue thus essentially revolved around a strict and quite (to my opinion) 'unworldly' interpretation of the relevant extradition treaty between Mexico and the U.S.; only if the terms of the treaty prohibited abduction, then jurisdiction could not be exercised. This obviously contradicts the important (customary) international law principle of non-intervention as mentioned in 2.3.3 which clearly prohibits the exercise of police power in the territory of another state without the latter's consent. Justice Stevens, who dissented (together with Justices Blackmun and O'Connor), showed this strange reasoning of the other six judges. He stated that in the event the United States should think it more "expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty."[150] The Supreme Court however held that the rule of *Ker v. Illinois* was fully applicable to this case (even though there were some important differences between the two cases) and that the District Court should not have divested itself of jurisdiction over the accused. It stated that it was up to the executive to decide whether to return Alvarez. The Supreme Court unfortunately did not address Alvarez's arguments that *Ker*, unlike *Alvarez-Machain,* did not involve conduct by U.S. Government officials and that in *Ker* no protest was lodged by the foreign nation whose sovereignty was violated. It seems that the Supreme Court's judgement thus extended 'male captus bene detentus' to official conduct by U.S. organs and their representatives.[151]

> The minority of the Supreme Court strongly disagreed and considered the decision "monstrous". In their view, the concept of due process of law should be interpreted as relating not only to the question of whether the accused would receive a fair trial but also to such principles as protection of the court's process from abuse by the executive, respect for a broadly interpreted concept of international rule of law and respect for human rights.[152]

---

[148] Rayfuse 1993, p. 886.
[149] See Margulis-Ohnuma 1999, p. 166.
[150] Rayfuse 1993, p. 888.
[151] Costi 2003, p. 86.
[152] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 82.

Moreover, the judgment was criticised in legal doctrine, condemned by most states and denounced by international human rights organisations.[153] Although the Supreme Court did not give the international law principles the credits they deserve and the fact that the Court seemed to have ruled that *Toscanino* was a mistake[154] (after all: it stated that regardless of the possible shocking nature of the government's acts, Alvarez was subject to jurisdiction), this case unfortunately still must be considered "the leading U.S. case on forcible abduction by government agents."[155]

Although Alvarez was ultimately acquitted due to a lack of evidence, he filed a civil action against his abductors and the U.S. Government on grounds that the Supreme Court had observed that Alvarez's abduction could be a possible violation of general international law. The District Court found that state-sponsored, cross-border abductions and arbitrary detention violated customary international law. More than thirteen years after the abduction, the Court of Appeals for the Ninth Circuit[156] disagreed on appeal with both Alvarez and the District Court, ruling that there was no clear and universally recognized norm prohibiting transborder abduction under customary international law. However, it did decide that the extraterritorial arrest and detention of Alvarez were arbitrary and "prohibited under a recognized norm of customary international law, as reflected in major comprehensive human rights treaties, in addition to over a hundred national constitutions."[157] On 29 June 2004 however, the U.S. Supreme Court reversed the decision of the Court of Appeals for the Ninth Circuit. When dealing with the question whether the prohibition of arbitrary arrest has attainted the status of binding customary international law, it stated that Alvarez cited

---

[153] See Costi 2003, pp. 86-87, see also Rayfuse 1996, p. 882 et seq. where she writes that "the US Supreme Court has confirmed that the law of the jungle reigns".

[154] See Rayfuse 1993, p. 893.

[155] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 82, citing Paul Michell, 'English-speaking justice: evolving responses to transnational forcible abduction after *Alvarez-Machain*' (29 *Cornell International Law Journal* (1996), 383-500, at 404).

[156] U.S. Court of Appeals for the Ninth Circuit: *Alvarez-Machain v. United States et. al.* (No. 99-56762); *Alvarez-Machain v. Sosa et. al.* (No. 99-56880) (3 June 2003).

[157] Ibid. See also http://homepage.ntlworld.com/jksonc/docs/alvarez-machain-2003-06-03.html and http://www.asil.org/ilib/ilib0610.htm

> little authority that a rule so broad has the status of a binding customary norm today. (...) Alvarez's failure to marshal support for his rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States, which refers to prolonged arbitrary detention, not relatively brief detention in excess of positive authority. (...) Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.[158]

Thus in both cases (criminal and civil), the U.S. Supreme Court did not accept important arguments of Alvarez, hereby seemingly focusing more on domestic than on international law. This very recent decision in a way confirms the criminal case, which received quite some criticism (see below). It may be asserted therefore that the Supreme Court was not impressed too much by the reactions of the international community and consistently proceeds on the path taken earlier.

It is interesting to look a little bit deeper into the first and more important (because on criminal law instead of civil law focused) Supreme Court's decision, which has received a lot of criticism and for some has proven yet again the arrogant and dangerous attitude of the U.S. towards international law.[159] It appears that the U.S. in general, like all mighty states, seem to adhere to the functional view of international law; it will only be used when this has clear benefits, where the interests of that particular state are at stake.[160] The danger hereof is that this mentality can set a dangerous precedent causing international anarchy in the future. It furthermore can have its effects towards individuals as well: if even states do not follow the rules, how can they expect their inhabitants to follow them? It is to be hoped that this era, which is so often called the war on terrorism, will not fool the international community and that respect for the sovereignty of states, human rights and the rule of law will prevail.

Another important case related to this topic was the 1992 *State v. Ebrahim* case.[161] Here, the Appellate Division of the South African Supreme Court clearly weakened the traditional

---

[158] Supreme Court of the United States, *Sosa v. Alvarez-Machain et al.*, Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 03-339, Argued 30 March 2004, decided 29 June 29 2004, see http://a257.g.akamaitech.net/7/257/2422/29june20041115/www.supremecourtus.gov/opinions/03pdf/03-339.pdf, pp. 4 and 44.

[159] See Blakesley 1999, p. 81.

[160] The evident illegal war against Iraq in 2003 is a recent example of that assertion as well. See also the (sometimes desperate) attempts of the U.S. to oppose the ICC's functioning.

[161] *State v. Ebrahim*, 2 *S.A.L.R.* 553, Judgment of 26 February 1991. Facts taken from Costi 2003, p. 88.

approach used by South African Courts by reversing -unanimously- a conviction secured by the forcible abduction of a South African citizen, accused of treason, from his home in Swaziland by two individuals claiming to be police officers. The kidnappers went to Pretoria, South Africa, and contacted a high-ranking police official who arranged the appearance of the suspect at the police headquarters where he was officially arrested. The Swaziland government did not protest and the South African police denied any involvement in the alleged abduction. The Supreme Court, in the words of Steyn J, held:

> The individual must be protected against illegal detention and abduction, the bounds of jurisdiction must not be exceeded, sovereignty must be respected, the legal process must be fair to those affected and abuse of law must be avoided in order to protect and promote the integrity of the administration of justice. This applies equally to a state. When the state is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands". When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean.[162]

In its judgement, the Supreme Court not only reversed the previous case law as wrongly decided in contravention of the applicable rules of common law, it also made explicit reference to the fact that 'male captus bene detentus' had come into discussion in the United States. It hereby referred to the *Toscanino* case.[163] The importance of this South African case lies in the fact that even in the absence of a formal protest by Swaziland, there was no power to try (the by state officials abducted) Ebrahim. The Supreme Court hereby seemed to shift its attention from the inter-state relation to the personal human rights of Ebrahim and the integrity of its own administration of justice. However, Steyn's J's judgement may be seen as unfortunate in two ways.[164] The first is the fact that its judgement was purely based on national law (whereas it should have been interesting to see the effect of international law): "The question at issue here, he went on to say, was not "what the relevant rules of international law are, but what those of our

[162] Ibid. (Quotation found at *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 90.)
[163] See *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 90.
[164] See Costi 2003, p. 90.

own law are"."[165] The second is the fact that the involvement of public authorities seemed to be necessary for staying the proceedings. This is questionable, see *Toscanino* where the public authorities-involvement was also required. Costi asserts that "even when the state denies any involvement in the abduction, the better view is that the state ratifies the act by prosecuting an accused who has been illegally seized."[166] I agree with that. To my opinion however, this does not have to mean that a person has to be released at once. The authorities should only understand that a wrong has been committed and that a profiting court must - not only in order to respect the human rights of the person and his basic sense of justice, but also the court's own integrity as well - repair that wrong. In extreme cases, the release seems appropriate but a reduction of the sentence could be possible as well. This all depends on the (f)actual situation.

After some lack of clarity with respect to the modern position of English law towards 'male captus bene detentus'[167], the law was clarified by the House of Lords in the 1993 *re Bennett* case[168] which dealt with a case of disguised extradition.[169] Bennett, a New Zealand citizen, accused of fraud-related offences in England, was found in South Africa. Although there was no extradition treaty between the two countries, "special arrangements could have been made for extradition under section 15 of the Extradition Act 1989."[170] However, the English police decided not to institute extradition proceedings, but convinced the South African police to arrest the suspect and return him forcibly to England, under the pretext of deporting him to New Zealand via Heathrow, England. It was there where the English police subsequently arrested him.[171] The

---

[165] Ibid., p. 89.
[166] Ibid., p. 90.
[167] In the 1981 case *R. v. Bow Street Magistrates, ex parte Mackeson* (1982) 75 *Cr.App.R.* 24, the Court stayed the proceedings against an U.K. citizen, sought for fraud charges, because the organisation of his deportation from Zimbabwe to the U.K. had circumvented regular extradition proceedings. However, the authority of *Mackeson* was thrown into doubt by the decision of the Divisional Court in *R. v. Plymouth Magistrates' Court, ex parte Driver* [1985] 2 *All ER* 681, where it was held that *Mackeson* had been decided *per incuriam* (a decision which a subsequent court finds to be a mistake, and therefore not of binding precedent).
[168] *Re Bennett*, House of Lords, 24 June 1993, *All ER* (1993) 3. See for a detailed analysis Choo 1994, p. 626 et seq.
[169] According to Shaw 2003, p. 606, the approach in *Bennett* was extended in *R. v. Latif* to cover entrapment (which is in fact luring). "However, where an accused was taking legal action to quash a decision to proceed with an extradition request, the fact that he had been lured into the jurisdiction was not sufficient to vitiate the proceedings since safeguards as to due process existed in the light of the Home Secretary's discretion and under the law of the state to whom he was to be extradited."
[170] Choo 1994, p. 626.
[171] Ibid.

House of Lords stated that in these kinds of cases the maintenance of the rule of law prevails over the public interest in the prosecution and punishment of crime.[172]

Lord Bridge of Harwich added that, to his opinion, there is

> no principle more basic to any proper system of law than the maintenance of the rule of law itself. When 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 law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view.[173]

The House of Lords further ordered the release of the suspect as the only remedy against the abuse of the legal process by governmental authorities. According to the Trial Chamber in the 2002 *Nikolic* case, the 'Bennett approach' "is now generally considered to be the ruling principle for cases where representatives of a State have been involved in a violation of international law and which amount to a violation of the rule of law."[174] *Bennett* made clear that a court has a discretion to stay criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either because it will be impossible to give the accused a fair trial or because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.[175] Although this case was primarily focused (again) on the more procedural side of the problem (and less on the human rights side), the decision is nevertheless to be welcomed. It clearly supports the idea that a serious 'male captus' situation should make the judges decide to divest their jurisdiction. However, it is a pity that the Lords still

---

[172] *Re Bennett*, House of Lords, 24 June 1993, *All ER* (1993) 3, at 138-139. (Quotation found in *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 87.)

[173] Ibid., at 156. (Quotation found in *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 87.)

[174] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 87.

[175] See *Prosecutor v. Milosevic*, Decision on Preliminary Motions, 8 November 2001, para. 49, see http://www.un.org/icty/milutinovic/trialc/decision-e/1110873516829.htm See also Choo 1994, p. 630.

state that involvement of government agents is necessary whereas I believe this is irrelevant. Important is that a wrong has been committed and that it has to be repaired by the profiting court.

A recent case (and the last of this 'domestic chapter') that paid more attention to the human rights side is the famous 2003 *Öcalan* case, judged by the ECHR. In 1999, the leader of the Kurdistan Workers' Party, Abdullah Öcalan, was abducted by Turkish agents in Kenya. Öcalan, "an alleged terrorist accused of killing thousands of Turks in the past twenty years and of promoting the secession of a part of the Turkish territory"[176], argued before the ECHR that he had been victim of an extraterritorial abduction. The Court stated that "an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the persons individual rights to security under Article 5 (1) of the convention."[177] However, since Kenya had cooperated with Turkey in order to bring the suspect to the latter country, there was no violation of Article 5 (1). As a consequence, Kenya's sovereignty wasn't violated either. However, since Öcalan had not been promptly brought before a court and the lawfulness of his detention had not been decided upon speedily, Articles 5 (3) and 5 (4) were breached. The same can be said about Article 6 (the right to a fair trial) and Article 3 (inhumane treatment by being sentenced to death following an unfair trial). Although the fair trial article could here be of interest, this provision is mainly focused on a fair hearing and does not seem to include the pre-transfer period. It can be concluded that *Öcalan* very much resembles the other ECHR-case within the 'male captus' context, *Stocké*. After all: although attention is paid to human rights, the role of the state still seems to matter a lot. In both cases, the right to liberty and security could not be relied upon. In *Stocké*, there was no collusion whereas in *Öcalan*, there was collusion. However, in the last case, there was consent of Kenya as well. My conclusion therefore is that it is a pity that the 'male captus bene detentus' topic could again not be elaborated in detail by the European Court.

3.4 Conclusion

[176] Costi 2003, p. 72.
[177] Ibid., p. 73. See also my scheme in 2.3.3.

It is always difficult to say anything wise about a general concept when there has already been a selection of cases in advance. However, the cases discussed keep reappearing in doctrine as being the most important ones with respect to 'male captus bene detentus', so I believe I can use them as the fundaments of the conclusion in this domestic-level-dimension.

Although not every court in the first period followed 'male captus bene detentus' (see the French case *re Jolis*), it is clear that domestic (mainly British and American) judges have held for a long time that they have jurisdiction over a person at the moment the suspect appeared before them, no matter how custody was secured (see *Ex Parte Susanna Scott*, *R. v. Nelson and Brand* and (the) *Ker*(-Frisbie doctrine)). These judges stressed that once the suspect is in court, a fair hearing should be given and that that should be enough, hereby giving priority to the strict interpretation of what is fair for a suspect and thus to the social need for crime repression at the expense of the rights of the suspect. One thus could say that the end really justified the means.

Later in time, although there were some exceptions like the Israeli *Eichmann* case, courts in other jurisdictions, "while accepting and restating the general proposition that the court has jurisdiction, have occasionally exercised their discretion in favour of a defendant."[178] This view became acceptable in cases like *R. v. Hartley* (New Zealand), but the emphasis in that case seemed to be more on the possible threat to the good administration of justice than on the need to respect international law and human rights principles. Furthermore, the involvement of state officials was necessary to trigger the abuse of process doctrine, see also the Australian case of *Levinge*.

Human rights began to play a more important role in the South African *Ebrahim* case, but there, the decision was merely made on grounds of national law. (Furthermore, the involvement of state officials in the 'male captus' situation was still necessary for staying the proceedings, see also *Stocké*, a case before the ECHR.) Human rights also played an important role in the American case of *Toscanino*. Especially in doctrine, it was hoped that this case would alter the American way which was one of the advocates of 'male captus bene detentus'. However, its practical influence was not that what one was hoping for (see also the American *Yunis* case).

[178] Rayfuse 1993, p. 893

> Although most circuits have acknowledged the Toscanino exception, it is highly significant that no American court has ever applied it to dismiss an indictment. Two distinct grounds have been relied upon in refusing to dismiss an indictment under the Toscanino-exception; either courts conclude that the torturous activity did not rise to the level of outrageousness warranting dismissal, or conclude that United States officials were not directly involved in the torturous activity. The fact that not one of the courts relied on Toscanino to dismiss the indictments highlights the extreme narrowness of that exception and underscores the force of the Ker-Frisbie doctrine.[179]

The second exception to (the) *Ker*(-Frisbie doctrine) recognized by U.S. courts[180] (besides *Toscanino*) states that a court may not try an individual rendered for trial via a violation of international law. However, it seemed that the famous *Alvarez*-case, one of America's leading cases on this subject, showed a clear disdain for international law. Nonetheless, this decision by the U.S. Supreme Court -whatever one may think of it- still remains important.

What *Toscanino* could not do for America, was done by *Bennett* for that other important common law country: the UK. *Bennett* can be seen as the modern British approach to 'male captus bene detentus'. Here, the British Lords "acceded to the claim of the applicant that proceedings against him would be an abuse of process, given the circumstances in which his presence in the United Kingdom had been achieved."[181] Although *Bennett* was primarily focused (again) on the more procedural side of the problem and less on the human rights side, the decision nevertheless supports the idea that a serious 'male captus' situation should make the judges decide to divest their jurisdiction. However, as with all the other cases, it is a pity that the Lords required the involvement of government agents whereas I believe this is irrelevant.

Finally, it must be stated that one still has to wait for the authoritative ECHR to give its opinion on the 'male captus' discussion, although it is expected that it will pay much attention to the human rights dimension. The in 2003 decided *Öcalan* case unfortunately did not address the problem properly.

To conclude, it seems that the modern view of 'male captus bene detentus' on the domestic level states that it is up to the courts' discretion to decide whether jurisdiction should be

---

[179] Paust et al. 1996, p. 430.
[180] See Bassiouni 1999, pp. 254-255.
[181] Warbrick 2000, p. 489.

exercised or not. For 'pure' human rights advocates, this is probably disappointing since they may state that where an individual's presence before a court is secured as a result of a violation of that individual's human rights, then the court automatically lacks jurisdiction to try that person. Although this rationale may seem correct, I do not believe it can always work in reality, especially not with respect to suspects of international crimes (this issue will not only play an important role for the tribunals (see the next chapter) but for the domestic level as well since more and more states are drafting laws making it possible for them to prosecute international crimes). It should not be so that a judge automatically has to release a suspect of whom there is strong evidence that he has committed a genocide when it becomes clear that something went wrong during his apprehension. This however does not mean that I do not believe in the fact that the rights of *every* human must be respected. The wrong clearly has to be repaired. To whom the wrong has been committed should therefore not play a role. I hereby may even go further than the cases discussed before national courts (and the ECHR): when a wrong has occurred, it should always be repaired by the prosecuting court. This means that even when private individuals have kidnapped a person and when it is sure that the prosecutor can't be blamed for any of this, the sense of justice demands that the profiting court should repair that wrong by giving an appropriate remedy. However, an automatic release will sometimes not be proportional. As a consequence, I do not think it is strange to let the judges decide if jurisdiction should be barred or that another remedy should be accorded. After all, they are the ultimate experts in weighing pros and cons.

Resting my own opinion now and returning to the conclusion of this chapter: it is very easy to delete a seemingly old-fashioned and disdaining (U.S.) practice towards international law because it contradicts a more general development towards another and more modern idea of 'male captus bene detentus' (where judges' discretion in serious cases can make the maxim disappear). Nevertheless, the final conclusion of this chapter can be no other than the fact that at this moment it seems that state practice is not uniform.[182] Therefore, it is difficult not to agree with Strijards when he says that doctrine and jurisprudence on the inter-state level shows "a

[182] Van Sliedregt 2001 B, p. 75. See also Lamb 2001, p. 40. Although most attention has been paid to the U.S., it is interesting to note that the 'old-fashioned' practice is still followed as well by that other nation with a (according to me) 'functional' view of international law: Israel. The case of (the on 21 April 2004 released) Mordechai Vanunu should hereby be shortly mentioned: this former Israeli nuclear technician, who in 1986 revealed to the British 'Sunday Times' information about Israel's nuclear program, was kidnapped in Italy (again by the *Mossad*), brought to Israel and (after a secret trial) sentenced to 18 years imprisonment.

helter-skelter course."[183] Although such a conclusion may seem not to be very helpful, it is to my opinion the only correct outcome of this chapter.

[183] Strijards 2001 B, p. 97.

Chapter 4: The tribunals' context

4.1 Introduction

At the beginning of this research, I mentioned that it is important to look at the domestic context first in order to fully understand the status of 'male captus bene detentus' in the target-context of this thesis, the one of the international criminal tribunals. This is not only so because the maxim appeared for the first time in inter-state relations, but also because the national case law and doctrine can play an important role with respect to the sources that determine the rules in the international community and thus may play a role in the context of the international criminal tribunals as well. I will discuss this later when dealing with the law by which the tribunals are governed (this may include domestic case law as well).

Now that it is discovered in the previous chapter that state practice related to the status of 'male captus bene detentus' is not uniform, it's time to look at how the international criminal tribunals have handled the problem. After all, the advent of the ICTY, the ICTR and the ICC has placed the maxim in another perspective and in another level of interaction (between international criminal tribunals and states instead of between states only).

This chapter will be dealt with as follows: first, attention will be paid to the history of this context when dealing with the old International Military Tribunals of Nuremberg and Tokyo (4.2). After that, the two ad hoc tribunals (ICTY and ICTR) will be analyzed in detail (4.3). In 4.4, the permanent ICC will be discussed. Next to general information concerning their creation, different features of these three operational international criminal tribunals will be reviewed; their relation with international human rights, the duty for states to cooperate with them, the specific transfer-procedures and -of course- the most important cases with respect to 'male captus bene detentus'. This chapter will end with a conclusion in 4.5.

4.2 The first international criminal tribunals

4.2.1 Their creation

The dream of exercising international criminal jurisdiction seems to have existed for a long time. Especially after situations of war, its ideological strength was exploited by human rights advocates. WW I marked a new phase within this development since the victors of that war for the first time included penal provisions on the trial and surrender of persons accused of having committed international crimes in the peace treaties with the vanquished.[184] A famous example can be found in Article 227 of the 1919 Treaty of Versailles[185], which stated that the German Emperor Wilhelm II should be tried by an international court for "a supreme offence against international morality and the sanctity of treaties".[186] Such an international court however never appeared since the Netherlands, which had remained neutral during the war and where Wilhelm was hiding after the war, refused to extradite the accused. With respect to other suspects, the "German government and large sections of the German public (...) strongly resisted the idea of surrender of German nationals with a view to their trial by foreign courts."[187] The possibility of trying them before the Supreme Court in Leipzig was advanced, which proposal was accepted. Due to the failure of bringing Wilhelm to trial and the dissatisfaction with the results from 'Leipzig' (888 accused were acquitted or summarily dismissed of a total of 901 cases), it can be held that the attempt to punish war criminals ended in failure. The aftermath of WW I showed that (strict) procedures concerning arrest and cooperation-duties in the context of an international criminal tribunal were probably what one needed to fight impunity more effectively in the future.

The horrendous crimes committed during WW II (especially those by the Nazis) asked for another approach. In order that the international community would never forget what had happened during those five dark years, it was decided by the allied governments that an international approach was to be chosen with respect to the prosecution of the major Nazi and Japanese war criminals: its result came later: the International Military Tribunals (IMTs) of Nuremberg and Tokyo.

---

[184] See Swart 2002 B, p. 1641.
[185] See http://www.yale.edu/lawweb/avalon/imt/menu.htm
[186] Article 227 Treaty of Versailles.
[187] Swart 2002 B, p. 1642.

4.2.2 Making a trial possible

In Europe, it was realized that a repetition of the WW I-surrender system was to be avoided. Therefore, after the war, "a series of armistice agreements and declarations of surrender between the victorious and the vanquished States, almost all of them including explicit provision on the apprehension and surrender of persons accused of war crimes"[188] were concluded. Furthermore, the allied governments set up administrative procedures for the mutual surrender of wanted persons. Until the beginning of the Cold War, "this network of instruments seems, on the whole, to have functioned well."[189] An explanation of why this system had worked and the one after WW I had failed can be that the WW II, in contrast to 1914-1918, "ended with the Allied Nations occupying the territories of their enemies and thus being able to impose their will on them without too many difficulties."[190] As a result, problems connected with my delimitated version of 'male captus bene detentus' (transfer from one jurisdiction to another) simply did not exist. The same can be said about the situation in Japan where "the vast majority of the defendants were already in allied hands before trials began."[191]

In Nuremberg[192], justice was done by jurists from the three major wartime powers (United States of America, the United Kingdom and the Soviet Union) and France while the court in Tokyo[193] consisted of eleven judges originating from countries that had suffered under the Japanese regime.[194] 'Nuremberg' was governed by its Charter[195], which served as an example for the Tokyo Charter[196] and which was -due to its drafters- mainly based on common law.

4.2.3 The role of the suspect

---

[188] Ibid., p. 1645.
[189] Ibid.
[190] Ibid., p. 1647.
[191] Wald 2001, p. 96. Zappalà 2002 A on p. 1186 explains that most WW II defendants "had been arrested even before the decision to establish an international tribunal was taken (…)."
[192] Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'). This agreement, together with the tribunal's Charter, entered into force on 8 August 1945, see 82 *U.N.T.S.* 280 and http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm
[193] The Tokyo tribunal was created in January 1946 by an executive decree of the Supreme Commander for the Allied Powers in Japan (the American general MacArthur).
[194] See Jansen 2001, p. 11.
[195] Charter of the International Military Tribunal, 82 *U.N.T.S.* 280, entered into force on 8 August 1945.
[196] Charter of the International Military Tribunal for the Far East, 19 January 1946, amended on 26 April 1946.

From the beginning, it was clear that the victors were conscious of the importance of respecting due process principles and the rights of the suspects: "we must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."[197] However, the International Military Tribunals of Nuremberg and Tokyo "did not focus much attention on the rights of the accused – at the time of their establishment there was no international body of law establishing basic rights of due process."[198] This meant that although there existed some general provisions in the Charter concerning fair trial[199] one was convinced of the fact that "procedural questions should at no time enable a guilty person to escape justice."[200] Notwithstanding this, it can be argued that both tribunals - especially if one considers the time and context in which they were created when many people thought that it would be better to execute the war criminals at once instead of giving them a trial - provided rather fair trials. The fact that some suspects even were acquitted can be seen as evidence for that statement. "It could be said that as an example of victor's justice it was fair."[201]

Two elements are brought forward by Zappalà when he deals with the reasons behind the quite scare provisions protecting the rights of the suspect in Nuremberg and Tokyo. First, the heinous character of the events of World War II, which "did not allow a rigorous reflection on the protection of the rights" of the suspects and secondly, "the concepts of fair trial and of due process had not yet received international proclamation (...)."[202] The first reason ressembles the earlier discussed (and contested) Eichmann-exception. The second reason, the lack of international attention with respect to due process, was revisited in the aftermath of WW II when international and regional human rights treaties (see my scheme in 2.3.3) were drafted. What these human rights treaties mean for the present international criminal tribunals will be discussed in 4.3.2.

---

[197] American Prosecutor Robert Jackson in his Opening Speech for the Prosecution, Nuremberg, 21 November 1945 (see Zappalà 2002 B, p. 1321).
[198] Goldstone 1996, p. 9.
[199] See Section IV (Article 16) of the Nuremberg Charter and section III (Articles 9 and 10) of the Tokyo Charter.
[200] See La Rosa 1997 (http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList164/FE9C28FD64E69684C1256B66005B4896).
[201] Zappalà 2002 B, p. 1323, note 9 when discussing the Tokyo trial.
[202] Ibid., p. 1324.

4.2.4 Their legacy

Although nothing certain can be said on the matter of 'male captus bene detentus', it is still interesting to see what the general legacy of the IMTs is. 'Nuremberg' and 'Tokyo' "undeniably represented progress towards the creation of a body with truly international criminal jurisdiction, but they were greatly influenced by their origins and in effect applied the law and justice of the victors rather than those of the universal community of States."[203] Whatever their exact legal outcome, they served as examples for the international criminal tribunals after them; they formed the first real steps towards a specific body of law that could be capable of creating a permanent international criminal tribunal in the future. This is especially so with 'Nuremberg' and the seven 'Nuremberg Principles of International Law'.[204] It must finally be said that a quick overview of the first international criminal tribunals learns that a strict duty of arrest and surrender is of essential importance for the success of an international criminal system.[205]

4.3 ICTY and ICTR

4.3.1 The creation of the two ad hoc tribunals

Although there have been many human rights violations in both war and 'peace' situations after the second World War (one could think of Vietnam and Iraq), it was only after the disintegration of the former Yugoslavia when the international community *as a whole* (represented by the Security Council acting under Chapter VII of the UN Charter) decided that international peace and security were at risk and that a new international criminal tribunal was necessary in order to

---

[203] Ibid.

[204] See the 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal', adopted by the International Law Commission at its second session, in 1950, and submitted to the UN General Assembly, see the *Yearbook of the International Law Commission, 1950*, vol. II. and http://www.un.org/law/ilc/texts/nurnberg.htm. One important principle is principle no. 1 which states that 'any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.'

[205] See Swart 2002 B, p. 1640.

punish the perpetrators of the atrocities which reminded the world (and Europe in specific) of WW II. The ICTY was instituted in 1993 by UN Security Council Resolutions 808 and 827 and has its seat in The Hague.

Only one year later, a barbarous genocide took place in Rwanda; within only three months time, almost one million people got killed. Again, the Security Council acting under Chapter VII of the UN Charter concluded that international peace and security were at risk and that the creation of an international criminal tribunal was the best way to prosecute the violations. The ICTR was instituted by UN Security Council Resolution 955 and has its seat in Arusha (Tanzania). Both tribunals are ad hoc tribunals which means that they are not permanent and that their job will end some day, just like 'Nuremberg' and 'Tokyo'. As already stated, the ICTY and the ICTR were set up by the Security Council[206] and based on Chapter VII of the UN Charter. This chapter deals with "action with respect to threats to the peace, breaches of the peace, and acts of aggression". It was thought that only a rapid creation by the Security Council (in contrast to for example the time-consuming method of a treaty) could counter the urgency of the situations at hand.[207]

The tribunals' law is mainly formed by its own primary sources: their Statutes[208] (greatly influenced by common law[209] and written by the UN) and RPE[210], which were written by the judges themselves.[211] The Statutes can be seen as treaties, to which the Vienna Convention on the

---

[206] These important legal institutions were thus set up by a political entity. This has caused lots of discussions with respect to the legal fundaments of the tribunals (Has the UN Security Council the authority to create such international criminal tribunals?). This question has been answered in the *Tadic* case (Appeals Chamber), 2 October 1995 (ICTY) and the *Kanyabashi* case (Trial Chamber), 18 June 1997 (ICTR), where both Tribunals stated that they were in fact legally created. An extensive interpretation of Article 41 UN Charter (Chapter VII-measures not involving the use of armed force) was hereby used. Knoops 2002 (p. 18) shows that it is "fair to say that the drafters of Article 41 did not have an international criminal court in mind. It is however, also fair to conclude that the Article 41 powers are expansively written and therefore do not exclude the imposition of criminal responsibility on persons for atrocities which can only be deterred by establishing international prosecution and trials." Knoops continues by stating that the "direct SC power to create judicial measures pursuant to Article 41 was already exemplified by SC Resolutions 731 and 748, whereby sanctions were imposed on Libya as a means of forcing Colonel Gaddafi to surrender for trial two Libyan nationals accused of the 1988 Lockerbie bombing."

[207] See Trifunovska 2003, p. 6. The fact that both tribunals were set up so fast had the result that the Statutes were quite incomplete (see also Tavernier 1997 (http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList164/A84C98727641A195C1256B66005B4739) which e.g. explains the power and free role of the judges in the creation of the RPE.

[208] The ICTY Statute was adopted on 25 May 1993 by Sec. Council Res. 827 (1993) and the ICTR Statute was adopted on 8 November 1994 by Sec. Council Res. 955 (1994).

[209] See Boot 2001, p. 443.

[210] ICTY: adopted on 11 February 1994. ICTR: adopted on 29 June 1995.

[211] See Damminga and Witjens 2002, p. 618 and the very broad Articles 15 ICTY Statute and 14 ICTR Statute.

Law of Treaties applies.[212] Besides the Statutes and RPE, the tribunals fully apply, if relevant, general international law. One could hereby think of customary international law, general principles of law and international treaties (for as long as the latter are evidence of the former two).[213] Especially if one looks at customary international law, chapter three of this Master's thesis comes in sight. Customary international law can namely be deduced (besides opinio iuris) from what states actually do, for example with respect to the maxim 'male captus bene detentus'. And it was what states actually do with respect to 'male captus' which was at the center of all those cases in chapter three of this thesis. Since it has been concluded that state practice is not uniform, there is no clear custom concerning 'male captus' either. However, one could also look at national law 'an sich': although the ad hoc tribunals have generally been careful in applying national case law as such[214], Chambers have stated that it could be 'appropriate' and 'useful' to analyse such law.[215]

The ad hoc tribunals' system can be seen as *sui generis*, "a system with strong ties of course with the 'old' law families and traditions, but definitely with its own new meanings for concepts and terms, which cannot be automatically deduced from the old meanings."[216]

4.3.2 International human rights

It is clear that the adoption of several international human rights instruments which took place in the period between the IMTs of Nuremberg and Tokyo and the two ad hoc tribunals in the nineties of past century had it consequences. As stated earlier, these treaties could bind the tribunals if they are evidence of customary international law.

---

[212] See Haveman 2003, p. 8: "although the *Statutes* and the *Rules of Procedure and Evidence* of *the ad hoc* tribunals are not the outcome of a treaty, the tribunals themselves have on several occasions pointed out *the sui generis* character of the Statutes as international legal instruments 'resembling a treaty', or have said at least that the rules of treaty interpretation contained in the Vienna treaty 'appear relevant'." See also Sluiter 2001 A, p. 16.

[213] See Sluiter 2001 A, p. 16.

[214] Sluiter 2001 B, p. 155.

[215] See the *Dokmanovic* case (IT-95-13a-PT) of 22 October 1997 (Decision on the Motion for Release by the Accused Slavko Dokmanovic), para. 68: "appropriate to analyze some pertinent national case-law" and the *Nikolic* case (*The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal)), paras. 76-77: "the national case law must be "translated " in order to apply to the particular context in which this Tribunal operates. While bearing in mind these considerations, the Chamber still regards it useful to provide an overview of this case law".

[216] Haveman 2003, p. 18.

Although the provisions of international and regional human rights treaties only create obligations for states parties (with respect to all kinds of offenses) and thus not for non-state entities like an international criminal tribunal (which -by the way- only deals with international crimes), it could be argued that the provisions from my scheme in 2.3.3 are evidence of customary international law and as such binding on all subjects of international law, including such a tribunal.[217] Moreover, if a tribunal was not bound by these provisions, obligations imposed on states could then easily be circumvented by creating tribunals which take over state functions.[218] Finally, it could also be noted that it is not very logical to maintain that these sub-organs of the UN Security Council, which are seen as model institutions with respect to the promotion of human rights[219], could operate without respecting these (procedural) rights. "Lack of respect for individual rights could (...) have negative consequences that transcend the limited framework of the Tribunals."[220]

Fortunately, it was made clear from the beginning that the ad hoc tribunals would have to ensure full respect for these international standards. The UN Secretary-General stated that it was "axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused *at all stages of its proceedings*" [Italics ChP].[221] This means that it has been stated that the protection of the rights of the accused is not limited to a fair hearing in the courtroom and thus that a broad version of the concept of fair trial/due process must be used. Evidence of this development could be read in the fair trial articles of the ICTY Statute (20 and 21) and ICTR Statute (19 and 20) which take the indictment as the beginning of the trial proceedings. A broad version of the concept of fair trial should be used as a safety net in that global fairness is the yardstick against which the decisions of the tribunals must be measured.[222] However, important rights in one of the first stages of the proceedings (such as the

---

[217] See also Zappalà 2002 B, pp. 1327-1328.
[218] Ibid. p. 1328. See also Sluiter 2002, p. 702.
[219] See Article 1 ('purposes') of the UN Charter: "promoting and encouraging respect for human rights and for fundamental freedoms for all" and Zappalà 2002 B, p. 1328.
[220] Swart 2001, p. 201.
[221] UN SG Rep. S/25704, 3 May 1993, para. 106, see also Zappalà 2002 B, p. 1328 and *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 110. "This Tribunal has a paramount duty and responsibility to respect fully the norms developed over the last decades in this field, especially within, but not limited to, the framework of the United Nations. For this reason, this Tribunal has a responsibility to fully respect "internationally recognized standards regarding the rights of the accused at all stages of its proceedings."
[222] See also Zappalà 2002 B, p. 1329.

rights to liberty and security of person and the right not to be subjected to arbitrary arrest and detention) do not exist in the Statutes. As creators of the RPE, judges have tried to fill this gap (although some of their 'creations' have received criticism as well[223]). Attention should hereby be paid to Rule 42, which provides rights to suspects during investigation. Although this rule merely seems to focus on 'fear hearing' human rights such as the right to be assisted by counsel,

> Procedurally, both the Security Council and the Judges, who were responsible for establishing the rules of evidence and procedure for the Tribunals, have (...) been careful to ensure that the two Tribunals adhere strictly to international law rules governing due process. (...) The two Tribunals are therefore distinguishable from the Nuremberg and Tokyo Tribunals procedurally.[224]

With inspiration from (or by applying directly) treaties like the ICCPR and especially the ECHR[225], judges have tried to fill that gap as well in case law: the approach of the Appeals Chamber in *Barayagwiza* (see 4.3.5) is hereby exemplary, see below. One could also think of a provision granting the right to challenge the legality of the arrest, which is absent in the texts governing the ad hoc tribunals: "as stated several times by the Chambers of the Tribunals, such a right is implicit in the system of the Tribunals for its fundamental importance and it directly derives from international norms protecting the rights of the individuals in criminal proceedings, which are binding on the Tribunals."[226]

4.3.3 Duty of cooperation

Now that it is established that the tribunals in principle try to respect quite broad concepts of fair trial/due process in all stages of the proceedings, it is interesting to see to what extent this protection is valid in practice. After all, it has been stated before that these tribunals have no own police power and therefore cannot execute an important part of the proceedings; they are

[223] The best-known example of this is probably the Rule 61-procedure which has been seen as a sort of disguised form of and part of the (often forbidden) trial in absentia.
[224] Goldstone 1996, pp. 8-9.
[225] See Sluiter 2001 B, p. 155: "One may explain the prominent place of the ECHR and the jurisprudence of the European Court as recognition of the importance and authority of this instrument and this international judicial body."
[226] Zappalà 2002 A, p. 1195.

dependent for their enforcement of national authorities and (military) forces present in the area involved (e.g. UNTAES, IFOR and SFOR[227]). This enforcement power is (in the form of the apprehension and transfer of the suspect) of vital importance to the tribunals since the tribunals do not approve 'in absentia' trials[228]. The suspect thus must be in power of the tribunals' system; the tribunals must have in personam jurisdiction. In order to find an answer to the question concerning the extent of the protection, it is good to provide some more information on the relationship between the tribunals on the one hand and the national states and military forces on the other hand.

The Chapter VII-basis[229] and Articles 25[230] and 103[231] of the UN Charter give the tribunals "the power to direct binding orders to States. Unlike inter-State judicial assistance, which is based on the sovereign will to be bound, States are obliged to cooperate with the Tribunal and its requests must be given primacy over other treaty obligations."[232] The exact duty of cooperation with respect to this Master's thesis' subject can be found in Articles 29 of the ICTY Statute and 28 of the ICTR Statute (which have been elaborated in the RPE) and which state:

1. States shall co-operate with the International Tribunal (...) in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   (...)

---

[227] Within this context of a more general military force, one could also think of the use of special forces which are especially trained for operations such as arresting war criminals. An example in this respect is the arrest of Anton Furundzija and Vlatko Kupreskic in Vitez (Bosnia) in 1997 by a group of SFOR-soldiers (Dutch marines (probably related to the special force BBE (Bijzondere Bijstands Eenheid [Special Support Unit])) and commandos). See "Binnen zonder kloppen" ["Entering without knocking"], http://www.kijk.nl/artikel.jsp?art=4309

[228] See Articles 21 (4) (d) ICTY Statute, 20 (4) (d) ICTR Statute and 63 (1) ICC Statute.

[229] An order by a tribunal is to be considered as an application of an enforcement measure under Chapter VII, see S/25704 (1993), para. 126 (Report of the Secretary-General).

[230] "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

[231] "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[232] Van Sliedregt 2001 B, p. 73.

d) the arrest or detention of persons;

e) the surrender[233] [Footnote ChP] or the transfer of the accused to the International Tribunal (…).

A more general obligation for states to cooperate can also be found in resolutions of the Security Council[234] and in case law of the tribunals themselves.[235] Of importance hereby is the fact that UN members cannot invoke the provisions of internal law (e.g. constitutional impediments, implementations with respect to extradition treaties/human right treaties) as justification for a failure to comply with a request or order of a tribunal.[236]

Although it is clear from the previous that there exists a strict duty of cooperation, the tribunals do not have the power to force states to comply with its orders. Van Sliedregt rightly calls this the tribunals' "Achilles heel".[237] In the case of non-compliance, the only option left for the tribunals is to report the matter to the Security Council and hope that this political entity will address the issue. However, as always in international politics, mighty states which support a tribunal (see the U.S.-ICTY relation) could compensate this relative lack of enforcement power by exerting pressure on non-cooperative states. One could hereby think of financial impetus for states that transfer suspected war criminals. Such an action does not necessarily have to be of a non-legal nature: the ICTY has qualified "the obligation to cooperate with the International Tribunal set out in Article 29 of the Statute as an obligation *erga omnes partes*, in the fulfilment of which 'every member State of the United Nations has a legal interest'."[238]

However, cooperation with entities other than states, which may not have the political will to cooperate[239] (since the nature of international crimes is often characterised by a high level of

---

[233] Swart 2002 B notices (p. 1666) that it is not clear what the distinction between surrender or transfer implies; it seems that no particular legal consequences seem to attach to the distinction. Since the RPE of the two present and working international criminal tribunals (ICTY and ICTR) have a preference for 'transfer', I have chosen this word to be in the title of this inquiry.

[234] See for the ICTY para. 4 of Res. 827 (1993) and for the ICTR para. 2 of Res. 955 (1994): "Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber (…)".

[235] See for example the *Blaskic* case (IT-95-14-PT), 18 July 1997 (Decision of Tr. Ch. II on the objection of the Republic of Croatia to the issuance of Subpoenae Duces Tecum), para. 77: "there are no specified grounds on which a state may refuse to comply with an order or request from the International Tribunal, as there are in treaties or bi- or multilateral agreements". (Text found in Sluiter 1998, p. 386.)

[236] Swart 2002 B, pp. 1664-1665. See also Rules 56 and 58 of the RPE.

state involvement[240]), may be more effective.[241] Sluiter even notes, when talking about the ICTY, that practice "has demonstrated that the increase in the number of indicted persons has to a large extent been due to the execution of arrest warrants by entities other than States."[242] One could hereby think of forces in the context of an international peace-keeping operation that have been stationed in a disordered country after war. Examples within the context of the former Yugoslavia are the (military) forces of UNTAES[243] (United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium) and the NATO-led IFOR[244] (Implementation Force) and SFOR[245] (Stabilisation Force) which was and respectively is stationed in Bosnia-Herzegovina.

Although it seems that cooperation with the ICTY (this includes arrest proceedings) falls within their mandates, it is not sure whether this includes a similar strict *duty* to cooperate.[246] Gaeta, who asserts that the multinational force IFOR (and SFOR) does have the authority but not a duty to arrest persons indicted by the ICTY[247], shows that the North Atlantic Council (NATO's political body under which authority the force(s) operate) adopted a resolution on 16 December 1995 which provided that

> having regard to the United Nations Security Council Resolution 827, the United Nations Security Council Resolution 1031, and Annex 1-A of the General Framework Agreement for Peace in Bosnia and Herzegovina, IFOR *should* detain any persons indicted by the International

---

[237] Van Sliedregt 2001 B, p. 74.
[238] Ciampi 2002, p. 1634.
[239] See Sluiter 1998, pp. 383-384.
[240] See Van der Wilt 2004, p. 275.
[241] This is especially so with respect to the ICTY. Ruxton 2001 (p. 20) shows that the ICTR "had considerable success working with national authorities of African countries. As a result we had many high-ranking accused in custody from an early stage."
[242] Sluiter 2001 B, p. 151.
[243] See http://www.un.org/Depts/dpko/dpko/co_mission/untaes.htm
[244] See http://www.nato.int/ifor/ifor.htm
[245] See http://www.nato.int/sfor/index.htm
[246] See Sluiter 2001 B, pp. 151-152.
[247] Gaeta 1998, p. 181. The situation is different with respect to UNTAES though: an *obligation* to cooperate with the ICTY (including the obligation to execute arrest warrants) has been imposed upon UNTAES by Security Council Res. 1037 (1996) where the words "UNTAES *shall* co-operate with the International Tribunal [Italics ChP]" (para. 21) are used (see Gaeta 1998, p. 180, n. 16.). The same is valid for KFOR (Kosovo). Para. 14 of Security Council Res. 1244 (1999), establishing KFOR, "*Demands* full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia [Italics ChP]".

> Criminal Tribunal who come into contact with IFOR in its execution of assigned tasks, in order to assure the transfer of these persons to the International Criminal Tribunal [Italics ChP].[248]

Of interest is the word 'should'. Gaeta notices that "the choice of the word 'should' seems to indicate both *the absence of an obligation proper* and a *strong invitation* to IFOR to execute arrest warrants [Italics ChP]."[249] Furthermore, the passage "persons (…) who come into contact" seem to show that IFOR does not need to actively seek the indicted persons. In the 2002 *Nikolic* case, which will be dealt with in detail below, these matters were further analyzed. The Chamber hereby followed the 2000 *Simic* decision where it was stated that there is in principle

> no reason why Article 29 [which *obliges* states to cooperate, see also 4.3.4, ChP] should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs such as SFOR (…). The need for such cooperation is strikingly apparent, since the International Tribunal has no enforcement arm of its own – it lacks a police force.[250]

Although the formulation to my opinion is not that strong "no reason why (…) should not", it could be asserted that there exists a duty of cooperation for SFOR as well.[251] Whether the force will actively look for indicted persons must again be answered in the negative: the relevant verb remains "to come into contact with"[252], hereby making clear that the force would not go out of its own way to look for a suspect.

That a force like SFOR does not operate pro-actively, has led to a new discussion whether international criminal tribunals (and especially the permanent ICC) should have their own

---

[248] Gaeta 1998, p. 178.

[249] Ibid., n. 10.

[250] *Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, Case No. IT-95-9, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000, para. 46, see http://www.un.org/icty/simic/trialc3/decision-e/01018EV513778.htm Quotation found in *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 49.

[251] See also *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 67: "Once a person comes "in contact with" SFOR (…) SFOR is *obliged* under Article 29 of the Statute and Rule 59 *bis* to arrest/detain the person and have him transferred to the Tribunal [Italics ChP]."

permanent, independent and international 'tracking team' and/or arresting squad. Such entities could also circumvent the potential problem that countries (alone or within the context of an international organisation) stop supporting the tribunals with know-how, materials and personnel - one could hereby think of the deployment of a national special force (under NATO command). The idea of a tracking team (which would help an arrest team in locating suspects) has been proposed by ICTY prosecutor Del Ponte in April 2001[253] whereas the Royal Marechaussee of the Netherlands has put forward the idea of establishing an international arresting team.[254] While discussing this last proposal, it was stated that "arresting war criminals is not a soldier's job but a police responsibility. The actual arrests (...) should be left to specialised police trained teams of the gendarmerie-type, such as the Marechaussee itself (...)."[255] Since these kinds of teams are already available, "the real question (...) would be whether it would be politically feasible."[256] Leurdijk, after analyzing potential obstacles with respect to the proposal such as the role of the non-intervention principle, answers the question in the negative: "while a permanent arresting team might be considered highly desirable, at the same time, it is highly unlikely that here is sufficient political support among UN member states to establish such an 'A-team' (...)".[257]

Notwithstanding this outcome, these interesting ideas deserve attention, especially with respect to the permanent ICC and its functioning in the future.

4.3.4 Transfer procedures

Due to the unique different legal context in which the tribunals operate and the consequential strict duty of cooperation for states (and to a somewhat different but not less effective extent non-state entities like military forces) it is clear that "transfer of persons to a tribunal is fundamentally different from extradition of persons between States."[258] As stated above: UN members cannot

---

[252] The judges in the *Nikolic* case use: "whenever, in the execution of tasks assigned to it, SFOR comes into contact with such a person." (See *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 53.)

[253] See Leurdijk 2001, p. 69.

[254] Ibid.

[255] Ibid.

[256] Ibid., p. 70.

[257] Ibid., p. 71.

[258] Swart 2002 B, p. 1665. See also Amnesty International's International criminal tribunals. Handbook for government cooperation (AI Index: IOR 40/007/1996), 1 August 1996, see

invoke the provisions of internal law as justification for a failure to comply with a request or order of a tribunal. Examples of this assertion can be found in the fact that the normally 'sacred' extradition-requirements in the inter-state context, such as the aspect of double criminality and the exception not to extradite nationals are not valid in this new context of the tribunals. The same can be said about certain national immunities. Furthermore, and this may seem particularly interesting for the problem in this research, Articles 29 ICTY Statute and 28 ICTR Statute "do not permit States to advance human rights arguments against transfer."[259] (It appears however that this prohibition is especially created to counter the more politically coloured arguments with respect to the independence and impartiality of the tribunals in general.) As a result of all this, an order for arrest/detention and transfer cannot be refused. National limitations, procedures and problems may not bar a transfer to the tribunals which can thus in a way be seen as 'superior' to national states. (See also Articles 9 ICTY Statute and 8 ICTR Statute which state that the tribunals shall have primacy over national courts.) It is necessary for the tribunals that there exists such a strict duty of cooperation (e.g. with respect to the transfer) since - as already stated - the tribunals do not have their own enforcement powers. And that it is important to enforce, is clear; in 1996, when not one of the over fifty indicted persons had been detained, Goldstone wrote that this failure of the ICTY "to follow through and arrest those indicted could well be fatal to the credibility of the Tribunal."[260]

The exact procedures of the tribunals with respect to the arrest and transfer of a suspect can be found in the RPE: Rule 2 learns that a suspect is "a person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction." Rule 40 ('provisional measures') gives the prosecutor the power to request any state, in case of urgency, to arrest a suspect and place him in custody whereas Rule 40*bis* learns that the prosecutor may transmit to the Registrar, for an order by a judge, a request for the transfer and provisional detention of a suspect. These Rules deal with a 'suspect'. When 'one or more counts in an indictment have been confirmed by a judge', one no longer speaks of a suspect but of an accused. "Pursuant to Rules 47 and 61, orders

---

http://web.amnesty.org/library/index/engior400071996#TOT) where it is stated that: "Transfer of an accused to an international tribunal or court is not extradition and does not involve the same state concerns as extradition."

[259] Swart 2002 B, p. 1669 who discusses among others the example of existing clauses in extradition treaties forbidding the extradition if a person would have to stand trial before a 'special court', created under circumstances that cast doubt on its independence and impartiality.

for the arrest and transfer of accused persons may be made by a judge or a Trial Chamber."[261] There exist two different arrest warrants. The first is made on the basis of Rules 47 and 54 and is transmitted to a state or to 'an appropriate authority' or 'international body' (see Rules 56 and 59*bis*). The second arrest warrant is sent to all states and is thus called an international arrest warrant (see Rule 61). "The international arrest warrant (...) is meant to be an official reaction of a tribunal to the failure of a State to execute an arrest warrant issued on the basis of Rules 47 and 54".[262] It is a pity that, according to the literal text of the Rules, certain procedural guarantees only are valid after the transfer, see for example Rule 40*bis* (h):

> The total period of provisional detention shall in no case exceed 90 days *after the day of transfer* of the suspect to the Tribunal, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made [Italics ChP].[263]

Swart explains the possibilities of an arrested person once the transfer proceedings in the requested state have started:

> At this stage (as well in the earlier stage of provisional arrest) the arrested person's sole recourse is to a tribunal for *habeas corpus* or for obtaining interim release, since Rule 57 of the RPE of both *ad hoc* Tribunals leaves no discretion to States to decide on these matters. It is, therefore, to be deplored that neither the Statutes nor the RPE of the *ad hoc* Tribunals accord an explicit remedy to the person at this stage. The duration will be determined by the diligence of the Tribunal and the requested State in conducting the proceedings as well as by the choice of the person requested to challenge transfer or to consent to it.[264]

The state to which the order was sent, must then make arrangements with the tribunal for his physical transfer. "Deportation, expulsion, and other means used by the State on whose

---

[260] Goldstone 1996, p. 13.
[261] Swart 2002 B, p. 1671.
[262] Ibid., p. 1674.
[263] Rule 40*bis* (h).
[264] Swart 2002 A, p. 1250.

territory an accused or suspect to remove him have played no visible role in securing the presence of these persons before a tribunal."[265] This is so since the existing procedures as mentioned above

> will almost always offer a better and more effective solution. Matters are different, however, where abduction and other means of getting hold of a person are concerned, which usually derive their efficacy from the fact that the State where a person remains is kept unaware of them.[266]

In the next paragraph, this last issue and other examples of 'male captus' situations will be discussed. First however, it must be noted that it seems that the exact tribunals' procedures (instead of what can be found on paper and in declarations) concerning the pre-transfer period seem to be less focused on the rights of the individual and more on the duty of cooperation for states.[267] The tribunals' provisions regarding the time limits of detention (which are only concerned with the detention *after* the transfer) are examples of this assertion. However, the tribunals' judges seem to use every opportunity to state that all stages of the proceedings must be fair, notwithstanding the exact rules and procedures. In the *Barayagwiza* case for example, the Appeals Chamber of the ICTR held that

> arrest and detention for the purpose of transfer should conform to established international legal norms, that the person arrested on the territory of a State may turn to the Tribunal for *habeas corpus*, and that surrender proceedings should be conducted with due diligence on the part of the Prosecutor.[268]

---

[265] Swart 2002 B, p. 1675.
[266] Ibid.
[267] See Swart 2002 A, p. 1251.
[268] Swart 2002 A, p. 1251.

With respect to the already quoted Rule 40*bis* (h), the Appeals Chamber stated that it should be interpreted as requiring that the time limits are valid from the moment of the arrest[269] (and not from the moment of the transfer), hereby adding procedural guarantees to the pre-transfer period as well.

One final and important question has to be answered with respect the transfer-procedures: which authority is responsible for which part? According to Swart, where it is a case

> involving the *ad hoc* Tribunals, rather than a case of extradition between two States, the responsibility for the person's arrest/or detention lies mainly with the Tribunals, and it is therefore principally to the Tribunals that a suspect or accused must turn for the protection of his basic individual rights when deprived of his liberty for the purpose of surrender.[270]

Notwithstanding this clear statement, it is still unclear if a tribunal will take the consequences for unlawful pre-transfer proceedings that happen outside the view of the tribunals (for example when private individuals kidnap a person and subsequently bring him to OTP officials). According to Sluiter[271], also in cases in which the suspect was the victim of human rights violations without the involvement of the tribunals, the latter can be induced to take appropriate measures. After all, the tribunal has a duty to make sure that the suspect will receive a fair trial, which cannot be seen loose from what has happened before the suspect was transferred. I fully agree with that. However, to my opinion, the integrity or legitimacy of a procedure before an international criminal court may also being jeopardised in case of a serious violation of international law such as a clear state-sponsored abduction. If a tribunal - a model institution in the promotion of human rights and international law in general - 'approves' a clear case of state-sponsored abduction, then there is a certain danger that states abuse that approval in order to use the reprehensible method of abduction even more often, which development could finally lead to international anarchy.

---

[269] Swart 2001, p. 199.
[270] Swart 2002 A, p. 1250.
[271] See Sluiter 2001 A, p. 18.

4.3.5 Most important cases

I will now deal with the most important cases involving the issue of 'male captus'-like situations and their effect on the tribunals' system. Four cases will hereby be analyzed: three before the ICTY: (*Dokmanovic* (1997), *Milosevic* (2001) and *Nikolic* (2002)) and one before the ICTR (the 1999 *Barayagwiza* case). As with the national cases, I will discuss them chronologically.

Dokmanovic[272] was "the first case before either of the *ad hoc* Tribunals in which the legality of arrest was the object of litigation."[273] It is an excellent example of luring and resembles the already analyzed *Stocké* case. Slavko Dokmanovic was accused for his role "in the greatest single massacre of the 1991 war in Croatia, that of the execution of 261 people forcibly taken out of a hospital in Vukovar, eastern Croatia."[274] Dokmanovic was hiding in the Federal Republic of Yugoslavia (FRY), where UNTAES had no arrest powers. And although the FRY had not received the arrest warrant for Dokmanovic, it had failed earlier to execute the arrest warrants of three co-accused. Therefore, OTP investigator Kevin Curtis went to Dokmanovic's home in the FRY in an effort to lure him into Eastern Slavonia; he said he would set up a meeting between him and the Transitional Administrator of Eastern Slavonia, "for the stated purpose of arranging for possible compensation for Dokmanovic's property in Eastern Slavonia, which he had been forced to abandon."[275] Dokmanovic agreed and crossed the border into Eastern Slavonia under what he believed was a promise of safe conduct. There, he was arrested by UNTAES soldiers which put him on board of an airplane to The Hague.

Dokmanovic claimed that the case should be dismissed since he was arrested in a 'tricky' way. Furthermore, he alleged that his arrest violated the sovereignty of the FRY and international law as he was arrested in the latter country without the knowledge or approval of the competent state authorities. These arguments were rejected: the arrest was legal since it had taken place on Croatian territory, where UNTAES had arrest powers[276] and the sovereignty claim could not be made since the ICTY was established under Chapter VII of the UN Charter. With respect to the

---

[272] *Prosecutor v. Slavko Dokmanovic,* (Decision on the Motion for Release by the Accused Slavko Dokmanovic), No. IT-95-13a-PT, T. Ch. II, 22 October 1997.
[273] Sluiter 2001 B, p. 151.
[274] Scharf 1998, pp. 369-370.
[275] Ibid., p. 370.
[276] UNTAES was fulfilling its obligation pursuant to Res. 1037 to cooperate with the ICTY.

luring: this was found not contrary to customary international law and international human rights law. The Trial Chamber hereby focused on the distinction between luring and forcible abduction: the former was acceptable whereas the latter might be not. It explained that in this case, the luring was acceptable in the context of international law since there was no actual physical violation of the FRY territory. This is very questionable since Kevin Curtis "did physically enter FRY territory with the purpose of engaging in a law enforcement activity (the luring) without the FRY's permission."[277] Moreover, it has been stated before (see 2.3.2) that many countries (with the exception of the United States) do not distinguish between the two 'male captus' situations of abduction and luring (since the arrest of a suspect in both situations is obtained by fraudulent means) and therefore do not tolerate the two practices. Scharf explains that the Trial Chamber

> sought to distinguish the many national cases in which courts have "frowned upon the notion of luring an individual into the jurisdiction to effectuate his arrest" on the ground that in such cases there existed an established extradition treaty that was circumvented, while in the *Dokmanovic* case there was no extradition treaty in force between the FRY and the Tribunal.[278]

This is of course a quite strange argument of the ICTY since it has been shown (in this research as well) that there exist no extradition procedures *at all* between states and the international criminal tribunals and that the existing transfer-procedures are not at all comparable to the inter-state mechanism of extradition. However, since it seems that the normal transfer-procedure - the ICTY could have issued an arrest warrant to the FRY - had been circumvented (which can lead to the defense of a violation of the rule of law), it "raises the same concerns as if the ICTY had acted in circumvention of an operational extradition treaty".[279]

Nonetheless, both the luring and the arrest were found legal and thus the question of 'male captus bene detentus' did not have to be answered. After all, there was no 'male' (according to the ICTY). This is certainly an easy way to avoid the whole problem, but also a not so very satisfying one since it seems that the arrest was in violation of *Dokmanovic's* personal human right to liberty and security and thus unlawful. It is a pity that the tribunal hereby used a quite old fashioned way of looking at the concept of luring.

---

[277] Scharf 1998, p. 372.
[278] Ibid., p. 374.

Scharf notes that if the question of 'male captus' was to be answered by the ICTY, it could choose - while recognizing at the same time that 'male captus bene detentus' is generally inconsistent with the modern law of human rights - to adopt the Eichmann exception since in the case of universally condemned offenses, "the issue of the fugitive's abduction should be "decoupled" from his subsequent trial".[280]

As probably has become clear, I do not agree with that idea since I believe that every human right deserves a reparation of a wrong, even the worst criminals and with respect to the worst crimes. This however does not mean that a court should automatically divest itself of jurisdiction: that is the only appropriate remedy for the worst 'male captus' situation. (A release in *Dokmanovic* would for example be not an appropriate and proportionate remedy. "Financial compensation or a (minor) reduction of the sentence in case of conviction would have been more in line with the nature of the violation."[281])

After the *Dokmanovic* case, the ICTR had to deal with the issue. The already often cited *Barayagwiza* case is a very interesting one, given - among others - the quite complicated and long pre-trial detention period which the suspect, accused of genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, had to undergo.[282] On 15 April 1996, Barayagwiza, one of the founders of the notorious and

---

[279] Ibid., p. 376.
[280] Ibid., p. 381.
[281] Sluiter 2001 B, p. 154.
[282] The most relevant dates (taken from http://www.un.org/icty/Supplement/supp9-e/barayagwiza.htm and Appendix A (chronology of events) of the Appeals Chamber Decision of 3 November 1999 in the case of *Jean-Bosco Barayagwiza v. The Prosecutor*) are:
-15 April 1996: Cameroon arrests twelve to fourteen Rwandans on the basis of international arrest warrants. Barayagwiza was among those arrested. The suspect asserts he was arrested by Cameroon on the basis of a request from the ICTR prosecutor, while the prosecutor contends that the suspect was arrested on the basis of international arrest warrants emanating from the Rwandan and Belgian authorities.
-17 April 1996: the prosecutor requests that provisional measures under Rule 40 be taken in relation to the Appellant.
-16 May 1996: prosecutor states she has no intention to prosecute the suspect.
-During May 1996 and February 1997, Barayagwiza was deprived of his liberty solely on the basis of Rwanda's extradition request.
-21 February 1997: a Cameroon court rejects Rwanda's extradition request for Barayagwiza. The court orders his release, but he is immediately re-arrested at the behest of the prosecutor pursuant to Rule 40. This is the second request under Rule 40 for the provisional detention of the appellant.
-24 February 1997: pursuant to Rule 40*bis* (transfer and provisional detention of suspects), the Prosecutor requests the transfer of Barayagwiza to the ICTR.
-3 March 1997: Judge Aspegren signs the order pursuant to Rule 40*bis* which requires Cameroon to arrest and transfer Barayagwiza to the ICTR.
-4 March 1997: order filed.
-21 October 1997: the president of Cameroon signs a decree ordering the suspect's transfer to the ICTR.

hatred inciting radio station RTLM[283] was arrested (whether this was done at the request of the ICTR-prosecutor is not clear) and transferred to Arusha on 19 November 1997, a period that lasted more than 19 (!) months. Other important delays can be found between the order of transfer and provisional arrest (4 March 1997) and the transfer itself (19 November 1997) and between the transfer (19 November 1997) and his initial appearance in court (23 February 1998). Reasons enough for the Appeals Chamber to consider on 3 November 1999 that the fundamental rights of the suspect, such as the right to be brought before the Trial Chamber without delay upon his transfer (based on Rule 62 and Articles 19 and 20 of the Statute)[284], the right to be promptly indicted (based on Rule 40*bis*)[285] and the right to be promptly informed of the reasons for his arrest and of any charges against him (mainly based on international human rights standards)[286], had been violated. It found moreover[287] that the prosecutor failed in her duty to diligently prosecute the case. As a result of all this, the Appeals Chamber concluded not only that the rights of Barayagwiza were violated (para. 100) but also that there was an abuse of process (para. 101), about which the judges stated that it "may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases 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."[288]

The Appeals Chamber decided to release Barayagwiza[289] which is an extreme measure but a possible one, considering the fact that a) the rights of the accused were heavily violated and b) that the OTP itself (and not for example private individuals) was co-responsible for these violations. By deciding the release, the judges in a way created a right to liberty and security[290] whereas this right does not exist in the ICTR Statute, an approach which can fill legal gaps and

---

-23 October 1997: indictment confirmed and arrest warrant and order for surrender issued.
-19 November 1997: accused transferred to the Tribunal's detention unit.
-23 February 1998: initial appearance of the accused before Trial Chamber II.

[283] Radio Télévision Libre des Mille Collines.

[284] *Jean-Bosco Barayagwiza v. The Prosecutor*, Appeals Chamber Decision of 3 November 1999, paras. 70-71.

[285] Ibid., para. 67.

[286] Ibid., para. 85.

[287] Ibid., paras. 91-98.

[288] Ibid., para. 74. See for more information about the doctrine of abuse of process before international criminal tribunals Knoops 2002, p. 235 et seq.

[289] Swart 2001, pp. 197 and 201.

[290] The judges in the *Milosevic* case (see below) referred to 'Barayagwiza' and made clear that the tribunal was bound by Article 9 (4) ICCPR, although that *habeas corpus*-provision is not reflected in the ICTY Statute: "as one of

which will hopefully be followed in this international context. The decision in contrast also led to great protest from Rwanda, which suspended its cooperation with the ICTR.[291] However, Barayagwiza was not released immediately after the decision since the prosecutor had submitted a motion for review. That motion was successful; the Appeals Chamber reviewed its earlier decision on 31 March 2000 in the light of new facts. The Appeals Chamber found that Barayagwiza was earlier aware of the general nature of the charges against him, the prosecutor had actually made efforts to speed up the process and the initial appearance of the accused had been deferred with the consent of his counsel.[292] "It arrived at the conclusion that although the rights of the Appellant had been violated, these violations did not justify the dismissal of the indictment."[293] Instead, he was entitled to other remedies such as a reduction of his sentence and financial compensation. As stated earlier, I believe this is the right approach: although the ICTR in a way upheld 'male captus bene detentus' (after all: notwithstanding violations of the suspect's human rights, the court did not divest itself of jurisdiction), it also showed that the release of a suspect of international crime is possible when serious human rights violations have taken place.

The *Barayagwiza* case can be seen as a giant step forward in the protection of human rights within the context of the international criminal tribunals (especially if one looks at the first case dealing with human rights (*Prosecutor v. Dusko Tadic*) when it was held by the ICTY that the "unique nature of the international tribunal and the exceptional circumstances in which it has to operate might prevent it from applying international human rights standards without any reservations or restrictions"[294]). The ICTR for example stated that *every* violation of the suspect's human rights needs reparation which means that the international criminal procedure is not limited to what happens in court.[295] Evidence of a similar broad notion can be found in para. 73 of the Appeals Chamber's decision which states that "under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's

---

the fundamental human rights of an accused person under customary international law, it is, nonetheless, applicable, and indeed, has been acted upon by this International Tribunal."

[291] Boot 2001, p. 447.

[292] See Swart 2001, p. 207.

[293] Swart 2001, p. 197.

[294] Ibid., p. 202 (citing the *Prosecutor v. Tadic* case (IT-94-1-T) of 10 August 1995 (Decision on the prosecutor's motion requesting protective measures for victims and witnesses), paras. 27-28).

[295] See Sluiter 2001 A, p. 20.

rights."[296] These passages can in fact be read as a sort of broad acceptation of the tribunals' responsibility in that even the actions of private individuals outside the court's scope can lead to a bar to jurisdiction. The case however also showed that a state will not hesitate to stop its cooperation when a suspect of an international crime is released for procedural reasons. This demonstrates the extremely vulnerable position such an international criminal tribunal can have in the international community: not only is there a constant risk for negative reactions when the tribunal violates human rights, it can also get negative reactions when it wants to execute probable righteous consequences of these violations.

The third case is the famous story of *Milosevic*. Almost a year after four Dutch SAS-fanatics went to Yugoslavia with the alleged goal of kidnapping Milosevic (and got caught[297]), the former president was apprehended in a more successful operation from his home by special Yugoslav forces on 31 March 2001 for corruption and electoral fraud. Milosevic had been indicted earlier (in May 1999) on four counts by the ICTY. At that time, he was the first head of state in function that was called to account by an international criminal tribunal. An international arrest warrant was issued the same month. Now that Milosevic was in custody (albeit for other crimes), the pressure from Western states to transfer Milosevic to the ICTY began to grow. On 23 June 2001, the Yugoslavian government issued a decree enabling the transfer of Yugoslavian suspects to the ICTY.[298] Milosevic's attorneys of course challenged this decree on grounds that it was unconstitutional.[299] While the request for transfer was still under discussion in the Yugoslavian Constitutional Court, Serbian Prime Minister Djindic transferred Milosevic to the ICTY on 28 June 2001. Djindic admitted the day after that the sudden transfer of Milosevic was the consequence of great pressure from in particular the U.S. and the European Union, which threatened Yugoslavia with a financial boycott if the country would not comply with the requests of transfer in this case.[300] Yugoslavian president Kostunica promptly labelled the transfer as

---

[296] *Jean-Bosco Barayagwiza v. The Prosecutor*, Appeals Chamber Decision of 3 November 1999, para. 73. It seems strange therefore that the second decision of the Appeals Chamber also concentrated on the fact that it was not the fault of the prosecutor (who had made efforts to speed up the process) but more the fault of Cameroon concerning the delay of the transfer. After all, under the abuse of process doctrine, it does not matter who committed the fault. The fact that there was a fault may divest the court of jurisdiction.

[297] See http://www.cnn.com/2000/WORLD/europe/07/31/yugo.dutch.02.reut

[298] See http://www.cnn.com/2001/WORLD/europe/06/23/milosevic.decree/index.html

[299] See Van Sliedregt 2003, p. 914.

[300] Strijards 2003, pp. 750-751. See also Van Sliedregt 2001 A, p. 635 where she states that it was the power of money and not the power of justice that made Milosevic end up in a prison in Scheveningen and

illegal and it must be admitted that, in the words of Van Sliedregt, the transfer does not deserve the beauty prize.[301] After all, Milosevic was actually in custody for other alleged crimes.

Milosevic, who was not willing to raise an inadmissibility issue under the ICTY RPE because such could be interpreted as an acceptation of the court's jurisdiction[302], made his point in two motions (of 9 and 30 August 2001) which were considered in the decision on preliminary motions of 8 November 2001.[303] Milosevic stated that his transfer was "an abuse of process in that the procedures of the Federal Republic of Yugoslavia were bypassed and he was unlawfully transferred to the International Tribunal."[304]

The Prosecution responded that states "may not rely on their national legislation to defeat their international obligations"[305], which meant in this case the transfer of Milosevic to the ICTY (see Article 29 ICTY Statute). Article 58 stipulates indeed that "the obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused (...) to the Tribunal which may exist under the national law or extradition treaties of the state concerned." The judges agreed, saying that the

> purpose of Rule 58 is to ensure that domestic procedures relating to the surrender and transfer of a person, from a State in respect of whom a request for arrest and transfer has been made, are not used as a basis for not complying with the request. The importance of complying with requests under Article 29 cannot be overstressed. (...) That being the case, the Rule should be given an interpretation that takes full account of its purpose. Accordingly, the Chamber holds that (...) the provisions of Rule 58 apply and, consequently, the transfer was effected in accordance with the provisions of the Statute.[306]

---

http://www.asil.org/insights/insigh76.htm: "Critics of the decision argued that Serbia was under pressure to act because an international donors' conference was scheduled for June 28 to consider $1.2 billion in aid for the reconstruction of Serbia." The same pressure can nowadays be found in the efforts of the West to pressure the Serbian Republic in Bosnia to arrest and transfer alleged war criminals such as Radovan Karadzic. Without that cooperation, Bosnia will probably not become member of the Partnership for Peace (see http://www.nato.int/issues/pfp/index.html), the 'waiting room' for NATO, see NRC Handelsblad, 1 June 2004, "Serviërs Bosnië beloven medewerking" [Serbians in Bosnia promise cooperation].

[301] Van Sliedregt 2003, p. 915.

[302] See Strijards 2001 B, p. 97.

[303] See http://www.un.org/icty/milosevic/trialc/decision-e/1110873516829.htm

[304] Ibid., para. 35.

[305] Ibid., para. 36. See also Article 27 of the Vienna Convention on the Law of Treaties which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The doctrine of abuse of process (which was considered in among others *Bennett* and *Barayagwiza*) was also discussed. The Trial Chamber explained:

> if there is an abuse of process, it does not lead to a lack of jurisdiction on the part of the International Tribunal; what it raises is the question whether, assuming jurisdiction, the International Tribunal should exercise its discretion to refuse to try the accused. Secondly, the International Tribunal will exercise its discretion to refuse to try the accused if there has been an egregious breach of the rights of the accused.[307]

The Chamber concluded that the circumstances under which Milosevic was arrested and transferred were not such as to constitute an egregious breach of the rights of the accused, hereby using the same formula as the judges in *Barayagwiza*. I agree with the decision in *Milosevic*: a domestic procedural problem should never bar an international criminal tribunal to exercise jurisdiction. Besides the fact that it is not the ICTY's problem when a state has procedural difficulties with its own law, such problems do not violate the suspect's rights in such a way to trigger the abuse of process exception.

Milosevic also addressed the District Court of The Hague, "complaining that the constitutional habeas corpus-guarantees had been violated – not by the ICTY, but by the Host State, facilitating the abduction."[308] However, the District Court Judge declared[309] the motion inadmissible, "relegating the whole question to ICTY, which he had to consider as hierarchically superseding his national jurisdiction."[310]

The most important 'male captus bene detentus' case in the context of the international criminal tribunals is the 2002 *Nikolic* case. Dragan Nikolic, accused of having committed crimes against humanity, was abducted from the territory of the FRY by unknown individuals who handed him over to representatives of SFOR in Bosnia. They on their turn delivered him to the OTP. On 17 May 2001, the defense filed a motion challenging the jurisdiction of the tribunal. The defense believed that the allegedly illegal arrest was attributable to SFOR and the prosecution.

---

[306] Ibid., paras. 45-46.
[307] Ibid., para. 48.
[308] See Strijards 2001 B, p. 97.
[309] Arrondissementsrechtbank 's-Gravenhage, *Slobodan Miloševic tegen de Staat der Nederlanden*, Vonnis in kort geding van 31 augustus 2001, LJN-nummer: AD3266. Zaaknummer: KG 01/975.
[310] Strijards 2001 B, p. 97.

However, it asserted as well that the illegal character of the arrest in and of itself should bar the Tribunal (which was set up with, inter alia, the objectives of preserving human rights) from exercising jurisdiction, by not applying the disputed maxim "male captus, bene detentus" (which, according to the defense, had lost much of its relevance in the practice of various national jurisdictions) but a new maxim called 'male captus, male detentus', "meaning that an irregularity has occurred in the arrest of the Accused and therefore should bar any further exercise of jurisdiction by the Tribunal."[311] The central submission of the defense was that an unlawful transfer of a suspect to the ICTY should lead to the conclusion that "international law has to some degree been breached and that the violation of some fundamental principle - whether it be state sovereignty and/or international human rights and/or the rule of law - needs to be protected above all other considerations."[312]

The prosecution on the other hand stated that this was not automatically so, but that it was up to the tribunal "to undertake a balancing exercise between the duty to respect the rights of the Accused and the duty to prosecute very serious violations of humanitarian law."[313]

The Trial Chamber delivered its judgment on 9 October 2002, in which it - probably thanks to the arguments of the defense - explicitly dealt with the issue of 'male captus bene detentus'. Just like my own inquiry, the Trial Chamber first looked at the case law of various national jurisdictions, hereby stating that the interpretation of this case law had to be "translated"[314] in order to apply it to the particular context in which the tribunals operate (vertical level instead of the horizontal inter-state level). It also had the same (for some probably disappointing) conclusion, namely that the case law in this matter is "far from uniform"[315].

After this review, the judges underscored the importance they attach to respect for the rights of the accused and to proceedings which fully respect due process of law.[316] The Chamber hereby stated that the latter "encompasses more than merely the duty to ensure a fair trial for the

---

[311] See http://www.un.org/icty/Supplement/supp37-e/nikolic.htm and *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 70.

[312] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 71.

[313] See http://www.un.org/icty/Supplement/supp37-e/nikolic.htm

[314] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 76.

[315] Ibid., para. 75.

[316] Ibid., para. 110.

Accused."[317] It "also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal."[318] These passages should of course be welcomed since they confirm that it is the whole proceeding that should pass the test of a fair trial and not only the one which starts from the moment the suspect stands before the judges. The Trial Chamber then followed the 'balancing-proposal' by the prosecution in that it was up to the judges to find out whether unlawful pre-transfer circumstances should have their effect on the tribunal's system or not. It hereby used the abuse of process doctrine as applied in *Barayagwiza* and *Milosevic*: a court may decline - as a matter of discretion - to exercise its jurisdiction in cases 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. It seems that the Chamber in the *Nikolic* case – like the Chambers in *Barayagwiza* (and *Milosevic* which referred to *Barayagwiza*) – approves that serious violations, whether they have been committed by entities related to the tribunal or not, may bar a court from exercising jurisdiction since it held that

> in a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment. *But even without such involvement this Chamber finds it extremely difficult to justify the exercise of jurisdiction over a person if that person was brought into the jurisdiction of the Tribunal after having been seriously mistreated* [Italics ChP].[319]

Notwithstanding this, the Trial Chamber rejected the allegations as the facts, although they did raise some concerns, did not show that the treatment by the unknown individuals was of such an egregious nature that it would constitute a legal impediment to the exercise of jurisdiction.[320]

---

[317] Ibid., para. 111.
[318] Ibid.
[319] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 114.
[320] The Trial Chamber also made an interesting statement concerning the allegedly violation of FRY's sovereignty. It stated that in the vertical relationship between the Tribunal and States, "sovereignty by definition cannot play the

Although the ICTY thus accepted a quite broad responsibility, it stressed that under Article 11 of the "with caution"[321] applied ILC's Draft Articles on State Responsibility (see also 2.3.2), SFOR did not acknowledge and adopt the conduct of the private individuals as its own when it took custody of the accused (and, according to the defense, advantage of the situation).[322]

The defense appealed and the Appeals Chamber delivered its judgement on 5 June 2003.[323] Some passages certainly deserve attention. Like the Trial Chamber, the Appeals Chamber gives a quick overview of national case law concerning 'male captus bene detentus'. In para. 24, the judges state:

> Although it is difficult to identify a clear pattern in this case law, and caution is needed when generalising, two principles seem to have support in State practice as evidenced by the practice of their courts. First, in cases of crimes such as genocide, crimes against humanity and war crimes which are universally recognised and condemned as such ("Universally Condemned Offences"), courts seem to find in the special character of these offences, and arguably, in their seriousness, a good reason for not setting aside jurisdiction [The Chamber hereby referred to the *Eichmann* case, ChP]. Second, absent a complaint by the State whose sovereignty has been breached or in the event of a diplomatic resolution of the breach, it is easier for courts to assert their jurisdiction. The initial *iniuria* has in a way been cured and the risk of having to return the accused to the country of origin is no longer present.[324]

The first principle resembles the Eichmann-exception which I object. However, it must be admitted as well that the seriousness of the crimes involved may play a role when dealing with the appropriate remedies for victims of 'male captus' situations. Nevertheless, every suspect must

---

same role" as in the horizontal relationship between States. The Trial Chamber found as well that, in contrast to various cases involving horizontal relationships between States, "in the present case, no issue arises as to possible circumvention of other available means for bringing the Accused into the jurisdiction of the Tribunal", as "States are obliged to surrender indicted persons in compliance with any arrest warrant". Even if a violation of State sovereignty had occurred, the FRY would have been obliged, under Article 29 of the Statute, to immediately re-surrender the Accused after his return to the FRY.

[321] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), para. 60. The Chamber explained that the articles are "still subject to debate amongst States" and that they are not primarily directed at the responsibilities of non-State entities.

[322] *The Prosecutor v. Dragan Nikolic* (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal), paras. 66-67.

[323] *The Prosecutor v. Dragan Nikolic* (IT-94-2-AR73), Appeals Chamber, 5 June 2003 (Decision on Interlocutory Appeal concerning Legality of Arrest), see http://www.un.org/icty/nikolic/appeal/decision-e/030605.pdf.

[324] Ibid., para. 24.

be able to have its wrong repaired. With respect to the second principle: if might be true that it is easier for courts to assert their jurisdiction when there has been no complaint from the injured state but the person involved will still have a feeling that injustice (iniuria) has been done, which will not be cured by the non-existence of a complaint from his state of refuge. I thus believe the human rights side is more important than the state sovereignty-discussion, especially within the context of the tribunals.

The Appeals Chamber continued by stating that the legitimate expectation that those accused of "Universally Condemned Offences" will be brought to justice swiftly "needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused."[325] It hereby gave little importance to the issue of State sovereignty. The judges even added that (leaving aside the human rights considerations for a moment) "assuming that the conduct of the Accused's captors should be attributed to SFOR and that the latter is responsible for a violation of Serbia and Montenegro's sovereignty, the Appeals Chamber finds no basis, in the present case, upon which jurisdiction should not be exercised."[326] Although I agree that the notion of state sovereignty should be of minor importance within this discussion, the Appeals Chamber should in my opinion be careful with the SFOR-part. Although SFOR-operations (because of their supranational powers) will probably not violate state sovereignty as quickly as a normal, national military unit within inter-state relations, the ICTY should maybe not have stated so clearly that it finds no basis upon which jurisdiction should not be exercised, even if a breach of international law should be attributed to SFOR. If an unlawful (due to a violation of international law) arrest or detention can be attributed to SFOR (or even closer to the tribunal: to the OTP), then this fact should play a role within the 'male captus' discussion, albeit it a smaller one than an unlawful arrest or detention caused by human rights violations. An international criminal tribunal will not give a good example and will consequently not be respected if it automatically approves unlawful activities of its organs and 'helpers', even if it 'only' concerns a violation of state sovereignty.

The Appeals Chamber then turned to the human rights dimension and agreed with the argumentation of the Trial Chamber that in exceptional cases, the egregious nature of a suspect's treatment could impede the exercise of jurisdiction. It hereby referred to *Toscanino* and

[325] Ibid., para. 26.

Barayagwiza. It also concurred with the Trial Chamber on the gravity of the alleged violation of the accused's human rights; it found that his rights were not egregiously violated in the process of his arrest. As a consequence, the appeal was dismissed.

4.4 The ICC

4.4.1 Its creation

The establishment, functioning and experience of the ICTY and ICRT gave new force to the old discussion, which had started around the beginning of the 20th century, of creating a permanent international criminal court. This discussion had revived after Nuremberg and Tokyo with the efforts (especially by the UN International Law Commission[327]) of drawing up a statute. Although this process was delayed by the Cold War, the ICC Statute was ultimately signed in Rome on 17 July 1998.[328] On 1 July 2002, the Statute entered into force. Although the UN has played an important role within the establishment of the ICC[329], the latter is not an UN organ like the ICTY and the ICTR but an independent international organisation. It is good that the ICC – as being a *permanent* and *independent* international criminal court – was not given birth by a political entity like the UN Security Council although it is clear that the ICC's establishment was among others made possible by earlier creations of the UN such as the ICTY and ICTR. Philippe Kirsch, the first President of the ICC wisely stated during the inauguration of the elected judges at the 'Ridderzaal' [Hall of Knights] in The Hague on 11 March 2003 the following. "Those institutions create a past for our future."[330]

---

[326] Ibid., para 27.

[327] See http://www.un.org/law/ilc

[328] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

[329] See also the name of the conference preceding the adoption of the Rome Statute: '*United Nations* Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' [Italics ChP] and the preamble of the Rome Statute "Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system (…)".

[330] See the 'Statement by the President at the Inaugural Ceremony of the International Criminal Court: http://www.icc-cpi.int/library/organs/presidency/Speech_President_of_the_ICC.doc

The ICC's (sources of) law can be found in Article 21 of the ICC Statute. It is principally formed by its Statute, the Rules of Procedure and Evidence (RPE)[331] and the Elements of Crimes (EofC)[332]. The latter shall assist the Court in the interpretation and application of the crimes as mentioned in Articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes).[333] It is interesting to note that - contrary to the ad hoc tribunals - the Statute, RPE and the EofC have been drafted by diplomats of the states parties who wanted to create texts, which could be approved by a great number of countries. As a consequence, these texts are the results of long debates and compromises. As the ICC Statute is a treaty, it is also governed by the Vienna Convention on the Law of Treaties. Next to the Statute, the RPE and EofC, Article 21 (1) of the Rome Statute shows that the ICC's law is formed by

> where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. (...) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.[334]

While para. 2 of this article states that the ICC may apply principles of law as interpreted in its previous decisions, para. 3 is especially important for this research and the notion of human rights since it states that "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights."[335]

It is important to note as well that the ICC's jurisdiction is not 'superior' to national courts (in the way the ad hoc tribunals are) but that it is complementary to national criminal jurisdictions[336]: the Court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or

---

[331] Report of the Preparatory Commission for the International Criminal Court, finalized draft text of the Rules of Procedure and Evidence, PCNICC/2000/INF/3/Add.1.
[332] Report of the Preparatory Commission for the International Criminal Court, finalized draft text of the Elements of Crimes, PCNICC/2000/INF/3/Add.2.
[333] See Article 9 ICC Statute.
[334] See Article 21 (1) ICC Statute.
[335] Article 21 (3) ICC Statute.
[336] See the Preamble of the ICC Statute.

unable genuinely to carry out the investigation or prosecution.[337] This in a way can be seen as identical to the idea of 'aut dedere aut iudicare': if a state does not prosecute the suspect, accused of having committed international crimes, itself, it must extradite him to another state (which is the original meaning of the maxim) or to the ICC (which can be seen as the modern meaning of the maxim).

Article 12 of the ICC Statute gives the preconditions to the exercise of jurisdiction, whereas Article 13 deals with the exercise of jurisdiction itself. Generally speaking, the Court may exercise its jurisdiction if one or more of the following states are ICC parties or have accepted its jurisdiction ad hoc:

1) The state on the territory of which the conduct occurred (comparable to the territoriality principle);
2) The state of which the person accused of the crime is a national (comparable to the active nationality principle).

These two main options are valid when a certain situation is referred to the prosecutor by a state party or when the prosecutor has initiated an investigation *ex proprio motu* (on its own accord). However, an exercise of jurisdiction is always possible (and thus not restricted to the 'territorial'- and 'active nationality'-states parties) when a situation is referred to the prosecutor by the Security Council acting under Chapter VII of the UN Charter. In that case, the globe is the ICC's limit (I will come back to this issue when dealing with the duty of cooperation in 4.4.3).

4.4.2 International human rights

The previous paragraph has made clear that international treaties, principles and rules of law – where appropriate – are part of the ICC's law. This may include treaties on the human rights field as well. Furthermore, whatever the exact ICC law consists of, it must be consistent with internationally recognized human rights. Next to this general Article 21, Article 67 of the same Statute contains a catalogue of so-called minimum fair-trial guarantees which are "basically the

[337] See Article 17 ICC Statute.

same rights provided for by the provisions of the ICCPR and the Statutes of the *ad hoc* Tribunals."[338] One could hereby think of the right to be tried without undue delay. Also of interest is Article 55 of the ICC Statute which is called 'rights of persons during an investigation' and which tackles the human rights problem during the pre-surrender phase. The article is a "clear improvement"[339] if one looks at the earlier mentioned Rule 42 of the ad hoc tribunals. The article learns that a person, among others:

-shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment
-shall not be subjected to arbitrary arrest or detention
-shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute

> These provisions are certainly the most advanced text on the protection of pre-trial rights of persons during international criminal investigations. No such provisions were contained in the Nuremberg and Tokyo Charters, nor are present, at least not in such a detailed form, in the ICTY and ICTR Statutes or RPEs. It is indisputable that, in the ICC Statute, there has been a clear attempt to improve the protection of rights relating to the administration of criminal justice, on the assumption that this is one of the parameters that will be examined in evaluating the fairness of the proceedings before the ICC.[340]

Although these rights are meant for an ICC-investigation, they "may be of importance (...) within the framework of national proceedings with regard to arrest, provisional arrest, and surrender."[341] In can also be stated that the ICC, which still has supranational powers and thus in a way is 'superior' to national institutions, should (like the UN ad hoc tribunals) take its responsibility for the whole legal process, even when a problem arises in the domestic context.

In conclusion, one could say that the effort has been made to give human rights related to the pre-transfer phase the place they deserve. This seems an improvement with respect to the

[338] Zappalà 2002 B, p. 1349.
[339] Sluiter 2002, p. 703.
[340] Zappalà 2002 A, p. 1183.
[341] Swart 2002 B, p. 1689.

rules of the ad hoc tribunals before their judges filled the legal gaps and when that part of the law mainly concentrated on the duties of the state.

4.4.3 Duty of cooperation

Since the ICC's Statute is an international treaty and thus in principle only binds states which are parties to it[342], the ICC's duty of cooperation-system cannot be compared to the ones of the ad hoc tribunals since the latter are based on Chapter VII of the UN Charter. The latter means that the duty of cooperation is valid for all UN members and that it prevails over obligations countries may have assumed under any other international agreement.[343] Since this is not the case for the ICC, it will have more difficulties in 'forcing' states to cooperate. The ICC however may also exercise its jurisdiction in a more robust way and to more countries than only the states parties if a certain situation is referred to the prosecutor by the Security Council, acting under Chapter VII of the UN Charter.[344] This means that the obligations with respect to the arrest and surrender[345] (the latter is the official ICC-word for 'transfer'), which will be dealt with in 4.4.4, then become obligations for all UN member states, also those which are not an ICC-state party. "Moreover, pursuant to Article 25 of the Charter, they acquire the character of obligations *erga omnes* while, as a consequence of Article 103 of the Charter, they prevail over obligations Member States may have assumed under any other international agreement."[346]

The normal ICC provisions relating to the duty of cooperation for states parties in general seem clear: the general obligation to cooperate can be found in Article 86 which states that states parties "shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". (Article 86 is the first article of part 9 of the Rome Statute which is entirely devoted to international cooperation and judicial assistance.)

---

[342] See Art. 34 of the Vienna Convention on the Law of the Treaties: "A treaty does not create either obligations or rights for a third State without its consent." (See http://www.un.org/law/ilc/texts/treaties.htm)
[343] This explains the drafting of e.g. Article 90 ICC Statute ('competing requests').
[344] See Article 13 ICC Statute.
[345] See Article 102 ICC Statute which states: "For the purposes of this Statute: (a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute. (b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation."
[346] Swart 2002 B, p. 1677.

The ICC may request non-states parties or inter-governmental organisations to cooperate with the Court on an ad hoc basis.[347] Especially inter-governmental organisations (e.g. NATO, Interpol) could be very useful for pre-trial proceedings and maybe even for the essential 'tracking' and arresting moments.

What can be said about the sanction mechanism in case a state does not cooperate as it should be? The ICC Statute gives an answer: paras. (5) (b)[348] and (7)[349] of Article 87 learn that the matter may be referred to the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council. Strijards notes that this sanction-arsenal is not very deterrent[350], but like the UN ad hoc tribunals, it is very well possible that mighty states in favor of the ICC put pressure on non-cooperative states:

> Failing any action taken or recommended by the Assembly of States Parties or the Security Council, States Parties to the Statute or any Member State of the United Nations, as the case may be, may resort to remedies generally available to them under international law, with a view to ensuring compliance with requests for cooperation by the Court.[351]

Although the ICC's system of cooperation can still be seen as mainly 'vertical' or 'supranational'[352], the ICC's enforcement mechanism is clearly not as robust as the ones of the ad hoc tribunals (with their Chapter VII-backbone). Therefore, the ICC is even more dependent on

---

[347] See http://www.icc-cpi.int/basicdocs/romestatute.html and Article 87 (6) of the Rome Statute which states that the "Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate." See also Articles 54 (3): "The Prosecutor may (…) (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate; (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person." and 44 (4): "The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties."

[348] "Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council."

[349] "Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

[350] Strijards 2001 A, p. 73.

[351] Ciampi 2002, p. 1635.

national states than the ICTY and ICTR. This enlarges the chance that – whenever there are problems between the court in The Hague and national states – the ICC may have more difficulties in forcing the states to cooperate. The discussion with respect to a permanent international arresting team, which could circumvent such a problem, must therefore not be forgotten.

4.4.4 Transfer procedures

"The arrest process lies at the very heart of the criminal justice process: unless the accused are taken into custody, we will have no trials, no development of the law by the courts; and ultimately, no international justice."[353] The issues of arrest and transfer, which are in the middle of a research concerning 'male captus bene detentus' are - as with the present ad hoc tribunals - of vital importance to the ICC as well since a "trial may not take place in the absence of the accused, as proceedings in absentia are not viable before the International Criminal Court."[354]

The most relevant articles relating to the subject of arrest and surrender are Articles 58 (issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear), 59 (arrest proceedings in the custodial state), 89 (surrender of persons to the Court), 90 (competing requests), 91 (contents of request for arrest and surrender), 92 (provisional arrest), 101 (rule of speciality) and 102 (use of terms). The RPE play a modest role; this "is not surprising since most articles in the Statute on surrender compare to those of the average extradition treaty in their desire to be as precise as possible."[355] The definition of surrender[356] can be found in Article 102, which "has been included in the Statute in order to make clear that the handing over of a person to the International Criminal Court is fundamentally different in nature from the handing over of a person within the framework of extradition between States."[357] This implicates that national extradition conditions, such as the nationality-exception, are not valid within this context.[358] Article 89 constitutes the arrest and surrender-version of the general obligation to cooperate and

---

[352] See Sluiter 2003, p. 694.
[353] Ruxton 2001, p. 19.
[354] See http://www.icc-cpi.int/basicdocs/romestatute.html and Article 63 ICC Statute.
[355] Swart 2002 B, p. 1677.
[356] Surrender means the delivering up of a person by a State to the Court, pursuant to the ICC Statute.
[357] Swart 2002 B, p. 1678.

states that states parties shall, in accordance with the provisions of this Part (i.e. the part on international cooperation and judicial assistance) and the procedure under their national law, comply with requests for arrest and surrender. According to Swart, the reference to national *procedures* "makes clear that *substantive* grounds for refusing surrender which are normal in domestic extradition law do not matter here [Italics ChP]."[359] Thus, although substantive grounds are not valid within this context, attention may have to be paid to national *procedures*, which I will do below.

A complicated factor in the surrender proceedings of the ICC is the involvement of states which are not parties to the Rome Statute. It could for example be possible that a war criminal is hiding in State A, which is not party to the ICC and which is not willing to surrender the suspect to the ICC. Would it be possible for State B, as being a state party to the ICC, to first ask for extradition and then to surrender the suspect to the ICC? In these kinds of situations, one in fact deals with a combination of the inter-state extradition law (as discussed in chapter 3) and a transfer-system comparable to that of the ad hoc tribunals (see the first part of this chapter). If that matter would be possible is 'highly unlikely' according to Swart: virtually all extradition treaties namely "contain provisions making re-extradition of the person surrendered to a third State subject to the consent of the State which has surrendered him. (...) there is no reason to suppose that such clauses would not apply where surrender of persons to the Court is concerned."[360] The following situation is also complicated: what if State A, where a war criminal and national of State B is hiding, is not a party to the ICC, while State B is? In these kinds of cases, Article 12 ICC Statute[361] learns that the Court has jurisdiction (active nationality principle). However, as State A is not an ICC-state party, the Court cannot oblige the country to cooperate (although it can ask State A to cooperate on an ad hoc basis). The most basic effectiveness of the ICC thus depends on a large number of states parties or cooperating non-states parties. The fact that (not very surprisingly) the U.S. is trying in a sometimes quite desperate way to oppose the ICC in every way it can (for example by concluding bilateral agreements with other countries not to

---

[358] See Robinson 2002, p. 1852.
[359] Swart 2002 B, p. 1680.
[360] Ibid., pp. 1686-1687.
[361] After all, Article 12 of the ICC Statute learns that the Court may not only exercise its jurisdiction with respect to the state on the territory of which the international crime was committed (territoriality-principle) but also with respect to the state of which the person accused of the crime is a national (active personality principle).

surrender Americans to the Court) is thus not very constructive to the objective of the ICC to have universal influence.

Returning to the articles relating to the actual arrest and surrender proceedings, one must first look at Article 58, which deals with the warrants for the arrest and surrender, issued by the Pre-Trial Chamber. This Chamber also takes care of requests for a person's provisional arrest.[362] According to Article 59 (1), a state party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its law and the provisions of Part 9. The reference to national law is an interesting one since provisions of human rights with respect to the deprivation of liberty may be part of that national law. It seems again that the most important matter relating to the arrest and surrender proceedings is (just as in the case of the ad hoc tribunals) the question of the division of responsibilities with respect to the protection of the suspect's human rights. According to Article 59 (2), the arrested person must be brought promptly before the competent judicial authority in the custodial state. Although *this article* does not accord the arrested person a right to have the lawfulness of his arrest and detention[363] checked by that authority, such a right "may nevertheless follow from human rights conventions to which the requested State is a party."[364] What the judicial authority can do according to the ICC article, is to verify (among others) whether the person has been arrested in accordance with the proper process and whether the person's rights have been respected.[365] "The expression 'proper process' seems primarily to refer to the national law of the requested State, including its obligations under human rights conventions."[366] The same can be said about the respect for the person's rights: this could also include the rights under national law and human rights treaties to which the requested state is a party. And although in the

> various provisions of the Statute care has been taken to provide a consistent body of rules with regard to arrest and detention of persons by the requested State, thus reducing the possibility that

[362] See for more information on the topic of provisional arrest, Article 92 ICC Statute.
[363] This means whether there has been a violation of the person's right not to be subjected to arbitrary arrest or detention and not to be deprived of his liberty except on such grounds, and in accordance with such procedures, as are established in the Statute, mentioned in Article 55 (1) (d), see Swart 2002 A, pp. 1253-1254.
[364] Swart 2002 A, p. 1252.
[365] Furthermore and in contrast to the situation before the ad hoc tribunals, the suspect can apply to that authority for interim release pending surrender, see Article 59 (3) ICC Statute.
[366] Swart 2002 A, pp. 1252-1253.

the obligation for a State under the Statute to arrest and detain a person conflicts with its obligation under one or more human rights treaties to respect that person's liberty and security[367]

it seems that the influence of the requested state's law has grown in comparison to the system of the ad hoc tribunals where little discretion was left to the states in this phase of the proceedings.[368] It seems that Swart is correct when stating that "the provisions on arrest proceedings in the custodial State present an interesting mixture of elements inspired by traditional inter-State practice and the law of the *ad hoc* Tribunals."[369]

Especially in countries which support a modern version of human rights law and a modern view of 'male captus bene detentus' (in that - although jurisdiction is presumed - pre-transfer circumstances must always be looked at and wrongs must be repaired), this new system seems to be able in creating interaction and more of a dialogue between the ICC and the state, which could influence the former.[370] If a suspect of an unlawful arrest or detention will nonetheless be surrendered to the ICC, Article 85 (1) ICC Statute may then be relied upon.[371] It states that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. "It does not seem to matter whether the unlawfulness of arrest or detention was due to the conduct of the Court or that of the requested State."[372] According to Zappalà, "the ICC Statute is the most advanced text in terms of protection of the right of compensation, even compared to the provisions of the international conventions on human rights."[373] It is to be seen whether or not this explicit provision excludes other 'repairing' remedies such as a bar to jurisdiction in extreme 'male captus' cases but if one looks at the efforts of protecting human rights within the ICC Statute, this is not very probable.

4.4.5 How will the ICC decide its cases?

---

[367] Swart 2002 B, p. 1681.
[368] See also Sluiter 2003, p. 694 and Swart 2002 A, p. 1249: "In the matter of arrest and detention, little autonomy or discretion is left to the requested State to refuse to comply with the Tribunals' orders."
[369] Swart 2002 A, p. 1251.
[370] However, it must be stated as well that the Court has the final word. See Sluiter 2003, p. 694, who makes clear that on grounds of Articles 87 (7) and 119 ICC Statute, states follow the final decision by the Court concerning the content of the law of cooperation.
[371] See for more information Rules 173-175 RPE.
[372] Swart 2002 A, p. 1255.
[373] Zappalà 2002 C, p. 1578.

It is of course very speculative how the ICC will decide its cases. What seems clear however is the fact that the influence of national states in the pre-transfer phase has grown. If a state adheres a view like the U.S. with respect to 'male captus bene detentus', it is up to the ICC itself to show its modern approach. It can then invoke its own articles which seem to give a quite broad protection of the rights of the person in the early stages of the proceedings. It will probably not be so that a suspect will be released by the national judicial authority in for example a case of an abduction, but due to the cooperation and dialogue[374] between the local level and the ICC with respect to this pre-surrender phase (which was absent in the system of the ad hoc tribunals), it is possible that the ICC will get influenced by a modern view of human rights law (although it is also true that certain state involvement within this context may only hinder the ICC's efficiency). Notwithstanding this potential positive development, the ICC Statute only speaks of 'compensation' in case of an unlawful arrest or detention. Although not very likely, this could mean that the ICC does not go that far as the ad hoc tribunals which have made clear that in case of serious human rights violations, the tribunals should divest themselves from jurisdiction. It is true that this remedy has been born out of case-law, and that the ICC-judges may follow that direction, but it is also clear that the ICC's 'law in the books' is far more detailed than the ones of the ICTY and ICTR. It is questionable (because of the detailed ICC's 'law in the books') whether the ICC-judges will be allowed to have the same freedom and power as their colleagues at the ad hoc tribunals. It is probable that in the first years, the ICC will have to prove itself and show the world that it is capable of fighting impunity. Of interest hereby is the issue of terrorism, which may (in theory[375]) also play a role in that the ICC may prosecute suspects of terrorism when the terrorist acts amount to genocide, crimes against humanity and war crimes as defined by the instruments of the ICC.

However, it is to be hoped that, in the end, the ICC will go further (and not return) on the human rights road made by the judges of the ad hoc tribunals. I hope the following quotation,

---

[374] See in this respect also Article 97 of the Rome Statute: "Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter." and Robinson 2002 p. 1854: "the State Party itself participates in the oversight and management of the ICC and the development of its procedures."

[375] In Rome, one could not agree on a definition of terrorism so it is unlikely that the ICC will prosecute terrorists in the near future.

found in the summary of the proceedings of the Preparatory Committee of the ICC during the period 25 March – 12 April 1996, will be illustrative for the Court's future in that it will follow the modern human rights version of 'male captus bene detentus': "A comment was made that custody over a suspect, however, should be in accordance with international law: the maxim male captus, bene detentus should have no application to the jurisdiction of the court."[376] All one can do now is wait for case law to confirm that comment. After all: although the ICC Statute seems to offer enough guarantees for an adequate compliance with human rights, "the proof of the pudding is in the eating."[377]

4.5 Conclusion

This chapter has hopefully shown that the transfer-system of the international criminal tribunals is of a complete different nature than the normal extradition proceedings between states. National features such as the nationality-exception for example do not exist within this context. However, the tribunals (especially the ICC) do everthing in trying to pay as much attention as possible to human rights. There further exists a quite strict duty of cooperation, which has proven to be an essential condition for the success of the tribunals' functioning (this in contrast to the failures on this area in the beginning of the 20th century). This is especially so in the system of the ad hoc tribunals which have been empowered with a "Chapter VII UN Charter-basis". Little discretion, also in the pre-transfer stage, is hereby left for the national authorities. Since the three tribunals are in a way 'superior' to national jurisdictions, it is appropriate that they take the responsibility of this position in guarding the whole judicial process and not only what happens in court.[378]

With the exception of the disappointing *Dokmanovic* case, the three other cases (*Barayagwiza*, *Milosevic* and *Nikolic*) have shown that the maxim 'male captus bene detentus' itself is normally avoided (Perhaps due to the uncertain status it has gained on the domestic level?) and that the judges seem to favor a new and more progressive version of the abuse of

[376] Preparatory Committee on the Establishment of an International Criminal Court, Summary of the proceedings of the Preparatory Committee during the period 25 March – 12 April 1996, UN Distr. General A/AC.249/1, 7 May 1996, see http://www.iccnow.org/romearchive/documentsreports/1PrepCmt/ProceedingSummary.doc

[377] Sluiter 2002, p. 704.

[378] See Sluiter 2001 A, p. 20.

process-formula, which appeared in national cases such as *Bennett* for the first time. This formula constitutes both the human rights side and the broader rule of law argument. To a certain extent, courts will not divest themselves of jurisdiction, even in cases of abduction (albeit that the tribunals have to be extremely careful with state-sponsored abductions since their 'approval' can lead in a worst-case-scenario to international anarchy). Thus, in principle, a court has jurisdiction. However, this acceptance of 'male captus bene detentus' (because that is what it in fact is) is only valid till a certain extent. When serious and egregious violations of the accused's rights (especially when the OTP itself is involved in the violations) would prove detrimental to the court's integrity, the judges *can* divest themselves of jurisdiction. There is however no obligation to do this. This concept of abuse of process goes further than the one at the domestic level since it does not seem to matter who violated the suspect's human rights, whereas in the national context the involvement of state authorities is necessary. Although the remedy should not be ruled out, the termination of the proceedings and the subsequent release of the suspect should only be the *ultimum remedium*, especially in the very delicate tribunals' context, which constantly has to ensure respect for both the international community, on which it depends, and - as model context in the promotion of international human rights - the rights of the accused.[379]

As has become clear in the previous pages, I believe this is a just policy. I do not agree that there should be an Eichmann exception in that the 'male captus' situations of suspects of international crimes must be decoupled from their subsequent trials. A human right namely is a *human* right, not a 'person-who-is-not-suspected-of-an-international-crime-right'. This means that even such a suspect should be released if it is clear that the integrity of the court, which should stand model for the protection of human rights, demands it. This option will most likely not be chosen too often. Preference will probably made to other remedies such as a reduction of the sentence or financial compensation. However, the *Barayagwiza* case has proven that the option for release is not only a theoretical one.

[379] See Lamb 2001, pp. 42-43: "(...) the legal consequences (...) would have to be carefully evaluated (...) in any given case. It is, however, clear that withdrawal of the indictment altogether and the release of the accused would be required only in extreme cases (...). (...) Nevertheless, the release of the accused must, *in extremis*, remain as the ultimate remedy on the grounds that it constitutes the strongest deterrent and sanction against the abuse of power by law enforcement personnel and serves as a remedy of last resort in those truly exceptional circumstances where the divestiture of its jurisdiction is thought by the Tribunal to be necessary to safeguard the integrity of the conduct of international criminal justice."

It is thus clear that international criminal tribunals must ensure human rights for everyone; since there is always a chance within the international criminal context that a suspect will be the victim of a fragmentation of two (or more) different legal systems, he should be given the best protection possible from at least one jurisdiction, the one of the profiting tribunal. However, the tribunals must be able to fight impunity as well. The reason why 'male captus bene detentus' to a certain extent has not been abandoned (to come back to my formulation of the problem at the beginning of this Master's thesis) seems thus also clear: although the tribunals must stay model institutions with respect to the promotion of international human rights in all its aspects, the international community demands as well that the (expensive) tribunals function and 'preferably' function well. In order to function, they need suspects. If every suspect were released due to a fault in the apprehension, then the judges would probably have not much to do. If no results in prosecuting perpetrators are made, the international community will soon show its displeasure. The tribunals would then not only lose important enforcement-powers, they would also give false hope to the victims of conflicts around the world. The relation with the rest of the international community is thus of vital importance. In conclusion, all these conflicting issues demand a careful 'balance exercise' and who could do this difficult weighing-task better than the judges of those international criminal tribunals? People more mastered in weighing pros and cons do probably not exist on this planet.

Chapter 5: Conclusion

5.1 Summary

The conclusion of this Master's thesis will probably not be that surprising. After all, during the research, one could find not only conclusions with respect to the different chapters but my own personal opinion to the different outcomes of the inquiry as well. I will now shortly summarize the findings of the previous pages.

Chapter 1

The formulation of the problem was as follows: to what extent will 'male captus' situations during the phase before the actual transfer of the suspect to the tribunal have effect on the latter's criminal procedure? What value do the tribunals give to human rights in this legal gray border-area of national and international law in which the tribunals depend for their enforcement on mainly national authorities? In short: what is the exact legal status of 'male captus bene detentus' in the system of the international criminal tribunals and is the outcome to be seen as satisfactory in light of the presumptive exemplary role these tribunals play in the support of international human rights?

Chapter 2

In this chapter, an introduction was made with respect to 'male captus bene detentus': the first cases dealing with the maxim were analyzed and the research was further delimitated. An extensive explanation of possible 'male captus' situations, contra-arguments and defenses against these practices including remedies for the victim of such infringements was hereby given. When dealing with the issue of international human rights, the danger of a fragmentation of the criminal procedure was discussed. It could be recommended that a new right should be drafted against

'male captus' situations such as kidnapping/abduction, luring and disguised extradition where there is a transfer from one jurisdiction to another. This could prevent a suspect from becoming a victim of a legal vacuum.

Chapter 3

This chapter started with some information about general concepts which come into play when a certain state wants to get hold of a suspect residing in another state. The concepts of judicial and in personam jurisdiction were hereby discussed. After that, the most important cases dealing with the problem of 'male captus bene detentus' within the national context were analyzed. The conclusion of chapter three was that state practice did not point to a certain clear direction: it was not uniform.

On the one hand, it showed a general development towards a more modern idea of 'male captus bene detentus'. This means that while accepting the general idea that a court has jurisdiction (even when some 'male captus' situations have occurred), a court can exercise its discretion in favor of a defendant. Courts hereby used the 'abuse of process' doctrine which constitutes both the ideas of respect for human rights and the rule of law. In case of extreme violations of a person's human rights, a court could divest itself of jurisdiction. I believe this is a just way of doing justice: although a release should not be ruled out after a 'male captus' situation, it should not be an automatic consequence either. All this must be considered by the judges, which are in the best position to find the most appropriate and proportionate solution. With respect to a 'normal' criminal, quite broad remedies could be conferred, whereas a judge could be more restricted with respect to the limited circle of 'hostes humani generis'. This will become more important for national states as well (besides tribunals which always deal with this limited circle of persons) since more and more states are drafting laws making it possible for them to prosecute international crimes. However, it should not be so that the 'male captus' situations of 'hostes humani generis' suspects are decoupled from their subsequent trials (the Eichmann-exception): *every* wrong has to be repaired. This includes a wrong committed to suspects of this limited circle as well. (It cannot be underscored enough that it is always possible that a suspect is innocent.) The national context also showed that it was necessary for the

application of the abuse of process doctrine that the government in some way was involved in the matter. I believe that national courts should even go further in that they should take into account the possibility of barring their jurisdiction as well when for example private individuals have committed a serious 'male captus' against a person who is now standing in court.

On the other hand, this positive (but to my opinion not progressive enough) development was not followed by an important player in this particular state practice: the U.S., whose Supreme Court clearly adhered to the - according to me - quite old-fashioned version of 'male captus', hereby not giving existing and emerging international (human rights) law concepts the credits they deserve. Although the U.S. attitude (both on the judicial and executive level) towards international law has been criticised during this research, this of course cannot justify to simply deleting the American vision out of the overview of state practice.

Chapter 4

In this chapter, attention was firstly paid to the history of the tribunals' context when dealing with the old International Military Tribunals of Nuremberg and Tokyo. After that, the three operational international criminal tribunals (ICTY, ICTR and ICC) were analyzed in detail by giving information about their creation, their relation with international human rights, the duty for states to cooperate with them and the specific transfer-procedures.

Chapter four demonstrated that the context in which the tribunals function cannot be compared to the normal inter-state system where 'male captus bene detentus' appeared for the first time. However, this chapter showed as well that the tribunals nonetheless use domestic case law where this is appropriate (e.g. as an illustration in their own argumentation). Therefore, the legal excursion to the domestic level had not been for nothing, see for example the ICTY-cases of *Nikolic* and *Milosevic* and the ICTR-case of *Barayagwiza* which have used the national (see e.g. *Bennett*) abuse of process-doctrine.

An interesting finding was further that it is important within the tribunals' context to create a strict duty of cooperation with the entities which deal with enforcement operations. This has proven to be an essential condition for the success of the tribunals' functioning in history.

Several provisions (such as the ones dealing with the duty of cooperation) made clear that the nature of the tribunals is often (if not always) superior to states and other entities which deal with the tribunals. A consequence of this to some extent superior character of the tribunals was that it is appropriate that they take the responsibility of this position in guarding the whole judicial process and not only what happens in court. A broad responsibility should hereby be taken, comparable with the 'adoption'-theory for national courts in chapter three. Although there seemed to be more room for states within the ICC's system to have some interaction, this should not mean that the ICC's overall responsibility should be diminished. On the contrary: the ICC should use this dialogue to go further on the quite progressive path taken by the ICTY and the ICTR!

I use the word 'progressive' since it seemed that the ad hoc tribunals' formulation of the abuse of process doctrine includes the possibility that the tribunals may divest themselves of jurisdiction not only in cases where an accused is seriously mistreated by persons or entities related to the tribunal, but even where such involvement is not the case.

In conclusion, the tribunals upheld their status as model institutions for the promotion of human rights, while at the same time 'fostering' their power of discretion in the difficult and delicate task of balancing all the relevant interests within the tribunals' context.

5.2 Final conclusion

It appears that the answers have been given on the formulation of this thesis' problem; the exact legal status of 'male captus bene detentus' in the tribunals' context is that the maxim is still valid, although the new attention paid to international human rights, broad concepts of fair trial and the rule of law in general can make it happen that the rule should be rejected. The tribunals hereby seem to use a broader acceptation of their responsibility than the courts at the national level since a serious violation of someone's human rights can be enough for an international criminal tribunal to divest itself of jurisdiction. It is therefore not needed (see the domestic level) that the violation is committed by government organs/officials. As such, the progressive tribunals have upheld their role as model institutions in the promotion of human rights while at the same time accepting a realistic and effective way, by linking the exceptions of the maxim to their own

discretion, in fighting impunity. The latter is probably the main reason why 'male captus bene detentus' to a certain extent has not been abandoned: the international community, on which the tribunals depend for their enforcement operations, demands as well that the (expensive) tribunals function and 'preferably' function well. I fully agree with that position and hope that *Nikolic* will not be the new *Toscanino* (with respect to the latter decision's effects) but that the ICC in the future will follow the recent ad hoc tribunals' case law.

To conclude this research with a personal view, I do not mind that 'male captus bene detentus' is officially maintained, as long as there is a growing development towards the idea that every human right must be respected and thus that every wrong must be repaired. This brings me back to that other, to my esteem, more important maxim: 'ex iniuria ius non oritur'; no right can be derived from a wrong. But when that wrong has been or will be repaired, a court may exercise jurisdiction, even when 'male captus' situations have occurred.

Bibliography

Books

Bassiouni and Wise 1995

M. Cherif Bassiouni and Edward M. Wise, *Aut dedere aut judicare. The duty to extradite or prosecute in international law*, Dordrecht: Martinus Nijhoff Publishers 1995, XIV, 340 pp.

Garner 1999

B. A. Garner, ed., *Black's law dictionary*, seventh edn., St. Paul: West Group 1999, XXIII, 1738 pp.

Goldstone 1996

R. Goldstone, *Prosecuting war criminals*, London: The David Davies Memorial Institute of International Studies 1996, 21 pp.

Harel 1975

I. Harel, *The house on Garibaldi Street: the first full account of the capture of Adolf Eichmann told by the former head of Israel's Secret Service Isser Harel*, New York: The Viking Press 1975, XX, 296 pp.

Henkin 1995

L. Henkin, *International law: politics and values*, Dordrecht: Martinus Nijhoff Publishers 1995, XIII, 376 pp.

Jennings and Watts 1992

R. Jennings and A. Watts, *Oppenheim's international law, vol. I, Peace*, ninth edn., Burnt Mill: Longman 1992, LXXXVI, 554 pp.

Knoops 2002

G-J.A. Knoops, *Surrendering to international criminal courts: contemporary practice and procedures*, Ardsley: Transnational Publishers 2002, XXXVII, 407 pp.

Paust et al. 1996

J.J. Paust et al., *International criminal law: cases and materials*, Durham: Carolina Academic Press 1996, XIV, 1438 pp.

Shaw 2003

M.N. Shaw, *International law*, fifth edn., Cambridge: Cambridge University Press 2003, CXLV, 1288 pp.

Sjöcrona and Orie 2002

J.M. Sjöcrona and A.M.M. Orie, *Internationaal strafrecht vanuit Nederlands perspectief*, derde, geheel herziene druk [International criminal law from a Dutch perspective, third, fully revised edition], Deventer: Kluwer 2002, XXII, 468 pp.

Strijards 2001 A

G.A.M. Strijards, *Een permanent strafhof in Nederland*, tweede vermeerderde druk [A permanent criminal court in The Netherlands, second enlarged edition], Nijmegen: Wolf Legal Productions 2001, VIII, 355 pp.

Wilske 2000

S. Wilske, *Die völkerrechtswidrige Entführung und ihre Rechtsfolgen* [Abduction contrary to international law and its legal consequences], Berlin: Duncker & Humblot 2000, 448 pp.

Articles

Beresford 2002

S. Beresford, 'Redressing the wrongs of the international justice system: compensation for persons erroneously detained, prosecuted, or convicted by the ad hoc tribunals', 96 *AJIL* (2002) pp. 628-646.

Boot 2001

M. Boot, 'Mensenrechten en oorlogsmisdadigers. Het recht op een eerlijk proces in internationale strafrechtspraak' [Human rights and war criminals. The right to a fair trial in international criminal law], 50 *AA* (2001) pp. 443-448.

Choo 1994

A.L.-T. Choo, 'International kidnapping, disguised extradition and abuse of process', 57 *The Modern Law Review* (1994) pp. 626-635.

Costi 2003

A. Costi, 'Problems with current international and national practices concerning extraterritorial abductions', 9 *Revue Juridique Polynésienne* (2003) pp. 57-100.

Damminga and Witjens 2002

S. Damminga and E. Witjens, 'Interview met amicus curiae prof. jhr. mr. Michail Wladimiroff. "We zeggen spontaan niets wat in het belang van Milošević is"'[Interview with amicus curiae prof. jhr. mr. Michail Wladimiroff. "We spontaneously don't say anything in the interest of Milošević"] , 51 *AA* (2002) pp. 618-623.

Gaeta 1998

P. Gaeta, 'Is NATO authorized or obliged to arrest persons indicted by the International Criminal Tribunal for the Former Yugoslavia?', 9 *EJIL* (1998) pp. 174-181.

Jansen 2001

C.H. Jansen, 'Het proces van Tokio' [The Tokyo trial], 2001/4 *VN Forum* (2001), pp. 10-12.

La Rosa 1997

A.-M. La Rosa, 'A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial', 321 *IRRC* (1997), pp. 635-650.

Margulis-Ohnuma 1999

Z. Margulis-Ohnuma, 'The unavoidable correlative: extraterritorial power and the United States Constitution', 32 *N.Y.U. J. Int'l L. & Pol.* (1999), pp. 147-203.

Rayfuse 1993

R. Rayfuse, 'International abduction and the United States Supreme Court: the law of the jungle reigns', 42 *ICLQ* (1993) pp. 882-897.

Scharf 1998

M.P. Scharf, 'The prosecutor v. Slavko Dokmanović: irregular rendition and the ICTY', 11 *LJIL* (1998) pp. 369-382.

Sluiter 1998

G.K. Sluiter, 'To cooperate or not to cooperate? The case of the failed transfer of Ntakirutimana to the Rwanda Tribunal', 11 *LJIL* (1998) pp. 383-395.

Sluiter 2001 A

G.K. Sluiter, 'Het Joegoslavië Tribunaal. Enige beschouwingen van procedurele aard' [The ICTY. Some considerations of procedural character], 2001/4 *VN Forum* (2001), pp. 13-22.

Sluiter 2002

G.K. Sluiter, 'Naleving van de rechten van de mens door internationale straftribunalen' [Compliance with human rights by international criminal tribunals], 27 *NJCM-Bulletin* (2002) pp. 699-713.

Sluiter 2003

G.K. Sluiter, 'Internationale samenwerking in strafzaken: de dimensie van internationale en 'geïnternationaliseerde' straftribunalen' [International cooperation in criminal cases: the dimension of international and 'internationalised' criminal tribunals], 52 *AA* (2003) pp. 691-696.

Strijards 2003

G.A.M. Strijards, 'Het proces Eichmann (1961)' [The Eichmann trial], 52 *AA* (2003) pp. 749-758.

Tavernier 1997

P. Tavernier, 'The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda', 321 *IRRC* (1997), pp. 605-621.

Trifunovska 2003

S. Trifunovska, 'Fair trial and international justice: the ICTY as an example with special reference to the Milosevic case', 2003/1 *RM Themis* (2003), pp. 3-12.

Van der Wilt 2004

H. van der Wilt, 'Het Joegoslavië Tribunaal en het beginsel *male captus, bene judicatus*' [The ICTY and the principle male captus, bene judicatus], 34 *DD* (2004) pp. 274-300.

Van Sliedregt 2001 A

E. van Sliedregt, 'Milosevic en command responsibility. De strafrechtelijke aansprakelijkheid van een agressor' [Milosevic and command responsibility. The criminal responsibility of an aggressor], 50 *AA* (2001) pp. 635-638.

Van Sliedregt 2003

E. van Sliedregt, 'Het proces Milosevic (2002)' [The Milosevic trial (2002)], 52 *AA* (2003) pp. 911-918.

Wald 2001

P. M. Wald, 'The International Criminal Tribunal for the former Yugoslavia comes of age: some observations on day-to-day dilemmas of an international court', 5 *Wash. U. J.L. & POL'Y* (2001) pp. 87-118.

Warbrick 2000

C. Warbrick, 'Judicial jurisdiction and abuse of process', 49 *ICLQ* (2000) pp. 489-496.

Contributions

Bassiouni 1986

M. Ch. Bassiouni, 'The United States model', in M. Ch. Bassiouni, ed., *International criminal law. Vol. II: procedure*, Dobbs Ferry: Transnational Publishers 1986, pp. 405-425.

Bassiouni 1999

M. Ch. Bassiouni, 'Law and practice of the United States', in M. Ch. Bassiouni, ed., *International criminal law, vol. II, Procedural and enforcement mechanisms*, 2nd edn., Ardsley: Transnational Publishers 1999, pp. 191-256.

Blakesley 1999

Ch. L. Blakesley, 'Extraterritorial jurisdiction', in M. Ch. Bassiouni, ed., *International criminal law, vol. II, Procedural and enforcement mechanisms*, 2nd edn., Ardsley: Transnational Publishers 1999, pp. 33-105.

Ciampi 2002

A. Ciampi, 'The obligation to cooperate', in A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: a commentary, volume II*, Oxford: Oxford University Press 2002, pp. 1607-1638.

Frowein 1994

J.A. Frowein, 'Male captus male detentus – a human right', in R. Lawson and M. de Blois, eds., *The dynamics of the protection of human rights in Europe. Essays in honour of Henry G. Schermers, vol. III*, Dordrecht: Nijhoff 1994, pp. 175-185.

Haveman 2003

R.H. Haveman, 'The context of the law', in A.H. Khan and R.H. Haveman, *Reader internationaal strafrecht 2003* [Reader international criminal law 2003], Leiden: Leiden University 2003, pp. 1-19.

Lamb 2001

'Illegal arrest and the jurisdiction of the ICTY', in R. May et al., eds., *Essays on ICTY procedure and evidence in honour of Gabrielle Kirk McDonald*, The Hague: Kluwer Law International 2001, pp. 27-43.

Leurdijk 2001

D.A. Leurdijk, 'The establishment of an international arresting team; fiction, reality or both?', in W.A.M. Van Dijk and J.L. Hovens, eds., *Arresting war criminals*, Nijmegen: Wolf Legal Productions 2001, pp. 59-72.

Mann 1989

F.A. Mann, 'Reflections on the prosecution of persons abducted in breach of international law', in Y. Dinstein and M. Tabory, eds., *International law at a time of perplexity. Essays in honour of Shabtai Rosenne*, Dordrecht: Nijhoff 1989, pp. 407-421.

Robinson 2002

D. Robinson, 'The Rome Statute and its impact on national law', in A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: a commentary, volume II*, Oxford: Oxford University Press 2002, pp. 1849-1869.

Ruxton 2001

G.F. Ruxton, 'Present and future record of arresting war criminals; the view of the public prosecutor of the ICTY', in W.A.M. Van Dijk and J.L. Hovens, eds., *Arresting war criminals*, Nijmegen: Wolf Legal Productions 2001, pp. 19-23.

Sluiter 2001 B

G.K. Sluiter, 'Decision on the Motion by the Accused Slavko Dokmanović, *Prosecutor v. Mrkšić, Radić, Šlijvančanin and Dokmanović*, Case No. IT-95-13a-PT, T. Ch. II, 22 October 1997, Commentary', in A. Klip and G.K. Sluiter, eds., *Annotated leading cases of international criminal tribunals, Vol. III: The International Criminal Tribunal for the Former Yugoslavia 1997-1999*, Antwerp: Intersentia 2001, pp. 151-156.

Stein 1995

T. Stein, 'Extradition', in R. Bernhardt, R.L. Bindschedler and P. Macalister-Smith, eds., *Encyclopedia of public international law, vol. II: East African Community to Italy-United States Air Transport Arbitration (1965)*, Amsterdam: North-Holland 1995, pp. 327-334.

Strijards 2001 B

G.A.M. Strijards, 'Arresting the criminal abroad', in W.A.M. Van Dijk and J.L. Hovens, eds., *Arresting war criminals*, Nijmegen: Wolf Legal Productions 2001, pp. 85-117.

Swart 2001

B. Swart, 'Commentary on *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999', in A. Klip, ed., *Annotated leading cases of international criminal*

tribunals, Vol. II: The International Criminal Tribunal for Rwanda 1994-1999, Antwerp: Intersentia 2001, pp. 197-207.

Swart 2002 A

B. Swart, 'Arrest proceedings in the custodial state', in A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: a commentary, volume II*, Oxford: Oxford University Press 2002, pp. 1247-1255.

Swart 2002 B

B. Swart, 'Arrest and surrender', in A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: a commentary, volume II*, Oxford: Oxford University Press 2002, pp. 1639-1703.

Van Sliedregt 2001 B

E. van Sliedregt, 'Arresting war criminals; Male captus bene detentus. Human rights and the rule of law', in W.A.M. Van Dijk and J.L. Hovens, eds., *Arresting war criminals*, Nijmegen: Wolf Legal Productions 2001, pp. 73-83.

Zappalà 2002 A

S. Zappalà, 'Rights of persons during an investigation', in A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: a commentary, volume II*, Oxford: Oxford University Press 2002, pp. 1181-1203.

Zappalà 2002 B

S. Zappalà, 'The rights of the accused', in A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: a commentary, volume II*, Oxford: Oxford University Press 2002, pp. 1319-1354.

Zappalà 2002 C

S. Zappalà 2002, 'Compensation to an arrested or convicted person', in A. Cassese, P. Gaeta and J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: a commentary, volume II*, Oxford: Oxford University Press 2002, pp. 1577-1585.

Table of Cases

Levinge v Director of Custodial Services, 9 *N.S.W.L.R.* 546

Military and Paramilitary Activities case (*Nicaragua v. United States of America*), 27 June 1986, 1986 ICJ Rep. 14, at 106

Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric, Case No. IT-95-9, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000

Prosecutor v. Milosevic, Decision on Preliminary Motions, 8 November 2001. See http://www.un.org/icty/milutinovic/trialc/decision-e/1110873516829.htm

Prosecutor v. Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic, No. IT-95-13a-PT, T. Ch. II, 22 October 1997

Prosecutor v. Tadic case (IT-94-1-T) of 10 August 1995 (Decision on the prosecutor's motion requesting protective measures for victims and witnesses)

Re Bennett, House of Lords, 24 June 1993, *All ER* (1993) 3

Re Jolis, Tribunal Correctionel d'Avesnes, 7 *Ann Dig* 191 (1933-1934)

R. v. Bow Street Magistrates, ex parte Mackeson (1982) 75 *Cr.App.R.* 24

R. v. Hartley case, [1978] 2 *NZLR* 1999

R. v. Plymouth Magistrates' Court, ex parte Driver [1985] 2 *All ER* 681

Slobodan Miloševic tegen de Staat der Nederlanden, Arrondissementsrechtbank 's-Gravenhage, Vonnis in kort geding van 31 augustus 2001, LJN-nummer: AD3266. Zaaknummer: KG 01/975

Sosa v. Alvarez-Machain et al., Supreme Court of the United States, Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 03-339, Argued 30 March 2004, decided 29 June 29 2004. See http://a257.g.akamaitech.net/7/257/2422/29june20041115/www.supremecourtus.gov/opinions/03pdf/03-339.pdf

S.S. Lotus case *(France v. Turkey)*, 7 September 1927, 1927 PCIJ (Ser. A) No. 9, at 18

State v. Ebrahim, 2 *S.A.L.R.* 553, Judgement of 26 February 1991

Stocké v. Germany, *E.C.H.R.* Ser. A, No. 199

The Attorney General v. Adolf Eichmann, District Court of Jerusalem, Criminal Case No. 40/61, Judgment of 12 December 1961, see http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/Judgment-001.html

The Prosecutor v. Dragan Nikolic (IT-94-2-PT), Tri. Ch. II, 9 October 2002 (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal.), see http://www.un.org/icty/nikolic/trialc/decision-e/10131553.htm

The Prosecutor v. Dragan Nikolic (IT-94-2-AR73), Appeals Chamber, 5 June 2003 (Decision on Interlocutory Appeal concerning Legality of Arrest), see http://www.un.org/icty/nikolic/appeal/decision-e/030605.pdf

United States v. Alvarez-Machain, 504 U.S. 655 (1992)

United States v. Toscanino, 500 F 2d 267 (1974)

United States v. Yunis, 681 F. Supp. 909 (D.D.C. 1988), rev'd on other gds., 859 F.2d 953 (D.C. Cir. 1988)

Miscellaneous

XVth Congress of the International Penal Law Association (September 1994), Resolution on the Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperation in Criminal Proceedings

African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *I.L.M.* 58 (1982), *entered into force* 21 October 1986. See http://www1.umn.edu/humanrts/instree/z1afchar.htm

Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement') See http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 *U.N.T.S.* 123 entered into force 18 July 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). See http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm

Amnesty International's International criminal tribunals. Handbook for government cooperation (AI Index: IOR 40/007/1996), 1 August 1996, see http://web.amnesty.org/library/index/engior400071996#TOT)

Arab Charter on Human Rights, adopted by the League of Arab States, reprinted in 18 *Hum. Rts. L.J.* 151 (1997). See http://www1.umn.edu/humanrts/instree/arabhrcharter.html

Charter of the International Military Tribunal, 82 *U.N.T.S.* 280, entered into force on 8 August 1945

Charter of the International Military Tribunal for the Far East, 19 January 1946, amended on 26 April 1946

European Convention for the protection of human rights and fundamental freedoms, 213 *U.N.T.S.* 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. See http://www1.umn.edu/humanrts/instree/z17euroco.html

ICTR Statute, adopted on 8 November 1994 by Sec. Council Res. 955 (1994)

ICTY Statute, adopted on 25 May 1993 by Sec. Council Res. 827 (1993)

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 *U.N.T.S.* 171, *entered into force* 23 March 1976. See http://www1.umn.edu/humanrts/instree/b3ccpr.htm

International Law Commission, *Draft articles on the Responsibility of States for Internationally Wrongful Acts,* Report of the International Law Commission on the work of its Fifty-Third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10), chapter IV.E.1. See also UN GA Res. 56/83 and
http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf
See for the commentaries
http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf

Preparatory Committee on the Establishment of an International Criminal Court, Summary of the proceedings of the Preparatory Committee during the period 25 March – 12 April 1996, UN Distr. General A/AC.249/1, 7 May 1996, see
http://www.iccnow.org/romearchive/documentsreports/1PrepCmt/ProceedingSummary.doc

Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission at its second session, in 1950, and submitted to the UN General Assembly, see the *Yearbook of the International Law Commission, 1950*, vol. II. and http://www.un.org/law/ilc/texts/nurnberg.htm

Report of the Preparatory Commission for the International Criminal Court, finalized draft text of the Elements of Crimes, PCNICC/2000/INF/3/Add.2

Report of the Preparatory Commission for the International Criminal Court, finalized draft text of the Rules of Procedure and Evidence, PCNICC/2000/INF/3/Add.1

Report of the Working Group on Arbitrary Detention, UN ESCOR, Hum. Rts. Comm., 50th Session. UN Doc. E/CN.4/1994/27 (1993)

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998

Security Council Res., 23 June 1960, UN Doc. S/4349

Statement by the President at the Inaugural Ceremony of the International Criminal Court: http://www.icc-cpi.int/library/organs/presidency/Speech_President_of_the_ICC.doc

The 'Final report on the exercise of universal jurisdiction in respect of gross human rights offences', International Law Association, Committee on International Human Rights Law and Practice, London, 2000 (see http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf)

Treaty of Versailles, see http://www.yale.edu/lawweb/avalon/imt/menu.htm

UN GA Res. 47/133 (1992) reproduced in (1993) 32 *ILM* 903

Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). See http://www1.umn.edu/humanrts/instree/b1udhr.htm

UN SG Rep. S/25704 (1993), Report of the Secretary-General