THE IMPACT OF COOPERATION OF STATES ON THE RIGHT TO LIBERTY OF DETAINED SUSPECTS BEFORE THE ICC: A CONTEXTUAL APPROACH

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ABSTRACT

The present ICD Brief discusses *habeas corpus* rights of defendants in cooperation proceedings during an investigation of the ICC. It argues that the challenges that cooperation poses to the rights of suspects and accused can be understood properly only by looking at the context in which such cooperation takes place, that is, the unique structural system of the Court. The Brief starts by exploring cooperation within the institutional design of the Court, focusing in particular on the close link between the latter's complementary jurisdiction and cooperation proceedings. It then moves on to examine the Statute's legal framework regulating the right to liberty of defendants and points out some of its major shortcomings. Finally, the Brief illustrates how cooperation occurring in the above-mention context impacts on the rights of suspects who were previously detained by national authorities through an overview of the relevant case law. The Brief concludes that the Prosecutor and the judges should have engaged with and reflected more critically on the structural characteristic of the ICC, with a view of better protecting the rights of detained suspects in cooperation proceedings.

I. INTRODUCTION

Like the *ad hoc* Tribunals, the International Criminal Court (ICC) relies on the cooperation of states and international organizations for conducting investigations and for the arrest and transfer of suspects. Compared to its predecessors, however, the ICC is more attentive to the risks that cooperation poses to individual rights and has been praised for containing the most advanced provisions on the protection of pre-trial rights of persons during international criminal investigations.[1]

Twelve years into the ICC's existence, it is possible to make some observations about how the provisions of the Rome Statute concerning the right to liberty have played out in practice. As this Brief shows, the legal framework of the Statute has not managed to guarantee the full respect of the *habeas corpus* rights of suspects, particularly those who were already (unlawfully) detained by national authorities when the Prosecutor applied to the Pre-Trial Chamber (PTC) for an arrest warrant. This is due not so much – or at least not only – to the

[1] Salvatore 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*, vol II (OUP 2002) 1183.

inadequacies of the Rome Statute, as to the inherent tensions and limitations of the ICC as an institution.

First, the Brief explores cooperation within the institutional design and structural features of the ICC. It starts by articulating why and how cooperation is more of a risk factor for the ICC than for its *ad hoc* predecessors, and thus how the ICC is much more vulnerable when states do not comply with their obligations. Second, it explores the close link that exists between cooperation and the complementary jurisdiction of the ICC. Cooperation with an international tribunal that has a complementary jurisdiction works in a unique way, and poses peculiar challenges to the right to liberty of defendants whose conduct the Prosecutor decides to investigate and who are subsequently charged. Third, the Brief examines whether the provisions of the Statute protecting the right to liberty sufficiently acknowledge the position of detained suspects in light of the division of labor between states and the Prosecutor during the investigation, and points out some of its major shortcomings. Finally, it reviews the case law concerning the challenges to jurisdiction raised by three accused: Lubanga, Katanga and Gbagbo. The Court's response to these challenges is a clear indicator as to how the ICC judges conceive of their supervisory role vis-à-vis the Prosecutor and national authorities and their responsibilities in guaranteeing the right to liberty of defendants.

The Brief concludes that the Prosecutor and the judges should have engaged with and reflected more critically on the structural characteristics of the ICC, so as to, on the one hand, minimize the inevitable risks that cooperation between states and the Prosecutor entails for the rights of suspects, and, on the other, provide an adequate remedy.

II. EXPLORING THE ICC DEPENDENCE ON COOPERATION

The dependence on cooperation from states and non-state actors to arrest suspects and the lack of enforcement powers is nothing new in international criminal justice. In this respect, the difficulties encountered by the ICTY in obtaining the presence of defendants and the problems that the ICTR faced in its relationship with the Rwandan government are well known.

However, it is argued that for the ICC, cooperation constitutes more of a risk factor due to the particular institutional characteristics of this court. The *ad hoc* Tribunals were established pursuant to UN Security Council (SC) resolutions under Chapter VII of the UN Charter in response to specific crises (Yugoslavia and Rwanda). They dealt with geographically limited areas where the international community had been cohesive in supporting their mission and 'had forged a consensus that the horrors done to civilians had to be addressed, in part, through criminal trials'.[2]

By contrast, the ICC is a permanent court established by a treaty extensively negotiated by sovereign states. Its jurisdiction can be triggered by three different mechanisms – a referral from a state, a referral from the SC or the *proprio motu* powers of the Prosecutor[3] – and is meant to deal with potentially every future instance of impunity for international crimes. The ICC's mandate covers a number of different situations, each with its own geopolitical context; this makes the constant support of the international community much more difficult to obtain. As a consequence, the ICC often cannot count on essential international backing to urge reluctant states to cooperate with it.[4]

The source of the obligation to cooperate with the *ad hoc* Tribunals and the ICC is also different in nature. Requests for cooperation of the *ad hoc* Tribunals are considered as 'the application of an enforcement measure under Chapter VII of the Charter of the United Nations'[5] and are binding on all UN member states; by contrast, the Rome Statute establishing the ICC cannot impose duties on states that are not parties to it, except when the SC triggered its jurisdiction.[6] As has been stated, 'what was ostensibly given to the ICTY and ICTR, by virtue of their SC mandate that binds all UN members to support these tribunals, must be earned by the ICC through its campaign for universal ratification of the RS [Rome Statute]'.[7]

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[2] Richard Dicker and Elizabeth Evenson, ICC Suspects Can Hide - and That Is the Problem, *Jurist Hotline* (2012), available at: http://jurist.org/hotline/2013/01/dicker-evenson-icc-suspects.php.
[3] Articles 13, 14 and 15 of the Rome Statute.
[4] Victor Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan' (2009) 31 *Human Rights Quarterly* 661-662.
[5] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993).
[6] Articles 12(2) and 13 of the Rome Statute.
[7] Peskin (n 4) 662.

At the time of writing, 123 states have acceded to the Rome Statute. Yet, some of the world's most influential states - such as three of the permanent members of the SC (US, China and Russia) - have not joined the Court.

III. COOPERATION WITH A COMPLEMENTARY COURT DURING THE INVESTIGATION

The principle of complementarity is enshrined in Article 17 of the Statute, a provision on the admissibility of cases before the Court. According to it, a case is admissible before the Court only when national authorities remain inactive towards it or, where there are domestic proceedings, but the authorities appear 'unwilling' or 'unable' to genuinely prosecute the case themselves.[8] The complementarity principle thus implies an assessment by the Court on whether and how national authorities are conducting proceedings over international crimes, so as to determine which forum is the most appropriate to adjudicate certain cases.

The connection between complementarity and cooperation has yet to be explored thoroughly by scholars, especially from a perspective of the protection of the rights of the accused. An exhaustive analysis of this topic exceeds the scope of this contribution. It is important, however, to point out two crucial and inter-related aspects of the above-mentioned relationship, which will serve as a background for the discussion regarding the right to liberty of detained suspects undertaken in Part V and VI of this Brief.

a) The interaction between the Prosecutor and national authorities for the purpose of the admissibility assessment before the opening of an investigation

Upon receipt of a referral or a communication regarding the commission of crimes, the Prosecutor starts a 'preliminary examination' of the information received in order to determine whether a 'reasonable basis' to open an investigation exists. At the end of the preliminary examination, should the Prosecutor decide that a reasonable basis to proceed exists, s/he will open a formal investigation into a situation.[9]

[8] Prosecutor v. Katanga, AC, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8, 25 September 2009, 78.

[9] Article 53(1) and (2) of the Rome Statute. In case the Prosecutor starts the investigation pursuant to her/his *proprio motu* powers, s/he shall request the PTC for an authorization to do so, see Article 15(3) of the Rome Statute.

To this end, s/he is mandated to determine - in addition to the existence of the ICC's jurisdiction and the interest of justice in the situation concerned - whether 'the case is or would be admissible under Article 17'.[10]

It is important to note that at this very early stage the Prosecutor has not yet developed a case against a specific individual. Thus, the assessment of national efforts is done 'with respect to potential cases (...) that would likely arise from an investigation into the situation'.[11] Moreover, since the investigation has not yet formally started, the Prosecutor has only limited means of fact-finding[12] and does not enjoy the powers that Article 54 sets forth for the investigation.[13] For the same reason, the cooperation regime under Part 9 of the Rome Statute[14] is not available yet.[15]

In light of the above, one might have the impression that the preliminary examination is a static evaluation phase, which occurs mainly in The Hague behind the Prosecution staff's desks, involving not much more than a careful study of the materials submitted with the referral and the reports published by the media and NGOs.

It is submitted that this is often a misconception. Since the engagement of the Prosecutor into a situation, the Prosecution and states authorities work in close connection. In addition to collecting information regarding the commission of crimes, the Prosecutor has to verify whether genuine investigations and prosecutions have been or are being conducted in the state concerned. Moreover, it is during the preliminary examination that the Prosecutor endeavors to ensure the cooperation of states that will be so essential in the future, should an investigation commence.

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[10] Ibid.

[11] OTP, 'Policy Paper on Preliminary Examinations' (2013) 43.

[12] According to Article 15(2) and Rule 104, the Prosecutor may seek additional information on the alleged crimes from states, organs of the United Nations, intergovernmental and non-governmental organizations and other sources, and may receive testimony at the seat of the Court. At this stage, thus, the OTP relies heavily on information from outside sources rather than its own investigators (i.e., UN inquiries, media reports and NGOs analysis).

[13] OTP, 'Policy Paper on Preliminary Examinations' (2013) 85.

[14] Part 9 of the Rome Statute, entitled 'International cooperation and judicial assistance', governs the 'external part of the Court's procedural law' and imposes on States Parties obligations to cooperate with the Court in the investigation and prosecution of crimes. See, Claus Kress, Kimberly Prost and Peter Wilkitzki, 'Part 9. International Cooperation and Judicial Assistance: Preliminary Remarks' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Beck/Hart 2008) 1506.

[15] OTP, 'Policy Paper on Preliminary Examinations' (2013) 85; OTP Informal Expert Paper, 'Fact Finding and Investigative Functions of the OTP' (2003) 20-29.

Inevitably, this implies a certain degree of interaction and diplomatic efforts between the Office of the Prosecutor (OTP) and national authorities; the OTP Policy Paper on Preliminary Examinations explicitly envisages the possibility for the OTP to 'undertake field missions to the territory concerned in order to consult with the competent national authorities, the affected communities and other relevant stakeholders, such as civil society organizations'.[16]

On their side, states will have to allow the deployment of such missions on their territory, provide information to OTP officials regarding their judicial system and the proceedings that they might be conducting, as well as confirming their willingness to assist the possible ICC investigation. Although it does not take the form of a formal cooperation envisaged by Part 9 of the Statute, it is clear that a collaborative attitude from state authorities is crucial already in this pre-investigation stage.

Finally, it is important to underscore the fact that the Statute does not impose a deadline on the Prosecutor for completing the preliminary examination, nor does it foresee an involvement of the PTC in supervising the Prosecutor's interaction with national authorities with the view of safeguarding the rights of persons who might become future suspects.
This means that unsupervised negotiations on burden-sharing[17] between the Prosecutor and states can go on for years without a meaningful involvement of the PTC in the situation of suspects until the issuance of an arrest warrant. As will be seen, this is especially problematic for those ICC suspects who are also subject to national proceedings throughout the Prosecutor's investigation.

b) Positive complementarity as a Prosecutorial strategy to enhance cooperation

Complementarity is not only a criterion governing the jurisdiction of the ICC, but also one of the main principles behind the strategy adopted by the OTP. Since the beginning of his tenure, the Prosecutor adopted a 'positive approach' to complementarity. According to this interpretation, rather than competing with national courts for jurisdiction, the OTP takes an active stance to encourage states to carry out their primary duty to prosecute international crimes, and 'relies on national and international networks, and participates in a system of international cooperation'.[18] As a consequence, positive complementarity encourages a division of labor between the Prosecutor and national authorities, in which the former focuses

[16] OTP, 'Policy Paper on Preliminary Examinations' (2013) 85.
[17] See further at b).
[18] OTP, 'Report on Prosecutorial Strategy' (2006) 5.

on the perpetrators bearing the greatest responsibility, while the latter deal with the remaining less serious cases.[19]

It has rightly been observed that the concept of positive complementarity implies 'interdependency between two *fora* rather than the complete independence of the ICC from domestic Courts'[20] and is based on an 'uncompetitive' relation between the ICC and domestic jurisdictions.[21] Interestingly, this understanding of complementarity resulted in a practice that appears to be at odds with the goal of encouraging national proceedings. In several occasions, in fact, the Prosecutor has exhorted states to refer situations on their territories to the Court.[22] The reason for prompting this so-called 'self-referrals' has to do with the structural constraints that characterize the functioning of the Court, first and foremost, the need for states' cooperation.

As early as 2003, the OTP acknowledged the fact that, 'where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage to knowing that that State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute'.[23]

So far, five out of eight situations investigated by the Court are the result of self-referrals, including those on the Democratic Republic of the Congo (DRC) and Ivory Coast.[24] The consistency of the practice of self-referrals with the letter and purpose of the Rome Statute has been debated at length among scholars, and goes beyond the scope of this contribution. However, when addressing *habeas corpus* rights of defendants, this 'friendly' relationship between the Court and the referring state is an important contextual element to keep in mind, as one would expect that more guarantees would be in place for the suspects.

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[19] Sarah Nouwen, *Complementarity in the Line of Fire* (CUP 2013) 341.
[20] Hitomi Takemura, 'A Critical Analysis of Positive Complementarity' in Stefano Manacorda (ed), *Criminal law between war and peace* (Cuenca: Ed de la Universidad de Castilla-La Mancha 2009) 602.
[21] Nouwen (n 19) 341.
[22] Takemura (n 20) 14.
[23] OTP, 'Annex to the Paper on Some Policy Issues before the Office of the Prosecutor: Referrals and Communications' (2003) 5.
[24] The investigation into the situation in Ivory Coast was technically opened at the Prosecutor's initiative under Article 15 of the Statute in 2011; however, the engagement of the Court in the country was prompted by a declaration accepting its jurisdiction under Article 12(3) of the Statute by the government of Ivory Coast in 2003.

IV. THE RIGHT TO LIBERTY OF SUSPECTS BEFORE THE ICC

a) Defining the terms 'suspect', 'situation' and 'case'

The Rome Statute leaves us much in the dark when it comes to the position of suspects: it does not provide a definition nor does it determine the moment when a person becomes one in the Prosecutor's investigation. From Article 55(2), we infer that a suspect is a person about whom the Prosecutor has grounds to believe that s/he has committed a crime within the jurisdiction of the Court.[25]

Upon the confirmation of charges under Article 61, the suspect acquires the status of 'accused', whose rights during trial are enshrined in Article 67.
Scholars noticed early on that this omission may turn out to be problematic and acknowledged that the word suspect 'will emerge in practice despite the fact that it has not been used in the Statute'.[26]

The notion of suspect is closely linked to that of a case, which equally does not find a definition in the Statute. However, the meaning of a case has been clarified by the judges in opposition to that of a situation. According to the PTC, 'situations are generally defined in terms of temporal, territorial and in some cases personal parameters (…) and entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such'.[27] Cases, on the other hand, 'comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects' and 'entail proceedings that take place *after* the issuance of a warrant of arrest or a summon to appear [emphasis added]'.[28]

[25] This provision protects suspects during questioning, either by the Prosecutor or by national authorities, affording them the traditional guarantees of being informed of the reasons for the arrest, remaining silent, legal assistance and the presence of counsel during questioning.
[26] Zappalà (n 1) 1182, n 3.
[27] Situation in the DRC, PTC I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, 65. On the meaning of a 'case' in the Rome Statute see, Rod Rastan, 'What is a Case for the Purpose of the Rome Statute?' (2008), 19 *Criminal Law Forum* 435-448.
[28] Situation in the DRC, PTC I, Decision on the Applications for Participation in the Proceedings (n 27).

The Court, thus, acknowledges the existence of a case, and hence of a suspect, only after the issuance of a warrant of arrest or a summons to appear pursuant to Article 58.[29]

In practice, however, the Prosecutor will most likely focus on individuals long before a legal case in the sense of Article 58 exists.[30] The Regulations of the OTP clarify that allegations against one or more specific individuals are bundled during the course of the formal investigation. Under Regulation 34, a joint team of the OTP will review the information and evidence collected during the investigation and will 'determine a provisional case hypothesis (or hypotheses) identifying the incidents to be investigated and the person or persons who appear to be the most responsible'. Such case hypothesis will include 'a tentative indication of possible charges, forms of individual criminal responsibility and potentially exonerating circumstances'.

It is useful therefore to distinguish between a case in a strict legal sense, which arises after the issuance of an arrest warrant or a summons by the PTC, and a case in a broader sense, which commences at the moment the Prosecutor directs her/his investigative efforts towards a specific individual in the course of the investigation.[31] However, there is no way of knowing when the Prosecutor begins such investigative efforts. The designation of suspects by the OTP is a matter of unpublished internal policy. The Statute does not require the Prosecutor to formalize such designation with a notification to the Registry, the PTC and even less Defense counsel,[32] although an exception might arise in case the Prosecutor decides to interrogate the suspect in the course of the investigation.[33] At the same time, there is no involvement of the PTC in supervising the Prosecutor's activities with respect to the designation of suspects and the safeguard of their right to liberty until the issuance of an arrest warrant.

[29] Pursuant to Article 58 of the Statute, the Prosecutor may request the PTC the issuance of a warrant of arrest or a summons to appear 'at any time after the initiation of an investigation'.
[30] Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court* (Springer Berlin Heidelberg 2010) 38.
[31] Ibid.
[32] Amal Alamuddin, 'Collection of Evidence' in Karim A.A Khan, Caroline Buisman and Chris Gosnell (eds), *Principles of Evidence in International Criminal Justice* (OUP 2010) 271.
[33] According to Article 55(2) of the Rome Statute, the interrogation of suspects (carried out either by the OTP staff or national authorities) requires certain guarantees, among which the right to have legal assistance of the person's choosing and to be questioned in the presence of counsel.

b) The legal framework of the Rome Statute

The Statute provides significant protection to individuals during the pre-trial phase. Along with the traditional guarantees concerning the questioning procedures, Article 55 provides that 'in respect of an investigation under this Statute, a person (…) shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute'.[34]

The grounds and procedure referred to by Article 55 are those contained in Article 58, regulating the issuance by the PTC of a warrant of arrest or a summons to appear,[35] and Article 59, dealing with arrest and surrender proceedings in the custodial state.

As is the case with the ICTY and ICTR, the ICC relies on the cooperation of states when it comes to the execution of its arrest warrants.

Pursuant to Article 59(1) the requested state shall immediately take steps to arrest the person in question in accordance with its laws and the ICC Statute. This provision further provides that:

> A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that a) the warrant applies to that person, b) the person has been arrested in accordance with the proper process, c) the person's rights have been respected.[36]

The obligation to arrest suspects, therefore, is governed by two legal regimes: the Rome Statute (at Part 5 regulating 'Investigation and prosecution', and at Part 9 regulating cooperation) and the relevant procedure under national law.
Under Article 59(3) the arrested person has the right to request interim release to national authorities pending surrender to the Court. It is important to remark, however, that national

[34] Article 55(1)(d) of the Rome Statute.
[35] According to the PTC, it may issue an arrest warrant on the application of the Prosecutor, if it is satisfied that a) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the ICC; b) the arrest of the person appears necessary to i) ensure the person's appearance at trial, ii) ensure that the person does not obstruct or endanger the investigation or the court proceedings; iii) where applicable, to prevent the person from continuing with the commission of crimes.
[36] Article 59(2) of the Rome Statute. See, Mohamed M El Zeidy, 'Critical Thoughts on Article 59(2) of the ICC Statute' (2006) 4 *Journal of International Criminal Justice* 448.

judges are not entitled to review the warrant of arrest issued by the PTC. Article 59(4) prohibits national authorities to consider whether the warrant of arrest was properly issued in accordance with Article 58(1)(a) and (b). Under Rule 117(3) of the Rules of Procedure and Evidence (RPE), the arrested person shall bring any challenge as to the issuance of the warrant directly to the PTC.

The protection under the Statute of the accused's right to liberty is premised on a clear distinction between proceedings before national authorities and proceedings before the Court. The right of persons not to be subject to arbitrary arrest and detention enshrined in Article 55 is specifically related to 'an investigation under this Statute'. However, this framework does not take into account the possibility that a suspect may also have been subject to an investigation under national proceedings, which may or may not be related to that of the Court. By so doing, it fails to acknowledge the reality that ICC investigations do not take place in a vacuum, and the activities of the Court cannot always be separated from those of the states. More often than not, the ICC is involved in situations of ongoing conflict where crimes continue to be committed while local authorities are taking measures to deal with them. In some of the situations before the Court (DRC, Central African Republic (CAR), Ivory Coast) the opening of an ICC investigation took place in the context of ongoing national criminal proceedings, which had to do with incidents falling within the broader situation investigated by the Court.

Along the same line, in endowing states with the task of ensuring the lawfulness of the arrest, Article 59(2) appears to have been drafted on the assumption that suspects would be at large. All the guarantees enshrined therein apply from the moment in which the person is apprehended and arrested by local authorities *on behalf* of the Court, and are aimed to make sure that states respect the basic human rights of suspects while executing the request of the Court. The early practice of the ICC has proved that this is only one of the possible scenarios. As the following Section will show, in the situation in the DRC and Ivory Coast, some defendants had already been in detention due to national proceedings when the Prosecutor requested their arrest on behalf of the Court.

V. CHALLENGES TO THE JURISDICTION OF THE COURT BASED ON *HABEAS CORPUS* RIGHTS

So far, three defendants have challenged the jurisdiction of the Court alleging violations of their *habeas corpus* rights: Thomas Lubanga[37] and Germain Katanga[38] in the situation in the DRC, and Laurent Gbagbo[39] in the situation in Ivory Coast.

These defendants were already in the custody of national authorities when the Prosecutor applied for an arrest warrant to the PTC. Both Lubanga and Katanga had been initially arrested in relation to the killing of nine MONUC peacekeepers on 25 February 2005.[40] Katanga was arrested by Congolese authorities the very day after the incident, on 26 February 2005,[41] whereas Lubanga was captured nearly one month later on 19 March 2005. Following their apprehension, both had been kept in detention and subsequently charged with additional and very serious crimes such as genocide and crimes against humanity. The Prosecutor's request for arrest on behalf of the Court, therefore, came after ten and 17 months of detention in national prisons respectively. Similarly, Gbagbo was arrested by forces loyal to the newly elected president Ouattara in April 2011 and detained in various locations before the issuance of an arrest warrant by the PTC on 23 November 2011 and his transfer to the Court one week later.[42]

Defendants complained that their initial detention by national authorities had been completely unlawful and motivated by political reasons. They lamented several violations of their basic rights by local authorities, such as being deprived of their liberty in the absence of an arrest warrant, without being informed of the charges against them, and being denied prompt access to a lawyer. Gbagbo's Defense also alleged grave physical ill treatment, abuses, and torture.[43]

[37] Prosecutor v. Lubanga, Defense Application for Release, ICC-01/04-01/06, 23 May 2006.
[38] Prosecutor v. Katanga, Defense Motion for a Declaration on Unlawful Detention and Stay of Proceedings, ICC-01/04-01/07, 2 July 2009.
[39] Prosecutor v. Gbagbo, Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Art. 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute, ICC-02/11-01/11, 29 May 2012.
[40] Prosecutor v. Lubanga, Prosecution's Submission of Further Information and Materials, ICC-01/04-01/06, 25 January 2006, 8-10.
[41] Prosecutor v. Katanga, (n 38) 12.
[42] Prosecutor v. Gbagbo (n 39) 8, 30, 41.
[43] Ibid. 20.

As a consequence, defendants requested the Court to take responsibility for the above violations and dismiss its jurisdiction.[44] This request was based on two arguments, which will be considered below.

a) Prosecutorial misconduct

Defendants complained of the Prosecutor's violation of the statutory duty of care towards the suspects because, by the time they became target of the ICC investigation, the Prosecutor had to be aware of the violations characterizing their detention before national authorities, but did nothing to stop them. Quite the contrary: s/he took advantage of them for her/his own investigations.

The core argument of defendants' submissions was that, once the accused becomes a principal suspect in the case and therefore a target of the activities of the Prosecutor, a duty of care towards him/her arises by virtue of Articles 54(1)(c), 67(1)(c) and 21(3).[45] The first article obliges the Prosecutor to 'fully respect the rights of persons' during an investigation; the second endows the accused with the right to be tried without undue delay, and the third one is the overarching principle according to which the Court must apply and interpret the provisions of the Statute in compliance with internationally recognized human rights.

A crucial issue that defendants had to face, therefore, was determining at which point in the investigations the Prosecutor's attention was drawn to them and they became suspects in the case. As has been seen, the Prosecutor has no obligation to formalize the moment in which a person becomes a suspect under the Statute. Moreover, in the view of the Court, a case in a legal sense arises only with the application of an arrest warrant by the Prosecutor. Katanga's Defense tried to show the limitations of this narrow view:

> In the time preceding the issuing of an arrest warrant by the ICC there was an increase in interest in the accused by the ICC. This is not a black and white situation. The successful application for a warrant of arrest would be an artificial point to measure the

[44] The scenario of a state that arrests or detains a suspect unlawfully before surrendering him to the ICC has been thoroughly discussed by Christophe Paulussen in his doctoral thesis on the issue of *male captus bene detentus* before the ICC. See: Christophe Paulussen, *Male Captus Bene Detentus? Surrendering Suspects to the International Criminal Court*, vol 41 (Intersentia 2010). See also: Kelly Pitcher, Addressing Violations Of International Criminal Procedure, *ACIL Research Paper* (2013-14), available at: www.acil.uva.nl and *Social Science Research Network*; Karel De Meester, *The Investigation Phase in International Criminal Procedure*, vol 71 (Intersentia 2015).

[45] Prosecutor v. Katanga (n 38) 90.

> beginning of participation by the ICC in the situation of the accused. At some point during the preceding period of growing interest in the accused there was a formulation of intention on the part of the OTP to treat the accused as a principal suspect in the case concerning Bogoro. It is at that point that the prosecutor assumes a duty of care towards the accused, whatever his status in the DRC.[46]

Along these lines, defendants endeavored to show that they had become target of the investigation long before the request by the Prosecutor of an arrest warrant to the PTC. They did so by quoting public statements and interviews of OTP staff released at the early stages of the investigation (and even during the preliminary examination) in which they explicitly referred to the fact that the Prosecution was monitoring the accused.[47]

At the same time, defendants claimed that the Prosecutor had to be fully aware of their unlawful conditions of detention. They reported visits of the Prosecutor's staff to their countries and meetings held between Prosecution representatives and national authorities that must have informed the OTP of their status.[48]

In the Lubanga case, the Prosecutor's knowledge about the defendant's conditions of detention before national authorities was explicitly admitted by the Prosecutor himself. In submitting further information and materials to the PTC to complement his request of arrest and surrender, the Prosecutor stated that:

> The DRC proceedings against, among others, Thomas Lubanga Dyilo are the subject of serious and increasing criticism. The arrest of Lubanga by the DRC authorities took place in the context of international pressure, arising from the reaction to the killing of UN (MONUC) peacekeepers on 25 February 2005 (…)[the so-called Ndoki incident]. To the extent that information is available to the Prosecution, neither at the time of his arrest nor later has evidence emerged that clearly links Lubanga to the Ndoki incident (…) This situation has resulted in increased criticism from international NGOs, alleging that the detention of Thomas Lubanga Dyilo and the other leaders of the political e/o military groups may be irregular.[49]

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[46] Ibid. 80.
[47] Prosecutor v. Gbagbo (n 39) 236-238.
[48] Prosecutor v. Katanga (n 38) 84-85.
[49] Prosecutor v. Lubanga (n 40) 8-11.

He then moved on to quote a report from Human Rights Watch documenting the breaches of international standards of due process by the DRC authorities in arresting the suspects of the Ndoki incident. Apparently, the Prosecutor's only concern with respect to these allegations was the fact that they 'may result in the DRC authorities soon being prepared to release Thomas Lubanga Dyilo'.[50] Hence, he stressed the urgency of the issuance of an arrest warrant by the PTC. Regrettably, Lubanga's Defense did not mention this in its motion challenging the jurisdiction of the case (although, with the benefit of hindsight, this probably would not have made much difference).

Finally, in light of the argument above, defendants alleged that the situation of unlawful detention in their home country enabled their transfer to the Court, and that the Prosecutor and national authorities collaborated closely to this end. The government of their state wanted them to be prosecuted before the ICC out of internal political calculations, while the Prosecutor, on his/her side, was more than willing to take up their cases and take advantage of the readiness of local authorities to cooperate. Once again, the defendants supported their allegations with circumstantial evidence: public statements of government officials expressing deference towards the Court's expectations and decisions; Prosecution's representatives expressing their preference for a trial before the ICC; NGOs reports suggesting that state authorities in the DRC have been keeping individuals in detention without charge merely for the benefit of the ICC (Katanga); the fact that the local prosecutor charged the accused with different crimes from those under the Rome Statute in order to enable the Court to step in; the fact that the ICC Prosecutor waited a long time before asking the PTC to issue a warrant of arrest. With respect to the latter criticism, it has to be noted that, after the opening of an investigation in the DRC, the Prosecutor waited almost three years before requesting the issuance of an arrest warrant to the PTC against Lubanga and Katanga.

Defense counsels pointed out that, in the meantime, the suspects were kept in unlawful detention by local authorities and, therefore, the Prosecutor had a duty to act with speed and diligence in requesting their transfer to the Court once he had determined that there were reasonable grounds to believe that they had committed crimes.

[50] Ibid. 12.

b) The Court's responsibility as the last forum of adjudication

Defendants argued that - irrespective of the negligence of the Prosecutor and her/his collusion with the government of their state - the Court should take responsibility for the violations of their rights committed by national authorities and dismiss its jurisdiction. Borrowing from the ICTR jurisprudence, Katanga's Defense used the concept of 'constructive custody'.[51] According to this notion, once the warrant of arrest is issued, the accused falls under the constructive custody of the ICC with the consequence that 'any continuing illegality becomes the shared fruit and responsibility of the DRC and the ICC'.[52] This is because the prior state of detention of the accused 'serves the interests of, enables, and is in fact being taken advantage of by the ICC for the purpose of the accused's eventual transfer to the ICC'.[53] The very fact that serious violations occurred, therefore, obliges the Court to review and supervise such violations without the need to conduct any inquiry into issues of knowledge and duty of care of the Prosecutor.

Both Lubanga's and Katanga's Defense referred to the ICTR jurisprudence on the abuse of process doctrine.[54] In Barayagwiza, the ICTR Appeals Chamber found that the accused had been held in pre-trial detention for an unreasonable amount of time (more than three years), and that his right to be promptly informed of the charges had been violated. The Chamber noted that it was irrelevant that the responsibility for such breaches was shared between the Tribunal and Cameroon (the state where the accused had been detained prior to his transfer to the ICTR), 'since it [was] the Tribunal and not any other entity that [was] currently adjudicating the Appellant's claims'.[55] In light of these findings, the Chamber concluded that the only adequate remedy for the violations of Barayagwiza's rights was the release of the defendant and the dismissal of the charges against him.[56]

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[51] Prosecutor v. Barayagwiza, AC Decision, ICTR-97-19-AR72, 3 November 1999, 43, 100.

[52] Prosecutor v. Katanga (n 38) 101.

[53] Ibid. 102.

[54] In the common law tradition, the abuse of process doctrine engages a court's discretion to stay proceedings in order to prevent the misuse of the criminal trial in cases of serious violations of the accused's rights, which would offend the court's sense of justice and integrity. See, Prosecutor v. Barayagwiza (n 51) 73-77.

[55] Ibid. 85. Christophe Paulussen pointed out that the Chamber appears to have gone even further by stating that it would take responsibility, not only if responsibility is shared, but also if a third party is to blame (thus even if the Tribunal is not to be blamed at all), see Paulussen (n 44) 529.

[56] Ibid. 106. The AC, however, did find that the Prosecutor's negligence and inaction were 'egregious', and that they played a great role in the resultant denial of the accused's rights. Upon appeal of the Prosecutor, the AC found that, based on 'new facts', the violations of the defendant's rights were not as serious as had been previously determined and they were due more to Cameroon than to the Prosecutor. As a consequence, the remedy of the relinquishment of jurisdiction was no longer appropriate. See, Prosecutor v.

Finally, defendants proposed a reading of Articles 55 and 59 consistent with a strong supervisory role of the Court over proceedings before national authorities. As has been seen, Article 55 endows the accused with the right not to be subject to arbitrary arrest and detention with respect to an 'investigation under this Statute', whereas Article 59 regulates arrest and surrender proceedings in the custodial State and mandates the latter to ensure that due process rights of defendant are respected.

With regard to Article 55, defendants invited the Court to adopt a broader interpretation of the terms 'investigation under this Statute', encompassing all the proceedings whose purpose is to bring the person before the Court, including those pertaining to the custodial State.[57] This interpretation would allow to widen the scope of the accused's protection and of the Court's review of violations committed by national authorities.

As far as Article 59 is concerned, defendants noted how this provision is drafted on the assumption that the accused would be at large, as local judicial authorities are mandated to review the respect of defendants' rights *in the execution* of the request of the Court to arrest and surrender.[58] As the Gbagbo Defense pointed out, however, defendants cannot be stripped of their protection from unlawful arrest on the pretext that they were already in detention at the time of execution of the procedure prescribed by the Court.[59] Unlawful arrest proceedings occurring prior to the application for a warrant of arrest to the Court constitute a violation of Article 59(2) of the Statute. In such cases, therefore, the arrest to be taken into account by the Court in supervising the activities of national authorities is the one which took place in the context of national proceedings, and not the one executed on behalf of the Court. Doing otherwise would create inequality between persons already in custody at the time the Prosecutor initiates proceedings, who would not be afforded statutory protection, and persons at large, towards whom the guarantees of Article 59 would apply.[60]

Barayagwiza, AC Decision on the Prosecutor's Request for Review or Reconsideration, ICTR-97-19-AR72, 31 May 2000. These seminal rulings have been debated at length among scholars. See, *inter alia*: William Schabas, International Decisions: 'Barayagwiza v. Prosecutor' (2000), 94(3) *American Journal of International Law*; Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2007) 279–290.

[57] Prosecutor v. Gbagbo (n 39) 256-257.

[58] Prosecutor v. Katanga (n 38) 104; Prosecutor v. Gbagbo (n 39) 258-260.

[59] Prosecutor v. Gbagbo (n 39) 258–260.

[60] Ibid.

VI. RESPONSIBILITY OF THE COURT FOR VIOLATIONS COMMITTED BY NATIONAL AUTHORITIES

The judges of the Court have constantly dismissed the arguments described above.[61] According to their view, Article 59 cannot be applied to the period of time before the receipt by the custodial state of the request for arrest and surrender by the Court 'even in cases where the person may already have been in the custody of that state, and regardless of the grounds for any such prior detention'.[62] From this reasoning it is clear that the Court considers the successful application for a warrant of arrest as the point to measure the beginning of its participation in the situation of the suspect and, therefore, its responsibility towards him/her. Violations of *habeas corpus* rights that have occurred prior to this moment can be supervised by the Court only upon the proof of 'concerted action' between an organ of the Court (i.e., the Prosecutor) and national authorities in the commission of such violations.

> Violations of fundamental rights, however serious, can be said to constitute an abuse of process only insofar as they can be attributed to the Court. This means that they have to be i) either directly perpetrated by persons associated with the Court; ii) or perpetrated by a third person in collusion with the Court. Conversely, when a violation of the suspect's fundamental rights, however grave, is established, but demonstrates no such link with the Court, the exceptional remedy of relinquishment of jurisdiction/staying of the proceedings is not available.[63]

In all the above-mentioned cases the Court found no evidence that the arrest and detention of the accused prior to the issuance of the ICC arrest warrant was the result of any concerted

[61] Katanga's challenge was dismissed because it was filed too late, see Prosecutor v. Katanga, AC, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defense for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings', ICC-01/04-01/07 OA-10, 12 July 2010.

[62] Prosecutor v. Gbagbo, PTC I, Decision on the 'Corrigendum of the Challenge to the Jurisdiction of the ICC on the Basis of Art. 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute', ICC-02/11-01/11, 15 August 2012, 101.

[63] Prosecutor v. Gbagbo (n 62) 92. Six years earlier, the same PTC adopted a less categorical view by stating that, even in cases where no concerted action is established, 'the abuse of process doctrine constitutes an additional guarantee of the rights of the accused'. At the same time, however, the Chamber recalled that this doctrine 'has been confined to instances of *torture or serious mistreatment* [emphasis added] by national authorities of the custodial State *in some way related* [emphasis added] to the process of arrest and transfer of the person to the relevant international criminal tribunal', Prosecutor v. Lubanga, PTC I, Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Rome Statute, ICC-01/04-01/06, 3 October 2006, 10. On this point see Paulussen (n 44) 591, 865.

action between the Prosecutor and local authorities. The Court clarified that 'mere knowledge' on the part of the Prosecutor of the investigations carried out by national authorities is no proof of his involvement in the way they are conducted or in the means applied therein. In the same vein, the mere fact that the Prosecutor was in contact with local authorities throughout the period of the preliminary examination and the investigation is not enough to demonstrate his/her complicity in the detention of the accused.[64]

VII. CONCLUSION

The Rome Statute has been praised for representing a clear improvement in protecting the right to liberty of the accused compared to the *ad hoc* Tribunals. Nevertheless, the early practice of the Court has shown that the Statute's guarantees alone are not sufficient when the investigation of the Prosecutor inserts itself in ongoing national proceedings where suspects are already in the custody of local authorities.

The engagement of the Prosecutor with national authorities goes far beyond the cooperation requests regulated under Part 9 of the Statute following the official opening of an investigation. In the ICC complementary system, negotiations regarding the division of labor between the Prosecutor and states start as early as the launching of a preliminary examination.

The Statute does not impose a maximum duration of the investigation and does not set a deadline for the Prosecutor to request the PTC the issuance of an arrest warrant against an individual. Within this scheme and broad prosecutorial discretion, the need of protecting ICC suspects who are detained by national authorities throughout the Prosecutor's investigation is largely unacknowledged.

The reviewed case law has shown that the Prosecutor and the judges have failed to engage with the inherent tensions and limitations of the Court and did not sufficiently reflect on the challenges that cooperation of states entails for the right to liberty of suspects within the unique structural system of the ICC.

[64] Prosecutor v. Lubanga, AC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01-06 OA-4, 14 December 2006, 42; Prosecutor v. Gbagbo (n 62) 109.

As has been seen, Defense counsels have advocated for the imposition of a duty of diligence on the Prosecutor when s/he becomes aware of national proceedings involving a person whom s/he has targeted for the purpose of the investigation.

Melinda Taylor and Charles Jalloh have exhaustively elaborated on the content of this duty, arguing, in particular, that the Prosecutor should notify the presence of detained suspects to the PTC.[65] This would indeed represent a viable way to more carefully supervise the cooperation of the Prosecutor with national authorities for the purpose of surrendering suspects to the Court, and would enable the judges to better assess the timeliness with which the Prosecutor requests the issuance of an arrest warrant.

As to the judges, it is submitted that the choice to acknowledge their responsibilities towards defendants only starting from the issuance of an arrest warrant is regrettable, as it fails to address the necessity of protecting the rights of persons who have been targeted by the Prosecutor long before the latter seeks an arrest warrant against them. Article 57 bestows the duty to 'provide for the protection (…) of persons who have been arrested' upon the PTC. A meaningful protection of arrested persons necessarily implies that the judges supervise the violations of suspects' rights occurring in the course of the investigation and irrespective of a concerted action between national authorities and the Prosecutor, which should nonetheless be considered as an 'aggravating factor'.[66]

This approach would also give a meaningful content to Article 85(1), which foresees an enforceable right to compensation to anyone who has been the victim of unlawful arrest or detention.

[65] Melinda Taylor and Charles Chernor Jalloh, 'Provisional Arrest and Incarceration in the International Criminal Tribunals' (*Social Science Research Network* 2013) 333.
[66] Ibid. 331.