No Shortcuts on Human Rights: Bail and the International Criminal Trial

Caroline L. Davidson
cdavidso@willamette.edu

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No Shortcuts on Human Rights: Bail and the International Criminal Trial
ARTICLES

NO SHORTCUTS ON HUMAN RIGHTS: BAIL AND THE INTERNATIONAL CRIMINAL TRIAL

CAROLINE L. DAVIDSON

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.\(^1\)

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\(^*\) Assistant Professor, Willamette University, College of Law. I am grateful to Paul Diller, Keith Cunningham-Parmeter and Greg McNeal, who were kind enough to tackle early drafts of this paper. I also am indebted to Meg de Guzman and other participants in the Junior International Law Scholars Association conferences at Temple University and Hastings Law Schools, as well as the Human Rights Section of the American Association of Law Scholars for the opportunity to receive feedback on a draft of this Article through its “New Voices in Human Rights Panel.” Finally, I must thank my former ICTY colleagues, prosecution and defense, in particular Bronagh McKenna and Diana Juricevic, for their helpful comments and my research assistant, Kara Cogswell. In the interest of full disclosure, I worked on provisional release as a lawyer in the Office of the Prosecutor (OTP) at the ICTY. The views reflected in this Article are mine alone and do not reflect those of the OTP.

INTRODUCTION

Release at international tribunals has come a long way, and the International Criminal Tribunal for the former Yugoslavia (ICTY) has done a lot right. Whereas defendants before the Nuremberg and Tokyo tribunals were automatically detained and could not seek release, at the ICTY, pre-

2. Due to problems with publishing diacritics and accents, I have replaced all diacritics and accented letters with the visually closest English letter. Also, in some instances, I have retained the full citation to a case when a shortened citation would be appropriate so as to retain identifying information that will help readers distinguish between cases and locate the primary source. Occasionally, I have omitted extremely long URLs and instead I have indicated the website where the source is available through a search engine.

trial release and release during breaks from trial has become increasingly common. Even at the ICTY’s sister tribunal, the International Criminal Tribunal for Rwanda (ICTR), provisional release lags behind, because only three defendants have been released.4

Nevertheless, at the ICTY, detention remains the starting point, and all defendants, other than those accused of contempt of court,5 are detained for trial. The acquittal of eleven of the 121 defendants whose cases have been completed, many after having spent several years in detention awaiting judgment, makes default detention for trial a concern.6 These defendants receive no compensation for their lost time.

Even for ICTY defendants who are released pre-trial because they pose no flight risk or danger, detention is inevitable. Once trial begins, the best they can hope for is to be released for court breaks or for short breaks due to illness or some other such circumstance. Litigants and the court appear to accept the baseline premise, with little or no discussion, that trial means detention.

This state of affairs is idiosyncratic. Domestic jurisdictions do not draw this stark line between pre-trial and trial for the purposes of release. Human rights norms likewise draw no such line.

True, trials for genocide or crimes against humanity are not trials for shoplifting. Courts and scholars have made much of the uniqueness of international tribunals. They have argued that the gravity of the charges, the complexity of the cases, the absence of an international police force, and the absence of explicit penalties for failure to appear, among other things, distinguish international criminal tribunals from domestic courts


6. See Wolfgang Schomburg, The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights, 8 NW. U. J. Int’l Hum. Rts. 1, 14 (2009), http://www.law.northwestern.edu/journals/jihr/v8/n1/1/ (noting that, according to data provided by the United Nations Detention Unit (UNDU) in The Hague, as of October 31, 2008, the average time of detention before final conviction was five years, that several defendants had been detained considerably longer, and that eleven alleged war criminals have been acquitted by the ICTY after spending lengthy periods in detention). Proceedings have concluded as to 125 ICTY defendants. See Key Figures of ICTY Cases, http://www.icty.org/sections/TheCases/KeyFigures (last updated June 30, 2010).
and render inappropriate human rights jurisprudence on the reasonableness of periods of detention.\footnote{See infra discussion accompanying notes 167–70 (noting the factors that many argue distinguish international criminal tribunals from domestic jurisdictions).}

However, international trials are also unique in ways that favor release. The accused are far from their families and support networks.\footnote{See Hans Holthuis, Registrar, Int’l Crim. Trib. for the Former Yugoslavia, Diplomatic Seminar of the Int’l Crim. Trib. for the Former Yugoslavia at The Hague 3, 10 (June 2008) (on file with author) (stating that “[i]n the case of the UNDU, its international character and unique detainee population raise further difficulties in terms of health care. Indeed, the particular profile and specific personal circumstances of ICTY detainees, being in many instances former high ranked political and military leaders, can aggravate the adverse impact of prison environment on their health. The distance from the detainees’ family and the familial social support network, as well as the detainees’ lack of familiarity with the surroundings, inevitably impact on the health condition of the detainees.”).} At the ICTY, defendants are also often considerably older and in worse health than detainees in domestic jurisdictions.\footnote{Id. at 3–7 (noting that at the UNDU, the average age of detainees was over twenty years older than in domestic jurisdictions and that over eighty percent of those detained were over the age of fifty).}

In addition, unlike in domestic jurisdictions, many international defendants are not direct perpetrators of the crimes, at least as the term is used in common parlance. Because they are not the trigger-pullers but rather the higher ups, many are, arguably, unlikely to be dangerous if released.\footnote{One could argue, however, that even those who never held a gun may be likely to present the very danger that landed them in the dock—fomenting ethnic tensions and participating in crimes through policy-making.}

But, most importantly, accused international defendants are detained for very long periods of time. Trials are long.\footnote{See James Meernik & Rosa Aloisi, Is Justice Delayed at the International Criminal Tribunals?, 91 JUDICATURE 276, 281 (2008) (stating that the average length of proceedings for top-level political military leaders at the ICTY is 1406 days, 1181 days for mid-level defendants and 950 days for low-level defendants); see also Stephanos Bibas & William W. Burke-White, International Idealism Meets Domestic-Criminal-Procedure Realism, 59 DUKE L.J. 637, 685 (2010) (noting that the average ICTY or ICTR case takes one and a half years, millions of dollars, and hundreds of witnesses).}

The ICTY has compounded the scale of the already massive cases by joining many defendants in widely varying roles in single cases.\footnote{The International Tribunals have engaged to varying degrees in the practice of joining several defendants and also several crimes and geographic areas into one trial. See Laura Bingham, Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 24 BERKELEY J. INT’L L. 687, 706 (2006) (noting that the ICTY has favored multi-defendant mega-trials as part of its completion strategy; whereas the ICTR has focused on trial readiness with smaller cases, and the ICTR Prosecutor has in fact sought to sever cases to bring them to trial sooner).}

Detainees spend many years in detention before their cases are resolved.\footnote{See Schomburg supra note 6, at 14 (“[T]he average time spent in pre-trial detention was 511 days. The average time spent in detention during trial was 489 days. The average time spent in detention while awaiting the finalization of appeal proceedings was 663 days.”).}
Detention prior to conviction is a serious infringement on the rights of defendants and has many real-life repercussions. Human rights implicated by detention include the rights to be presumed innocent, to liberty, and to a speedy and fair trial.\textsuperscript{14} As one Justice of the Supreme Court of Canada has stated, “[w]hen bail is denied to an individual who is merely accused of a criminal offence, the presumption of innocence is necessarily infringed.”\textsuperscript{15} Detention or release of accused international defendants also implicates victims’ rights to protection and, arguably, to participation in the criminal process.

Beyond normative concerns about release, there are practical ones. One of the likely explanations for the de facto “detention during trial” regime of the ICTY is the difficulty of sorting out an alternative plan. Whereas defendants who pose no risk of flight or danger to the community in a domestic jurisdiction can be released to their homes, defendants before the ICTY have no homes in The Hague. Their homelessness poses both strategic and practical problems for release. They are deprived of the argument that their ties to the community reduce the risk of flight because, of course, they have no ties. Further, there is the prosaic but real concern about where to put defendants if they are released. Also, who pays for their accommodations? How freely can they move about? Will the host country permit defendants to live there when not detained?

Although the ICTY and the International Criminal Court (ICC) have done their best to make conditions of pre-trial detention non-punitive, to such an extent that the United Nations Detention Unit (UNDU) has been described as the “Hague Hilton,”\textsuperscript{16} defendants are not at liberty. Moreover, a report of the Registrar of the ICTY, prompted by deaths and two suicides at the UNDU,\textsuperscript{17} contends that the exceptional length of the detention of ICTY accused is more akin to stays at penal institutions in national
jurisdictions. It concluded that “there is a very real and serious risk of a life-threatening episode occurring at the UNDU at some time in the future and without warning.”

A few scholars have written about provisional release at the ICTY and ICTR in the context of pre-trial detention. However, the de facto regime of detaining all defendants for trial has received little attention. This Article seeks to fill this gap.

I attempt to offer a better framework for provisional release decisions that applies both before and during international criminal trials. In Part I, I explain why provisional release at international tribunals matters. I contend that the foremost objective of international criminal tribunals should be to promote respect for human rights and the rule of law. Focusing on the International Convention on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) and domestic law, especially


20. See, e.g., Patricia M. Wald & Jenny Martinez, Provisional Release at the ICTY: A Work in Progress, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE 231, 236 (Richard May et al. eds., 2001) (discussing concerns Trial Chamber decisions often raise when denying release); Rearick, supra note 4, at 579 (discussing provisional release at the ICTR); Matthew M. DeFrank, Commentary, ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change, 80 TEX. L. REV. 1429, 1429–30 (2002) (noting Judge Robinson’s dissatisfaction with the current provisional release system).

21. At least one scholar has flagged the issue in passing. David Aronofsky contended that it is “inexplicable that international defendants who can afford bail and have nowhere to flee are nonetheless not allowed bail while on trial.” See David Aronofsky, International War Crimes & Other Criminal Courts: Ten Recommendations for Where We Go From Here and How to Get There—Looking to a Permanent International Criminal Tribunal, 34 DENV. J. INT’L. L. & POL’Y 17, 26 (2006). Aronofsky characterized the “disregard for the right to bail, accompanied by the parallel right to a quick bail hearing” as “[o]ne of the great travesties characterizing international criminal cases to date.” Id.


that of the United States, I discuss the normative and functional reasons for a more transparent and human rights protective provisional release regime. The ECHR and ECtHR jurisprudence is of particular interest because judges of the ICTY and the ICC often cite them in their provisional release decisions.  

In Part II, I explain why provisional release at the ICTY has failed to live up to international human rights norms and focus on the de facto detention for trial regime and the newly added “sufficiently compelling humanitarian circumstances” requirement for release after the close of the prosecution’s case. I focus on the ICTY, because, other than the ICC, it is the only international tribunal to have released defendants at all and has the greatest wealth of jurisprudence on provisional release.

Finally, in Part III, I evaluate alternative measures to address some of the ICTY’s human rights problems on provisional release, including streamlining and possibly restructuring trials, revamping the risk of flight and danger inquiry, compensating defendants for wrongful detention, affording victims the right to participate in release decisions and, finally, launching a concerted effort to eliminate the practical barriers to release.

the European Commission of Human Rights decided the admissibility of cases before the ECHR. Since then, the two institutions have merged. The ECHR issues decision binding on member states and has provoked legislative changes in member states. European Court of Human Rights, 50 Years of Activity: The European Court of Human Rights—Some Facts and Figures 3 (2010), http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresEN.pdf.

I. WHY PROVISIONAL RELEASE AT INTERNATIONAL CRIMINAL 
TRIBUNALS MATTERS

A. The Objectives of International Criminal Law

The purposes of international criminal law are many. International 
criminal courts not only strive for general law enforcement goals such as 
retribution, deterrence, incapacitation, and rehabilitation, but also seek to 
fulfill a myriad of goals unique to international criminal courts, including 
producing “a reliable historical record of the context of international 
crime,” providing “a venue for giving voice to international crime’s many 
victims,” spreading human rights values, developing international criminal 
law, and promoting peace and security. All the while, of course, these 
“objectives [are to] be pursued in proceedings solicitous of the rights of the 
accused.”

Achieving all of these aims is a tall order. As Professor Damaska has 
argued, international criminal law has suffered from there being too many 
objectives and no hierarchy among them. This problem is rendered all 
the more vexing in that these manifold objectives are often in tension with one another.

Moreover, international criminal law has serious constraints in 
accomplishing many of these goals in the first place. Although retributive 
justice “is the dominant stated objective for punishment of atrocity 
perpetrators at the national and international levels,” international 
criminal tribunals have significant limitations in achieving retribution. The 
inherent selectivity of tribunals, meaning their ability to prosecute only a 
few perpetrators from but a few of the world’s equally dire situations, 
challenges the retributive aims because decisions on prosecution and 
punishment ride on political or practical constraints rather than a 
determination of the gravity of offenses and the just deserts of the world’s 
perpetrators of atrocities. Likewise, the disproportionality between the 
severity of sanctions and the gravity of offenses, as well as the reliance of

25. Damaska, supra note 22, at 331.
26. See id.
27. See id. at 331–39 (listing numerous goals of international criminal courts and 
addressing the tensions that arise due to the lack of harmony and failure to prioritize); see also Sloane, supra note 22, at 45 (discussing the unduly high expectations of what 
international criminal law can do and listing some of the oft-cited objectives).
29. See id. at 151.
30. Id. at 154 (surveying national and international institutions and noting that 
sentences for extraordinary international crimes typically are no longer than for ordinary 
municipal crimes; sentences given by international tribunals likewise are no longer than 
those generally given by national institutions; and, finally, within institutions, including the
international tribunals on plea bargains, undermine the tribunals’ retributive function.  

Similarly, international tribunals also have limitations in deterring people from committing atrocities. The prevailing wisdom on deterrence is that deterrence depends on the existence of a high chance of prosecution and prompt punishment, not on the severity of punishment. The reality that only a tiny fraction of perpetrators will ever be prosecuted undermines the deterrent effect of international criminal tribunals. Moreover, as Professor Mark Drumbl notes, it is far from clear that would-be perpetrators of atrocities are rational enough actors to be deterred by fear of punishment. The commission of major atrocities, such as the genocide at Srebrenica and the ethnic cleansing in Kosovo, well after the establishment of the ICTY do little to bolster the effectiveness of international tribunals as mechanisms of deterrence.

The efficacy of international tribunals in achieving the goals more specific to the international arena, such as creating a historical record and promoting peace and security, is also debatable. Many argue that truth commissions are a better means of creating a historical record than a criminal trial, particularly one following the adversarial model. Criminal trials, although useful in some contexts, likewise may not always be the best way to promote peace and security. Trials may undermine transitional justice aims by interfering with other tools, such as amnesty and political solutions, to achieve peace.

ICTY, there are sentencing disparities not explained by valid retributive goals, such as differences in the gravity of the offenses).

31. *Id.* at 164 (arguing that, despite the many benefits of plea bargains, they “compete with the notion that perpetrators deserve to be punished” since plea bargains hinge on factors other than the gravity of the offense, such as the willingness of the defendant to cooperate, the information he or she has and institutional concerns).


33. *Id.* at 169–70.

34. *Id.* at 171 (arguing that social pressures and a need to commit criminal acts in order to survive may well prove more compelling than fear of criminal sanction).

35. DRUMBL, supra note 28, at 169.


37. *See Jain, supra* note 36, at 267 (noting that unlike criminal trials, truth commissions may provide a more accurate historical account of the causes and consequences of mass violence); see also John Bolton, *Speech Two: Reject and Oppose the International Criminal*
Empirical evidence appears to support this skepticism over the efficacy of international criminal tribunals in achieving these special goals. For example, Janine Clark’s recent study based on interviews of people in Bosnia and Herzegovina concluded that the ICTY did a poor job in achieving the goals announced by its first President, Antonio Cassese, which included dissipating calls for revenge, individualizing guilt, establishing a historical record and contributing to reconciliation. The author concluded that, at worst, the ICTY has achieved none of these goals. At best, the infrequency of revenge attacks suggested that the ICTY had helped only in the first aim of reducing calls for vengeance by creating a normative understanding that criminal trials, not vigilantism, are the way to address past crimes.

The law of provisional release at international criminal tribunals demonstrates the need to identify and prioritize achievable objectives of international criminal law. This decision on priorities will shape the provisional release regime used. If the primary objective of tribunals is to give victims a voice and to validate their suffering, then a very strict detention regime may be appropriate—the presumption of innocence and defendants’ rights to liberty and a fair trial be damned. If human rights are the top priority, then the detention regime may look somewhat different.

Easy or not, a number of scholars advocate prioritizing the goal of encouraging respect for human rights through international criminal law. I agree. One view of international criminal tribunals is as penal institutions geared at “expressing” public condemnation of acts contrary to international human rights and humanitarian law. According to this view, the tribunals are a potential “engine of jurisprudential development at the

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37. See Damaska, supra note 22, at 355–56 (discussing the relationship between deterrence and culpability in an effort to determine the proper sentence to impose and doctrine to follow).


39. Id. at 471.

40. See Damaska, supra note 22, at 355–56 (discussing the relationship between deterrence and culpability in an effort to determine the proper sentence to impose and doctrine to follow).

41. See Christoph J. M. Safferling, Towards an International Criminal Procedure 46 (2001) (“The main rationale for international criminal law is . . . the protection and promotion of human rights in the global society.”).

42. See Drumbl, supra note 28, at 173 (labeling this conception of international criminal justice “expressivism”); Damaska, supra note 22, at 343 (presenting a similar vision, which he terms a “didactic” model); Sloane, supra note 22, at 42, 44 (labeling the conception “expressivism”); see also Vijay M. Padmanabhan, Norm Internalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay, 31 U. Pa. J. Int’l L. 427, 430 n.6 (2009) (using the term “norm internalization”).
local level,” which can encourage “the legal and normative internalization of international human rights and humanitarian law.” Janine Clark’s empirical study lends credence to this view of international criminal law.

Still, promoting norms condemning genocide and the like through punishment of norm violators must be done in a manner consistent with the overall human rights promotion agenda. As Robert Sloane argues, “[i]t would be ironic and counterproductive were [international criminal law] trials to undermine some international human rights standards in an effort to vindicate others.” German scholar Christoph Safferling concludes the same, stating, “[h]uman rights can only be protected through human rights. If human rights are to be protected via criminal prosecution, the applied system must itself be strictly compatible with human rights.” This respect for human rights also serves transitional justice needs by increasing not only actual fairness, but also the appearance of fairness, and by promoting respect for the rule of law.

The interconnected transnational world in which tribunals operate makes this goal of human rights promotion all the more important. Judges, prosecutors, and defense attorneys return to their home countries armed with knowledge acquired at the international tribunals. The need to respect the human rights of defendants should be first and foremost among the lessons they carry with them. Indeed, there is already evidence that

43. Sloane, supra note 22, at 44.
44. See id. (“[I]nternational human rights law requires that the deterrent or retributive goals to which a focus on the expressive capacity of punishment may contribute be tempered and constrained by considerations of due process, rehabilitation, proportionality, and justice.”).
45. Id. at 42.
46. See Safferling, supra note 41, at 46, 48 (“[A] human rights enforcement system that is itself not compatible with human rights loses a great deal of impact and persuasiveness. How should one generally rely on and trust in a system that is meant to protect human rights but is intrinsically at odds with them? . . . The protection of human rights by using criminal law at an international level can only be effective if it is done with respect for human rights.”).
47. See RUTI G. TEITEL, TRANSITIONAL JUSTICE 30 (2000) (“For trials to realize their constructive potential, they need to be prosecuted in keeping with the full legality associated with working democracies during ordinary times, and when they are not conducted in a visibly fair way, the very same trials can backfire, risking the wrong message of political justice and threatening a fledgling liberal state. Accordingly, successor trials walk a remarkably thin line between the fulfillment of the potential for a renewed adherence to the rule of law and the risk of perpetuating political justice.”); see also Sonja B. Starr, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, 83 N.Y.U. L. REV. 693, 713 (2008) (arguing that perceived fairness is critical to transitional justice).
domestic jurisdictions are using ICTY procedural rules and case law for guidance.\textsuperscript{49} Moreover, international procedural rules often migrate from international criminal courts to hybrid tribunals\textsuperscript{50} and eventually to domestic jurisdictions. Among the oft-cited benefits of hybrid tribunals are increasing the affected region’s respect for the rule of law and trust in public institutions and building local capacity through collaboration with international lawyers.\textsuperscript{51} If criminal procedures trickle down from international tribunals to hybrid courts and hybrid courts to national courts, then an international provisional release law that fails to live up to international human rights norms may prove problematic. Release-unfriendly precedent of the ad hoc tribunals may be justifiable in the particular circumstances of international criminal tribunals, but less so in domestic courts. It is far from clear that national jurisdictions will resist the temptation to import exceptional international criminal procedures despite the absence of these justifications, particularly if the international court is not clear about the reasons for its decisions.\textsuperscript{52}

The same concern about setting a bad example for domestic jurisdictions and disseminating human rights-unfriendly laws arises under the framework of the Rome Statute of the ICC (Rome Statute). The ICC, whose jurisdiction is “complementary” and not “primary,” is premised on decentralization—the notion that most states are investigating and trying cases locally.\textsuperscript{53} If countries model their war crimes legislation and jurisprudence on those of international tribunals, the exceptional provisional release regimes of international tribunals may be imported into domestic law. This importation and possible dilution of the protections of domestic law may not be a good thing.

\textsuperscript{49} See Starr, supra note 47, at 714 & n.92 (citing examples from Germany, Ireland, Canada, and South Africa and noting that the procedures of the Iraqi Special Tribunal that tried Saddam Hussein were modeled on those of the ICTY and the ICTR).

\textsuperscript{50} Hybrid tribunals are courts created, often by the United Nations, in cooperation with national governments that meld international and domestic legal approaches. See Bibas & Burke-White, supra note 11, at 639 (listing Sierra Leone, Lebanon, Cambodia, East Timor, and Bosnia as examples of hybrid tribunals).


\textsuperscript{52} See Starr, supra note 47, at 744–45 (discussing the danger of the opacity in international judicial decisions in reference to its effect on the understanding of international human rights obligations at the national level).

The question then becomes what provisional release regime best promotes human rights? A defendant’s rights-protective provisional release regime arguably encourages human rights norms such as the rights to be free from arbitrary detention, to a fair trial, to the presumption of innocence, to a speedy trial, and the like. By freeing a defendant pending final judgment, the international tribunal expresses a high value, to use Sloane’s language, for these human rights norms.54

However, some argue that releasing people accused of genocide, crimes against humanity and war crimes undermines human rights by trivializing those offenses and the related human rights norms of right to life, security of person, and others.55 In essence, by letting a defendant roam the streets while accused of such serious crimes, the court expresses a view that these crimes are no more serious than any garden-variety domestic crime, and undermines the expressive function of the prosecution.

There is a risk that letting defendants out on provisional release for serious international crimes will create this impression, but the risk can be mitigated by other mechanisms showing that the tribunals take these crimes very seriously. The most obvious means of doing this is through sentencing. Once a defendant is convicted, his or her sentence should reflect the gravity of the crimes.56 Moreover, outreach can be aimed at explaining why defendants are released, the presumption of innocence, and defendants’ rights, while affirming the gravity of the crimes charged. Trying to achieve these expressive aims before a defendant is convicted puts the cart before the horse and unnecessarily undermines other important human rights norms.

B. Human Rights Implicated by Provisional Release Decisions

International human rights law does not recognize a right to bail or release pending trial. Rather, it recognizes the right to have a court decide the lawfulness of a defendant’s detention promptly after arrest.57 Detention

54. Sloane, supra note 22, at 69–70 (arguing for recognition of the expressive function of international criminal proceedings).
55. See infra notes 267–268 (discussing whether to release defendants for court breaks).
56. See Mark B. Harman & Fergal Gaynor, Ordinary Sentences for Extraordinary Crimes, 5 J. INT’L CRIM. JUST. 683, 688–89 (2007) (arguing that sentences at the ICTY have been too lenient and advocating for the introduction of sentencing guidelines).
57. The ICCPR provides, “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” International Covenant on Civil and Political Rights, pt. III, art. 9(4), opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, [hereinafter ICCPR]; see also Prosecutor v. Norman, Fofana, & Kondewa, Case No. SCSL-04-14-AR65, Appeal Against Decision Refusing Bail, ¶ 32 (Special Ct. for Sierra Leone Mar. 11, 2005), http://www.sc-sl.org/LinkClick.aspx?fileticket=gcYjozQ1q9U%3d&tabid=193 (stating that
and release of international criminal defendants also implicates a number of core human rights, including the presumption of innocence, the rights to liberty and to be free from arbitrary detention, and to a speedy and fair trial. Detention and release also affect victims’ rights.

Decisions about detention and release bring to the fore a key question about the relationship between international criminal law and human rights law—do the international human rights norms apply in the context of an international criminal trial? I contend that whether or not international human rights instruments technically bind international tribunals, the tribunals should seek to uphold them in order to achieve their objective of promoting respect for human rights and the rule of law.

1. Presumption of innocence

All major international human rights instruments and the statutes of the ICTY, the ICTR, and the ICC proclaim the presumption of innocence. For example, Article 6(2) of the ECHR enshrines the presumption of innocence: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

According to one leading international criminal law scholar, the presumption has three major implications:

(i) the person charged with a crime must be treated . . . as being innocent until proved guilty; (ii) the burden of proof, that the accused is guilty of the crimes with which he is charged, is on the Prosecutor; the defendant may limit himself to rebutting the evidence produced by the Prosecutor, but does not have to prove his innocence; (iii) in order to find the accused guilty of the crimes charged, the court must be convinced of his guilt according to a certain standard of proof, which in civil law

the “right to bail” is a “right to apply for bail” after which the court can determine whether pre-trial detention is necessary).


60. ECHR, supra note 23, art. 6(2).
countries is normally [the judge’s innermost conviction] whereas in common law countries it is “finding the accused guilty beyond a reasonable doubt.”61

To the extent one believes that the presumption of innocence applies more broadly than just to the burden of proof at trial, provisional release decisions arguably implicate all three aspects of the presumption. Indeed, discussion of the presumption of innocence appears most frequently in international tribunals in the context of provisional release.62

Regarding the first implication—that the person charged with a crime must be treated as being innocent until proven guilty—the significance for provisional release is that innocent people should not be detained absent strict justifications.63 Moreover, as the ECtHR has stated, “the gravity of

61. Cassease, supra note 59, at 390; see also Zappala, supra note 3, at 85 (listing three main consequences of the presumption of innocence). However, not all domestic jurisdictions agree on the scope of the presumption of innocence. Both the United States Supreme Court and the Supreme Court of Canada have noted the link between the presumption of innocence and bail, but the United States Supreme Court increasingly appears to have adopted a restrictive interpretation of the presumption of innocence as allocating the burden of proof at trial and having “no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun.” Compare Bell v. Wolfish, 441 U.S. 520, 533 (1979) (stating “[t]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . [b]ut it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun” in a case relating to conditions of detention), with Stack v. Boyle, 342 U.S. 1, 4 (1951) (stating “[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning”). It bears noting that Bell dealt with a class action suit about conditions of confinement for pre-trial detainees, not “with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails.” Bell, 441 U.S. at 533–34; see also Nico Steytler, Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996 134 (1998) (contending that the right to bail does not stem from the presumption of innocence). By contrast, the Supreme Court of Canada has noted: “it is generally accepted and acknowledged that the denial of bail has a detrimental effect on the presumption of innocence and liberty rights of the accused . . . .” R. v. Hall, [2002] 3 S.C.R. 309, 2002 SCC 64, ¶ 59 (Can.); see also R. v. Pearson, [1992] 3 S.C.R. 665, ¶ 24 (Can.) (stating that “the presumption of innocence is an animating principle throughout the criminal justice process. The fact that it comes to be applied it its strict evidentiary sense at trial pursuant to s. 11(d) of the Charter, in no way diminishes the broader principle of fundamental justice that the starting point for any proposed deprivation of life, liberty or security of the person of anyone charged with or suspected of an offence must be that the person is innocent”); Francois Quintard-Morenas, The Presumption of Innocence in the French and Anglo-American Legal Traditions, 58 Am. J. Comp. L. 107, 149 (2010) (noting that the French conception of the presumption of innocence is as “a rule of proof casting on the prosecution the burden of proving guilt [as well as] a shield that prevents the infliction of punishment prior to conviction;” whereas “Anglo-American jurisdictions tend to view the doctrine as a mere rule of proof without effect before trial”).


63. See ECtHR, supra note 23, art. 5(1) (delineating reasons for lawful deprivation of liberty); see also Safferling, supra note 41, at 134 (stating that “[s]een in terms of the presumption of innocence, the legitimacy of pre-trial detention [is] called in question, as it can be defined as the detention of an innocent”). Judge Pettiti in W. v. Switzerland offered
the charges cannot by itself serve to justify long periods of detention on remand.\textsuperscript{64} Nor can detention be used to “anticipate the sentence” or reflect the judge’s feeling or opinions as regards the accused’s guilt.\textsuperscript{65} Also related to this aspect of the presumption of innocence is the notion embodied in Article 9(3) of the ICCPR that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody.”\textsuperscript{66}

Regarding the second implication of the presumption of innocence—the allocation of burden of proof—the significance for provisional release is less clear. On the one hand, the decision whether or not to detain a person is not a final decision on the merits of the guilt or innocence of the defendant. However, to the extent one ties the possibility of release to the likelihood that the defendant committed the offense,\textsuperscript{67} arguably the presumption of innocence requires that the defendant not have to prove his or her innocence to get released. A stronger formulation is that the defendant should not bear the burden of proving anything, including the absence of flight risk or danger for the provisional release inquiry.\textsuperscript{68}

an even more defendant-friendly interpretation of the presumption. He contended that it also is to “mak[e] it possible for a defendant to cope with his position as an accused until his trial. As an extreme case, a person who knows he is guilty must be able, by remaining at liberty after being charged, to orientate his professional and family life and make arrangements for the future.” W. v. Switzerland, 254 Eur. Ct. H.R. (ser. A) 5, 22 (1993) (Pettiti, J., dissenting).


\textsuperscript{65} See Schabas, supra note 62, at 517. Safferling contends that the requirement that liberty be the general rule and jail the exception is the “logical and consistent adaptation of the principle of presumption of innocence to the pre-trial stage.” Safferling, supra note 41, at 135. In juxtaposition to the old rule at the ad hoc tribunals requiring “exceptional circumstances” to justify release, Safferling argues that “[o]nly under exceptional circumstances may a suspect be detained; otherwise he must remain free.” Id.

\textsuperscript{66} See Schabas, supra note 62, at 517.

\textsuperscript{67} See Schabas, supra note 62, at 517.

\textsuperscript{68} See, e.g., Zappala, supra note 3, at 85 (stating that the prosecutor should bear the burden of proof).
The ECtHR has stated that the burden of proof must be on the prosecution, not the defense, to establish grounds for detention, since “[s]hifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the [ECHR], a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively and strictly defined cases.”

Although, as Patricia Wald and Jenny Martinez note, it is common for domestic jurisdictions to have presumptions of risk or danger when a defendant is accused of certain serious offenses, and international crimes are undoubtedly extremely serious offenses, these presumptions are rebuttable, and the prosecution typically still bears the burden of persuading the court that the defendant is a risk of flight or danger.

Presumption of innocence notwithstanding, some domestic courts appear to allow the strength of a case against an accused to be factored into the provisional release decision. In the United States federal system, in certain serious cases where there is a presumption of risk of flight or danger, “the weight of the evidence” is one of the factors a judge is to take into account in deciding release.

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70. WALD & MARTINEZ, supra note 20, at 234 n.11; see also R. v. Pearson, [1992] 3 S.C.R. 665, ¶ 33 (Can.) (upholding a law placing the burden on those charged with drug trafficking to show why they should not be detained).

71. WALD & MARTINEZ, supra note 20, at 234.

72. The ECtHR has not banned presumptions of risks of flight or danger altogether, but it limits them by stating, “[w]here the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.” Ilijkov, 2001-IV Eur. Ct. H.R. ¶ 84 (2001) (internal citations omitted). In Ilijkov, the ECtHR found a violation of the ECHR in a case where Bulgarian courts failed to examine the circumstances that may have weighed against the danger that the accused would abscond or collude with others based on a strict presumption of detention that was “only rebuttable in very exceptional circumstances where even a hypothetical possibility of absconding, re-offending or collusion was excluded due to serious illness or other exceptional factors.” Id. at ¶ 83. Likewise, in the United States federal system, even in certain serious cases where there is a presumption of flight or danger, the defendant only bears the burden of producing evidence—not of persuading the fact-finder—that he does not pose a danger to the community or risk of flight. The burden of persuasion remains on the government to prove by clear and convincing evidence that the defendant is dangerous or by a preponderance of the evidence that he or she poses a flight risk. United States v. Mercedes, 254 F.3d 433, 436 (2d Cir. 2001); see also 18 U.S.C. § 3142(f)(2)(B) (2006) (requiring the government to prove that the defendant poses a serious risk of obstruction of justice). But see R. v. Pearson, [1992] 3 S.C.R. 665, ¶ 33 (Can.) (holding that it did not violate the presumption of innocence for the defendant to bear burden of showing why he or she should be released).

prosecution’s case can be relevant to the release inquiry. By contrast, ECtHR jurisprudence makes reasonable suspicion a sine qua non for detention, but the case for detention does not vary depending on the strength of the evidence against the accused. Likewise, in the United Kingdom, the likelihood of conviction has been deemed irrelevant to the bail inquiry since 1976.

Finally, the third implication of the presumption of innocence—the standard of proof—begs the question how much the standard of proof on release factors, particularly if one such factor is the likelihood of conviction, can deviate from the “beyond a reasonable doubt” or “innermost conviction of the judge” standard ultimately used to assess guilt or innocence. At the ICTY, the defense bears the burden of proving, on a balance of probabilities, that the accused will appear for trial and will not pose a danger if released.

Despite the scholarly debate on when the presumption should kick in, there is little discussion whether the presumption abates as damning evidence comes in. If the presumption is strongest against those who have not been indicted, is it weaker against those against whom more than a prima facie case exists? The language of the international criminal statutes, human rights instruments, and ECtHR cases suggests otherwise. One is presumed innocent until conviction. Nevertheless, as discussed below, the ICTY’s heightened release standard after the prosecution has rested raises the possible inference that courts view the presumption of innocence as weakening as more evidence comes in against an accused, even if they


75. See Metzmeier, supra note 73, at 413–15 (explaining the English system of bail).


77. Compare ZAPPALA, supra note 3, at 84 (advocating the early application of the presumption at least as of investigation), and C. Van den Wyngaert, Criminal Procedure in Belgium, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY, 15 (C. Van den Wyngaert, ed., 1993) (stating that Article 6(2) of the ECHR on the presumption of innocence is applicable throughout all stages of the proceedings), with Safferling, supra note 41, at 67 (questioning whether the presumption of innocence is even applicable pre-trial).

78. See, e.g., International Covenant on Civil and Political Rights, pt. III, art. 14(2), opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”); Neumeister v. Austria, 8 Eur. Ct. H.R. (ser. A) at 37, ¶ 4 (1968) (discussing Article 5(3) of the ECHR and stating “[u]ntil conviction, [an accused] must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable”); ICTY Statute, supra note 59, art. 21(3) (“The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.”).
seek to characterize the relevance of the evidence as the increased flight risk of the defendant.\footnote{79}

ICTY judges appear to consider the presumption relevant to the provisional release inquiry, but not determinative. As ICTY Judge Robinson noted in Prosecutor v. Jokic,\footnote{80} “as a general rule, a decision to release an accused should be based on an assessment of whether public interest requirements, notwithstanding the presumption of innocence, outweigh the need to ensure, for an accused, respect to the right to liberty of person.”\footnote{81} Another chamber has noted that ICTY jurisprudence considers the presumption of innocence not to be determinative on the issue of release “since otherwise . . . ‘no accused would ever be detained, as all are presumed innocent.’”\footnote{82}

2. \textit{The right to liberty and security of the person}

Detention or arrest is also a “severe infringement of the right to liberty and security of person” guaranteed in Article 9 of the ICCPR and Article 5 of the ECHR.\footnote{83} Article 9 of the ICCPR also forbids “arbitrary arrest or detention.”\footnote{84}

Of course, these rights are not absolute. The guarantee that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”\footnote{85} makes clear that some grounds for detaining people exist, notwithstanding the right, and the issue is over the legality of the grounds on which they are detained and the

\footnote{79. See infra Part II.C.} \footnote{80. Case No. IT-01-42-PT, Order on Motions for Provisional Release, ¶ 20 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2002).} \footnote{81. Id.; see also Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, ¶ 14 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 20, 2002), http://www.icty.org/x/cases/brdanin/tdec/en/20155759.htm (“The Trial Chamber has carefully balanced two main factors, namely the public interest, including the interest of the victims and witnesses who have agreed to co-operate with the Prosecution, and the right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and of the presumption of innocence.”).} \footnote{82. Prosecutor v. Milutinovic et al., Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 2006). At least one ICTY Trial Chamber has found that “there is no right of an accused to provisional release during the court recess derived from the presumption of innocence; rather, subject to the requirements of Rule 65(B) being met, it is based on judicial discretion.” Prosecutor v. Perisic, Case No. IT-04-81-T, Decision on Mr. Perisic’s Motion for Provisional Release During the Court’s Winter Recess, ¶ 15 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2008), http://www.icty.org/x/cases/perisic/tdec/en/081217.pdf.} \footnote{83. Safferling, supra note 41, at 133.} \footnote{84. ICCPR, supra note 57, art. 9(1).} \footnote{85. Id.}
procedures allowing for detention. As noted below, the ECtHR demands that “a genuine public requirement of public interest” outweigh the individual’s liberty interest. 86

Domestic jurisdictions also require a balancing of the right of the individual to liberty against the interests of the state in provisional release decisions. The United States Supreme Court and the Supreme Court of Canada have held that the government can constitutionally restrict a person’s liberty if there is a permissive regulatory purpose, such as ensuring the defendant’s presence at trial or “preventing danger to the community,” and the measure is not excessive. 87 In Germany, the notion is that detention requires justification because it deprives a person of his right to freedom of movement. 88 If the needs of society outweigh the rights of the defendant, the defendant, though presumed innocent, must make a “‘special sacrifice’ (Sonderopfer)” for the good of the community. 89

Although the interests of the state may outweigh those of a detainee in certain circumstances, judges should not have boundless discretion in detaining criminal defendants. In Schiesser v. Switzerland, 90 the ECtHR held that, to comport with Article 5(3), the official determining release or detention must “review[] the circumstances militating for or against detention, [and] decid[e], by reference to legal criteria, whether there are reasons to justify detention and . . . order[] release if there are no such reasons.” 91 Likewise, in upholding the Bail Reform Act’s provision allowing for detention based on danger to the community, the United States Supreme Court found it significant that the provision did not give “[t]he judicial officer . . . unbridled discretion in making the detention determination” since “Congress ha[d] specified the considerations relevant to that decision.” 92

85. See infra note 106 and accompanying text.
86. United States v. Salerno, 481 U.S. 739, 744 (1987); see also R. v. Pearson, [1992] 3 S.C.R. 665, ¶ 4 (Can.) (upholding the bail act’s presumption of detention in drug distribution cases based on the narrowness of the circumstances that justified detention and the finding that detention was necessary for the proper functioning of the bail system).
87. Safferling, supra note 41, at 134 (“Detention means that the suspect is deprived of his right to freedom of movement (outside his cell) for the duration of detention. It is not merely a violation of the human rights to liberty, but a temporary destruction of this right.”).
88. Id.
89. Id.
90. 34 Eur. Ct. H.R. (ser. A) at 14, ¶ 31 (1979)
92. Salerno, 481 U.S. at 742. The factors included “the nature and seriousness of the charges, the substantiality of the Government’s evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger posed by the suspect’s release.” Id. at 742–43.
“[a]ny bail provision that confers open-ended judicial discretion to refuse bail is unconstitutional, and it is a fundamental principle of justice that an individual cannot be detained by virtue of a vague legal provision.”  

Both the ICCPR and the ECHR provide that those who have been unlawfully arrested or detained have an enforceable right to compensation. Likewise, many European jurisdictions provide for compensation for unlawful detention. Some European jurisdictions even provide compensation to criminal defendants who are acquitted, even if their detention was lawful. By contrast, public compensation for detention is uncommon in the United States, and tort actions for malicious prosecution or false imprisonment are unlikely to succeed.

3. The right to a speedy trial

Although the right to a speedy trial is tied to the right to be free from arbitrary detention and the presumption of innocence, it has also been recognized as a human right “found to be basic to fairness in the criminal process,” both as part of the concept of due process and “as a separate, indentifiable [sic] right.”

Significantly for provisional release, the ICCPR and the ECHR provide that the remedy for failure to decide charges expeditiously is release. For example, Article 5(3) of the ECHR provides:

Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be
entitled to trial within a reasonable time or to release pending trial.

Release may be conditioned by guarantees to appear for trial. 99

The ICCPR provision is almost identical. 100 The United States views the right to be tried within a reasonable time in speedy trial terms and envisions an even more drastic remedy, dismissal of the charges with prejudice, as the ordinary remedy for the violation of this right. 101

Article 5(3) has been the focal point of ECtHR cases where litigants claim that their governments have violated their rights under the ECHR based on excessive detention prior to a final judgment. The ECtHR has held that Article 5(3)’s right to be tried within a reasonable time or to be released applies “until the day of the judgment that terminates the trial.” 102

The ECtHR engages in a three-step analysis to assess the legitimacy of detention under Article 5(3). The inquiry under the ECHR is first, whether there is reasonable suspicion that a suspect has committed a crime to support the detention. 103 Even if there is reasonable suspicion, continued detention is not acceptable unless the government shows “relevant” and “sufficient” grounds to justify the detention. 104 Even then, detention may become unreasonable under Article 5(3) if authorities fail to act with “special diligence” or if the proceedings go on too long. 105

To determine whether detention on remand (or denial of release) is permissible, despite the right to liberty and the presumption of innocence, the ECtHR uses a balancing test:

“Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of

99. ECHR, supra note 23, art. 5(3) (emphasis added).
100. See ICCPR, supra note 57, art. 9(3) (“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”).
101. See Strunk v. United States, 412 U.S. 434, 439–40 (1973) (contemplating alternative remedies, but concluding that dismissal must remain “the only possible remedy”).
104. Id.
105. Id. at 50; see also Debboub alias Husseini Ali v. France, App. No. 37786/97, 33 Eur. H.R. Rep. 1302, 1314 (2001) (acknowledging the complexity of the case but finding that the French courts had not acted with the necessary dispatch); Wemhoff, 7 Eur. Ct. H.R. at 26 (noting that Article 5(3) may be violated if proceedings go on too long even if a person is otherwise reasonably detained, but finding, in the very same case, that the exceptional length of the investigation and the trial, a total of three years, were justified due to the exceptional complexity of the case).
respect for individual liberty.” The ECtHR has recognized four permissible grounds for refusing provisional release—the risk that, if released, the defendant “will fail to appear at trial,” “take action to prejudice the administration of justice,” commit further crimes, or “cause public disorder.” Likewise, the United States Supreme Court has held that detaining criminal defendants based on risk of flight or danger to the community does not offend any constitutional rights to liberty, due process, or bail. As discussed below in Parts II and III, the ICTY rules have tied release to two of these grounds—risk of flight and danger—and the ICC rules to three—risk of flight, further offenses, and the obstruction of justice.

In addition to the guarantee of Article 5(3) discussed above in Part I.B.3, Article 6(1) of the ECHR provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” This right applies whether or not the defendant is detained. The ECtHR interprets the right to speedy trial to include the right for one’s trial to be completed expeditiously, not just that trial begins within a reasonable time.

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108. United States v. Salerno, 481 U.S. 739, 739 (1987). At the time of Salerno, detaining criminal defendants based on future danger was highly controversial and drew vigorous dissents. In particular, Justice Marshall argued that it violated the presumption of innocence. Id. at 762–63 (Marshall, J., dissenting); see also DANIEL RICHMAN, United States v. Salerno: The Constitutionality of Regulatory Detention, in CRIMINAL PROCEDURE STORIES 413, 413, 439 (Carol S. Steiker ed., 2006) (noting the controversy over the future danger ground and that it has since died down); Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 HARV. L. REV. 1429, 1454 (2001) (arguing that prevention and justice ought to be separated).
110. ECHR, supra note 23, art. 6(1).
111. Wemhoff v. Germany, 7 Eur. Ct. H.R. (ser. A) at 23 (1968) (resolving an ambiguity in the English text of the ECHR and holding that Article 5(3)’s right to be tried within a reasonable time or to be released applies “until the day of the judgement that terminates the trial”).
4. The right to a fair trial

The right of a criminal defendant to a fair trial is one of the core human rights guaranteed in international human rights instruments, including the ICCPR, the ECHR and others. It encompasses a variety of procedural concepts, such as a defendant’s right to have his or her case adjudicated by an impartial court. In addition, it includes moral concepts, such as the presumption of innocence, right to liberty, and security of the person, which are discussed above. It also includes the right for a defendant to be allowed a fair opportunity to defend himself or herself against charges.

As scholars, the ECtHR, and the Supreme Court of Canada have noted, detention on remand also presents a number of difficulties for defendants, including interfering with defense preparation, economic hardship, and pressure to plead guilty. Empirical studies suggest that “the longer a person spends time in pretrial detention, the more likely she will be convicted.”

112. SAFFERLING, supra note 41, at 29.
113. Id. at 30.
114. Id. at 30–31 (“[T]he texts of the human rights treaties, Art. 14 ICCPR in particular, [make clear] that ‘fair trial’ does not comprise one peculiar right. It consists of a whole range of different rights and obligations. Nevertheless it is one concept: how to make a trial ‘fair.’”).
115. See Salov v. Ukraine, 2005-VIII Eur. Ct. H.R. 143, 169 (“Article 6 of the Convention, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. In deciding whether there has been a violation of Article 6, the Court must consider whether the proceedings in their entirety, including the appeal proceedings, as well as the way in which evidence was taken, were fair.” (internal citations omitted)).
116. See, e.g., R. v. Hall, [2002] 3 S.C.R. 309, ¶ 59, 2002 SCC 64 (Can.) (Iacobucci, J., dissenting) (quoting Packer and noting that a Toronto empirical study conducted by Professor Friedland had demonstrated these prejudicial effects); W. v. Switzerland, 254 Eur. Ct. H.R. (ser. A) at 26 (1993) (Pettiti, J., dissenting) (noting that the “perverse effects of prolonged pre-trial detention” include the transformation of an “investigation into a coercion to confess or a punishment for refusing to accuse oneself” and the harm to a defendant’s well-being which has led to suicides or early deaths due to illness); id. at 27 (Walsh, J., and Loizou, J., dissenting) (stating “[i]t would be difficult to overemphasise the stark consequences of refusing provisional liberty pending trial to the person who is accused of a crime (of which he is presumed to be innocent). He will most probably lose his employment, possibly lose his dwelling place, his family’s life can be totally disrupted and driven to penury, and even his marriage may be driven to point of breakdown. A person presumed to be innocent cannot in justice be exposed to such terrible consequences unless the reasons for so doing completely outweigh all other considerations.”); H. L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 214–15 (1968); Jeffrey Manns, Liberty Takings: A Framework for Compensating Pretrial Detainees, 26 CARDOZO L. REV. 1947, 1947–48 (2005).
These concerns also apply to international criminal defendants. Like defense attorneys in domestic jurisdictions whose clients are in jail, defense attorneys at the ICTY spend a great deal of time getting in and out of the UNDU to visit their clients. In addition, if counsel or investigators are conducting investigations in the former Yugoslavia, communicating with their clients detained in The Hague can be difficult. Thus far, the tribunal has not recognized this difficulty as a sufficient reason for provisional release even where there is no risk of flight or danger. Detention in The Hague interferes with a defendant’s ability to make a living, much as detention in a domestic jurisdiction does. However, since international defendants are likely to face stiff sentences upon conviction even with a guilty plea, there may be less pressure to plead guilty to do the time and get on with their lives than in many cases in domestic jurisdictions.

Another aspect of the right to a fair trial implicated by provisional release is the fairness and transparency of the process by which detention or release is decided. Arbitrary detention is unfair to defendants, independent of the potential prejudice a defendant’s detention may have for his defense. Further, the transparency of the process and the criteria by which release or detention is decided is critical. As Professor Diane Marie Amann has put it, “[t]ransparency helps to assure that decisions will be both fair and seen as fair.”

5. The rights of victims to protection and participation

Finally, decisions on provisional release also implicate victims’ rights, which are increasingly being recognized as a part of the human rights picture. The past fifty years have seen the emergence of a powerful movement known as the victims’ rights movement that has impacted both the domestic and international spheres.

118. Telephone Interview with Norm Sepenuk, Defense Counsel, ICTY (Sept. 14, 2009).
119. See Prosecutor v. Gotovina, Cermak, & Markac, Case No. IT-06-90-T, Decision on Motion for Provisional Release of Ivan Cermak, ¶¶ 10–11 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 14, 2008), http://www.icty.org/x/cases/gotovina/tdec/en/080214b.pdf (finding that Cermak had met the statutory requirements for provisional release, but exercising its discretion to deny release and finding that “the mere fact that communication between Counsel and the Accused would be facilitated if they both were in Croatia at the same time, is not a sufficient reason for provisional release”).
121. See JONATHAN DOAK, VICTIM’S RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES 29–32 (2008) (discussing “the cross-fertilisation that is occurring between victimology and human rights” and the widespread recognition that the two are closely linked).
122. See id. at 8–9 (providing a chronology of groups and individuals involved in
Although the victims’ rights movement has gained force, it has many opponents even within the human rights movement. In jurisdictions where victims have no counsel, some argue that making prosecutors focus on the interests of victims undermines the traditional role of the prosecutor as a minister of justice.\textsuperscript{125} Others voice concerns that the victims’ rights movement undermines the presumption of innocence.\textsuperscript{126} Arguably, giving a person the status of victim before a conviction presumes the defendant guilty.\textsuperscript{127}

The central pillars of the victims’ rights movement are: protection, participation, remedy, truth, reconciliation, and reparation.\textsuperscript{128} These pillars receive varying degrees of international support.\textsuperscript{129} The ICCPR and the ECHR recognize victims’ rights to protection and to an effective remedy\textsuperscript{130} but do not recognize a right to participate in criminal proceedings.\textsuperscript{131} As

campaigning for victim-specific issues).


\textsuperscript{126} See Elizabeth, supra note 123, at 277 n.8 (citing scholars who view victim involvement as problematic to the procedural protections of defendants).

\textsuperscript{127} Id.

\textsuperscript{128} See Doak, supra note 121, at 243 (enumerating values that he contends any modern criminal justice system ought to support); see also Aldana-Pindell, supra note 124, at 1405.

\textsuperscript{129} See Doak, supra note 121, at 243 (explaining that there is considerable unity around the values of protection and remedy, but that other values are considerably more contentious).

\textsuperscript{130} Aldana-Pindell, supra note 124, at 1419–20. I am unaware of any case in which victims have brought a claim under the ECHR for a violation of their right to protection based on a defendant’s release.

\textsuperscript{131} See Doak, supra note 121, at 149 (recounting the sole ECHR case to address the right to participate, in which the European Commission of Human Rights found no violation of the ECHR where the mother of a murder victim complained that she had been denied the
one scholar described it, victims’ rights to participate in the criminal process are controversial and “any such ‘right’ [is] still very much in the developmental stage.”

To fulfill the obligation to protect victims in the provisional release context, courts must consider the safety of victims when criminal defendants are released. It seems that the “danger” or future crimes prong of the provisional release inquiry, present at both the ICTY and the ICC, is oriented towards this aim.

The more controversial issue is whether victims have a right to participate in release decisions. The victims’ rights movement contends that excluding victims from the criminal process is unjust because victims have an interest in the proceedings and therefore have a right to have their interest represented. However, since victims are unlikely to advocate for provisional release of a defendant, many defendants’ rights advocates question the propriety of their participation in release decisions. Lynne Henderson has argued that in the United States, the victims’ rights movement has accelerated the acceptance of preventive detention for criminal defendants. The argument for detention is that letting the defendant out leaves the victim wondering whether there is “any justice in this world.” Henderson contends that this thinking is understandable, but personal frustration of victims does not justify punishment before guilt is established.

Similarly, in the international sphere, scholars contend that solicitousness to victims’ rights often comes at the price of the rights of defendants. Professor Amann labels the problem the “impartiality deficit,” meaning that the tribunals have “lost sight of the individuals on whom suspicion has settled.” As Professors Danner and Martinez have argued, the “victim-oriented, civil law model of human rights” produces a disproportionate “concern for symbolic vindication of violations of

right to be involved in the sentencing process); see also ICCPR, supra note 57, art. 2 (excluding any such right).
132. DOAK, supra note 121, at 33.
133. See infra Part II.B.
134. See Blondel, supra note 125, at 239 (disagreeing that victims’ rights justify changing the adversary system).
136. Id. at 971.
137. Id. at 972.
138. AMANN, supra note 120, at 209; see also Diane Marie Amann, Saddam Hussein and the Impartiality Deficit in International Criminal Justice 4 (working paper Sept. 24, 2005), available at http://ssrn.com/abstract=813249 (noting that a critique of the impartiality deficit in international criminal justice should explore issues such as the validity and circumstances of detention).
victims’ human rights” and “has proven a more potent influence than worries over potential violations of defendants’ rights.”

Scholars have voiced concerns over victim participation rights in the context of release decisions at international tribunals. Professor Jenia Iontcheva Turner argues that the decision of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to allow victims to participate in appeals of release decisions embodies the ideals of the restorative justice at the expense of defendants’ rights. Others have argued that the involvement of civil parties at such an early stage of the case “could slow down the proceedings, place an unjust burden on the defense to respond to a multiplicity of opponents, and risk injecting irrelevant and potentially prejudicial material into the proceedings” and that the victims’ natural bias against the charged person and interest in securing a conviction prevents them from having the “sober and objective view on the suspect” necessary for a fair decision on detention. Moreover, as Turner points out, the issue raises a conflict between victims’ right to participation and defendants’ rights to the presumption of innocence.

C. The Human Rights of International Criminal Defendants

Arguably, international human rights norms do not bind international tribunals and therefore should not constrain tribunals in making their

139. Alison Marston Danner & Jenny Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CAL. L. REV. 75, 146 (2005); see also Damaska, supra note 22, at 333 (noting “the rocky relationship between the desire to be solicitous of the accused’s procedural rights and the desire to provide satisfaction to victims of international crime”); Gregory S. Gordon, Toward an International Criminal Procedure: Due Process Aspirations and Limitations, 45 COLUM. J. TRANSNAT’L L. 635, 698 (2007) (arguing that respect for the rights of a defendant requires a “neutral, dispassionate setting”). But see Doak, supra note 121, at 247–48 (arguing that one need not be too concerned about instances where defendants’ and victims’ rights may conflict and that by placing victims’ rights within the human rights framework, it gives courts a way of weighing the competing rights).

140. Turner, supra note 318, at 120.


143. Turner, supra note 140, at 121.
provisional release decisions. Not all rights are binding or enforceable in the first place. Even where rights are binding on states, international tribunals may still be off the hook. Human rights instruments, such as the ICCPR, the ECHR, and the African Charter for Human Rights, all were designed with domestic, not international, jurisdictions in mind—a state shall not deprive a person of certain rights.

International tribunals have sidestepped human rights norms before. Most famously, the Nuremberg tribunal is said to have violated the rule of “nullum crimen sine lege” (no crime without preexisting law) in prosecuting defendants for crimes against humanity and aggression, crimes that had never before been defined in international or domestic law. Similarly, in deciding the jurisdiction of the tribunal over the first defendant before the ICTY, the Appeals Chamber deemed the international human rights norm that those charged with crimes have a right to a “fair and public hearing by a competent, independent and impartial tribunal established by law” inapplicable to international tribunals.

However, the gravity of the crimes alone does not justify a departure from human rights norms. The European Commission for Human Rights (Commission) has found that the ECHR’s right to be tried within a reasonable time or released still applied to defendants charged with crimes

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144. See Bassiouni, supra note 58, at 242 (“They must therefore be considered individually as well as cumulatively to determine whether there is an obligation by a state to conform to the requirements of those rights.”). There are three types of binding legal norms: “convention or treaty; a general or particular international custom (as evidenced by consistent practice and opinio juris); and a general principle of law (as evidenced by other perfected and unperfected sources of international law or by principles derived from the major legal systems of the world.” Id. Although it is likely an uphill battle in the peacetime circumstances of most international tribunals, there arguably is a question whether derogation from such a principle is warranted in the context of international criminal tribunals. Id. at 252.


146. See Padmanabhan, supra note 42, at 442 & n.45 (noting that Nazi and Japanese officials were tried for the crime of aggression even though it was not a crime at that time).

147. ICCPR, supra note 57, art. 14(1) (emphasis added); see also Organization of American States, American Convention on Human Rights, art. 8(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (granting every person the “right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law”); ECHR, supra note 23, art. 6(1) (stating also that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”).

148. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm. The Appeals Chamber nevertheless concluded that the ICTY had been “established by law” in the sense that it was established in accordance with the rule of law. Id.
against humanity. The Commission examined Jentzsch’s claim of unreasonable detention during the investigation and prosecution of his trial for his “active participation in the so-called ‘death bath’ operations in the Gusen concentration camp.” Despite finding the norm against unreasonable detention applicable, the Commission considered the special features of the case, including the potential life sentence, the great number of witnesses and suspects involved, and the fact that the crime occurred outside of Germany, in assessing the diligence of the German authorities and found no violation of Article 5(3) of the ECHR, despite detention of some six years pre-trial, over a year at trial and two years during appellate proceedings.

ICTY judges seem to be conflicted on the applicability of human rights law, at least as expressed by the ECtHR, to their provisional release decisions. Noting some of the special features of international tribunals discussed below, the Trial Chamber in Prosecutor v. Brdanin & Talic explained that “care should be taken that too great a reliance is not placed upon [the decisions of the ECHR and the Commission] as defining what is a reasonable length of pre-trial detention in an international criminal court or tribunal rather than in particular domestic jurisdictions in Europe.”

The court emphasized that it must consider the circumstances in which the tribunal must operate in assessing what is a reasonable length of pre-trial detention at the ICTY.

Other ICTY chambers seem less inclined to take provisional release at international tribunals out of the realm of human rights law. In Prosecutor

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149. See Jentzsch v. Germany, App. No. 2604/65, 1971 Y.B. Eur. Conv. on H.R. 14, ¶¶ 10–11 (Eur. Comm’n on H.R.); see also Safferling, supra note 41, at 145 n.481 (citing Jentzsch and noting that, in Jentzsch, the Commission nevertheless found no violation of the right to be tried within a reasonable time due to the special circumstances of the case).
151. Id.
153. See supra note 24 (providing examples where ICTY judges were split on whether the ECtHR law binds the Tribunal).
155. Id.
156. Id. at ¶ 27; see also Prosecutor v. Delalic, Mucic, Delic, & Landzo, Case No. IT-96-21-A, Order of the Appeals Chamber on Hazim Delic’s Emergency Motion to Reconsider Denial of Request for Provisional Release (Int’l Crim. Trib. for the Former Yugoslavia June 1, 1999), available at http://icr.icty.org. (listing factors considered in deciding the length of the pre-trial detention).
v. Limaj, the Appeals Chamber stated: “[t]he ICTY is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and other innocent people. Justice, however, also means respect for the alleged perpetrators’ fundamental rights.” It concluded that the ICTY’s rules on provisional release “must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.” In particular, it flagged the ICCPR and ECHR’s mandates that an accused be presumed innocent until proved guilty and that “it shall not be the general rule that persons awaiting trial shall be detained in custody.” It also stated that the international human rights principle of proportionality must be considered in interpreting the ICTY’s rules on provisional release.

The Trial Chamber concluded that “no distinction can be drawn between persons facing criminal procedures in their home country or on an international level.”

The ICC appears to agree that it must adhere to international human rights norms, even in the context of provisional release. Unlike the ICTY’s statute, which enumerates the rights of defendants, but does not explicitly incorporate international human rights law, the Rome Statute creating the ICC provides that its law must be interpreted in accordance with international human rights law. In Prosecutor v. Lubanga Dyilo case,
the Appeals Chamber invoked the ICCPR, the ECHR, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights to support its assertion that “the Chamber must be vigilant that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognised human rights.” Of course, it did not state that the jurisprudence of courts interpreting those conventions in the context of domestic criminal trials would determine the length of reasonable detention at the ICC.

Arguing that international courts should not be bound by precedent dealing with the reasonableness of detention in domestic jurisdictions, scholars and courts have listed a number of factors that distinguish international criminal tribunals from domestic jurisdictions including the gravity of the crimes, the lack of a police force, the security situation in the region, the danger in and difficulty of apprehending defendants, and the need for caution in assessing the risk that an accused may abscond. Wald and Martinez also argue that tribunals lack sanctions for violations of release conditions or failure to appear. However, this argument ignores the power of the court to take into account the defendant’s misconduct at sentencing. Although this tool requires that the defendant be brought again before the court, so too do domestic sanctions for failure to appear.

166. Id.
168. See Prosecutor v. Ademi, Case No. IT-01-46-PT, Order on Motion for Provisional Release, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2002), http://www.icty.org/x/cases/ademi/tord/en/20220PR117236.htm (calling for a more cautious approach in assessing the risk that an accused may abscond); Prosecutor v. Brdanin & Talic, Case No. IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release, ¶ 18 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 28, 2001), http://www.icty.org/x/cases/brdanin/tdec/en/20155759.htm (explaining that the Tribunal depends on local authorities and international bodies to act on its behalf since it has no power to execute arrest warrants); Prosecutor v. Krajisnik & Plavsic, Case No. IT-00-39 & 40-PT, Decision on Momcilo Krajisnik’s Notice of Motion for Provisional Release, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2001) (Robinson, J., dissenting), available at http://tcrt.icty.org (“The Tribunal’s jurisprudence is that the lack of a police force, and its dependence on domestic enforcement mechanisms to enforce its arrest warrants, justify a stricter approach to applications for provisional release than is the case with applications for bail in domestic jurisdictions.”); Prosecutor v. Sesay, Kallon, & Gbao, Case No. SCSL-2004-15-AR65, Sesay - Decision on Appeal Against Refusal of Bail, ¶¶ 28, 36-37 (Special Ct. for Sierra Leone Dec. 14, 2004) (indicating that meaningful conditions and guarantees are important in light of these factors); WALD & MARTINEZ, supra note 20, at 236 (expressing the concern that the absence of a police force increases the likelihood that “once released an accused could escape the International Tribunal’s grasp”). Wald and Martinez also argue that tribunals lack sanctions for violations of release conditions or failure to appear. Id. However, this argument ignores the power of the court to take into account the defendant’s misconduct at sentencing. Although this tool requires that the defendant be brought again before the court, so too do domestic sanctions for failure to appear.
169. See WALD & MARTINEZ, supra note 20, at 235.
and the vulnerability of witnesses and evidence due to defendants’ positions of influence along with liberal discovery rules.  

However, international tribunals are not always as exceptional as claimed. Domestic jurisdictions also try defendants for serious international crimes, including crimes against humanity, genocide, and war crimes. Although in theory the tribunals seek to prosecute the people “most responsible” and to let domestic jurisdictions handle lower level war criminals, this is not always the case. Moreover, the security situation may or may not be appreciably worse than in a domestic jurisdiction. As Safferling notes, in many cases, where the conflict has ended, the risk of the defendants engaging in more crimes like those with which they are charged is extremely low. Finally, although UN peacekeepers and others risked their lives to arrest suspects who have absconded, this argument does not apply to defendants who have voluntarily surrendered. Furthermore, in domestic jurisdictions, police also often risk their lives to arrest suspects.

All of these arguments seem worthy of concern and support a rigorous inquiry into the danger to victims, witnesses and the community, as well as the risk of flight. However, the peculiarities of international tribunals do not warrant a blanket denial of release to international criminal defendants on trial. Other means of addressing issues like vulnerability of witnesses and evidence short of detention, including reforming discovery rules to afford victims more protection, should be explored. Moreover, the special features of international tribunals do not explain why defendants are released pre-trial, often for years, and then locked up once the trial begins.

Still, even if international tribunals are different from domestic jurisdictions and are not technically bound by human rights instruments, for the reasons described in Section I(A), tribunals should make their

170. Id. at 237.
171. See Bibas & Burke-White, supra note 11, at 655.
172. See S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (stating that the ICTY should “concentrat[e] on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transfer[] cases involving those who may not bear this level of responsibility to competent national jurisdictions’); see also S.C. Res. 1534, ¶ 5, U.N. Doc. S/RES/1534 (Mar. 26, 2004) (providing that the Security Council “[c]alls on [the ICTY and ICTR], in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003)”).
173. See Bibas & Burke-White, supra note 11, at 643 (arguing that the pursuit of low-level cases delays justice).
174. See SAFFERLING, supra note 41, at 144–45.
175. Judge Wald and Professor Jenny Martinez wrote before voluntary surrender of defendants became common.
176. See Bibas & Burke-White, supra note 11, at 697.
provisional release regimes reflect human rights law best practices in order to achieve their extremely important function of promoting respect for human rights.

II. PROVISIONAL RELEASE AT THE ICTY

At the ICTY, largely due to the appearance of governments in the former Yugoslavia more willing to work with the tribunal after the European Union (EU) made cooperation with the ICTY a condition for admission for Croatia and Serbia\textsuperscript{177} and the rise in voluntary surrenders by defendants,\textsuperscript{178} defendants are increasingly being released before trial and even during court breaks.\textsuperscript{179} However, as noted above, all are detained for trial.

The ICTY is of particular interest in the study of provisional release at international tribunals because it has released the greatest number of defendants and has the greatest wealth of jurisprudence on release. Of the 161 people who have been charged by the ICTY, 35 ICTY defendants have been released pre-trial, and 32 have been released for varying periods of time after the commencement of trial.\textsuperscript{180} There are some 598 judicial decisions and 522 motions and briefs with the term “provisional release” in the title, as well as some 1146 judicial decisions that mention provisional release.\textsuperscript{181}

\textsuperscript{177} The Croat and Serb governments resisted the Yugoslavia tribunal for years, until the European Union made compliance with the tribunal a condition for future EU membership. Marcia Luyten, France and the Tutsi have to face justice in Rwanda too, NRC HANDELSBLAD, June 23, 2009, http://www.nrc.nl/international/article2280195.ece.

\textsuperscript{178} As of September 7, 2009, of a total 161 indictees, 2 remain at large, 66 were arrested, 62 surrendered, 10 died before transfer to the tribunal, 20 had their indictments withdrawn, and 1 was transferred from a prison where he was serving an unrelated sentence imposed by a local court. See Email from Stuart Lester, Int’l Crim. Trib. for the Former Yugoslavia Media Office, to author (Sept. 7, 2009, 1:46 PDT) (on file with author).

\textsuperscript{179} For example, the court granted pre-trial release to all six of the accused in Prlic on September 8, 2004. All returned to the UNDU for trial on April 24, 2006. See Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, & Pusic, Case No. IT-04-74, Case Information Sheet, 7, http://www.icty.org/x/cases/prlic/cis/en/cis_prlic_al_en.pdf (stating that all six men were granted provisional release before trial from September 8, 2004 until April 24, 2006). Likewise, in the Stanisic & Simatovic case, on July 28, 2004, the Trial Chamber granted provisional release to both accused. See Prosecutor v. Stanisic & Simatovic, Case No. IT-03-69, Case Information Sheet, 4, http://www.icty.org/x/cases/stanisic_simatovic/cis/en/cis_stanisic_simatovic_en.pdf (discussing the procedural history of the case before trial). On February 6, 2008, the Trial Chamber terminated the provisional release of both accused and ordered them to return to the UNDU on February 11, 2008 for trial, which was to begin later in the month. Id.

\textsuperscript{180} See, e.g., supra note 179 (providing two ICTY Case Information Sheets).

\textsuperscript{181} This information is available through the ICTY Court Records search engine, http://icr.icty.org.
In theory, the law on provisional release at the ICTY comports with international human rights, but the reality of excessive discretion, de facto detention for trial and the new burden of showing “sufficiently compelling humanitarian circumstances” raises human rights concerns.

A. Provisional Release Procedures at the ICTY

Generally, upon confirmation of the indictment by a pre-trial chamber of the ICTY, the pre-trial chamber issues an arrest warrant, which includes an order for prompt transfer of the accused to the ICTY. The ICTY has determined that “[t]he arrest warrant provides the legal basis for detention.” Once an accused is transferred, he or she is detained by the ICTY at the UNDU in The Hague and may not then be released without an order of the court. It is noteworthy, however, that the rules envision that all ICTY defendants arrive pursuant to an arrest warrant. There is no written provision by which they can appear by summons.

The ICTY rule on the initial appearance of an accused does not mention the issue of detention, but a defendant or the court may raise the issue at this hearing. Thus, it can be said that the defendant is “entitled to take


183. Prosecutor v. Ademi, Case No. IT-01-46-PT, Order on Motion for Provisional Release, ¶16 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2002), http://www.icty.org/x/cases/ademi/tord/en/20220PR117236.htm (outlining the procedural considerations for detention and release); see also Gordon, supra note 139, at 690 (describing the pre-trial detention procedures).

184. Pursuant to Rule 64:

Upon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. In exceptional circumstances, the accused may be held in facilities outside of the host country. The President may, on the application of a party, request modification of the conditions of detention of an accused.


185. Nevertheless, as noted above, in at least two contempt cases, the court refused to issue arrest warrants and instead ordered the defendants to appear by summons. See supra note 5 (providing two examples of cases in which the court ordered an appearance by summons in lieu of holding defendants in contempt).

186. ICTY Rules Of Procedure, supra note 184, Rule 62 (discussing the right to counsel, right to a plea, and right to have material in a language the defendant understands, among other rights).

proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” such that the requirements of the ICCPR are met. However, at the ICTY, “[t]he fact of detention and the reasons for it are rarely, if at all, raised as issues to be discussed at the initial appearance,”¹⁸⁸

They are handled principally through written submissions.¹⁸⁹ The ICTY rules do not provide for periodic review of detention decisions. If a defendant wishes to be released, he or she must file a motion.

At the ICTY, to release a defendant, a Trial Chamber must be satisfied that the accused will appear for trial and, if released, pose no risk to any victim, witness or other person.¹⁹⁰ As noted above, the ECtHR and the United States Supreme Court recognize the validity of these grounds for detention.¹⁹¹ Although the ICTY has done away with the requirement that a defendant also show that “exceptional circumstances” warrant release,¹⁹²

¹⁸⁸. VLADIMIR TOCHILOVSKY, JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS: PROCEDURE AND EVIDENCE 609 (2008) (explaining that the issue of detention generally does not arise until more facts of the case have been considered).

¹⁸⁹. For example, during his initial appearance, ICTY defendant Jadranko Prlic stated that he did not believe that he should be detained, but no hearing on provisional release occurred at that time. Prosecutor v. Prlic, Case No. IT-04-74-PT, Transcript of Initial Appearance, 48:3–4 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 6, 2004), available at http://icr.icty.org. Prlic’s co-accused, Valentin Coric, also stated “I am not exactly thrilled by the fact that I am being held in detention.” Id. Four months later, there was a provisional release hearing for the six defendants in the Prlic case, but the presiding judge instructed the parties that it merely wanted to hear if there were any arguments, beyond those made in the written submissions, for release. Prosecutor v. Prlic, Case No. IT-04-74-PT, Transcript of Motion Hearing, 65:20–25 (Int’l Crim. Trib. for the Former Yugoslavia July 19, 2004), http://www.icty.org/x/cases/prlic/trans/en/040719MH.htm. Neither party presented any witnesses. Id.


¹⁹¹. See supra notes 107–08.

¹⁹². ICTY Rules Of Procedure, supra note 184, Rule 65(B). Prior to December 1999, an accused before the ICTY could be released from detention only if he or she could show that “exceptional circumstances” warranted release. Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, Rule 65(B), U.N. Doc. IT/32/Rev. 13 (July 10, 1998), available at http://www.icty.org/x/file/LegalLibrary/Rules_procedure_evidence/IT032_rev13_en.pdf; see also DeFrank, supra note 20, at 1430 (proposing language to amend the statute). Under this rule, only four accused were granted provisional release. DeFrank, supra note 20, at 1430. Scholars, defendants and at least one judge criticized the “exceptional circumstances” requirement for violating the human rights norm that pretrial detention be the exception rather than the rule. See, e.g., Safferling, supra note 41, at 143 (stating that ICTY Rules of Procedure 64 and 65 “foresee detention on remand as the general rule, liberty of the suspect as the exception” and arguing that this regime violates Article 9(III)2 of the
even under the amended rule, the burden of proving that he or she is neither a flight risk nor a danger remains on the defendant.\textsuperscript{193} As noted above, the ECtHR has held that the burden of proving the need to detain a criminal defendant must be on the prosecution.\textsuperscript{194}

The ICTY’s rules also state that the court must give “the host country and the State to which the accused seeks to be released the opportunity to be heard.”\textsuperscript{195} For pre-trial release and release during court breaks, ICTY defendants have had few problems getting their home countries to guarantee that they will supervise and return the defendant to the ICTY.\textsuperscript{196} However, particularly in the early days of the tribunal, judges were unwilling to give much weight to these guarantees, since many states in the former Yugoslavia were uncooperative with the tribunal and harbored fugitives.\textsuperscript{197} When a defendant is released, he or she falls under the jurisdiction of the states to which he or she is released.\textsuperscript{198}

\textsuperscript{193} Prosecutor v. Haradinaj, Balaz, & Brahimaj, Case No. IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, ¶ 8 (Int’l Crim. Trib. for the Former Yugoslavia July 20, 2007), http://www.icty.org/x/cases/haradinaj/tdec/en/070720.pdf (―It is for the accused to prove that the conditions of Rule 65(B) have been met and to satisfy the Trial Chamber that release is appropriate in a particular case.‖ (internal citations omitted)); see also DeFrank, \textit{supra} note 20, at 1431 (indicating that the amended rules left the burden of proving release factors on the defendant).

\textsuperscript{194} See \textit{supra} Part I.B.1.

\textsuperscript{195} ICTY Rules Of Procedure, \textit{supra} note 184, Rule 65(B).

\textsuperscript{196} See Rearick, \textit{supra} note 4, at 592–93 (noting that, unlike ICTY defendants, ICTR defendants have problems in getting released due to the unwillingness of Rwanda or other countries to take them).

\textsuperscript{197} Professors Wald and Martinez argued that after an amendment removing the “exceptional circumstances” requirement, “the heart of the release proceeding is the defendants’ ability to convince the judges that there are conditions which will guarantee their return and the safety of victims and witnesses.” WALD \& MARTINEZ, \textit{supra} note 20, at 245; see also Prosecutor v. Krajisnik \& Flavic, Case No. IT-00-39 & 40-PT, Decision on Momcilo Krajisnik’s Notice of Motion for Provisional Release, ¶ 18 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2001), available at http://icr.icty.org (noting that “until there is evidence of arrests, any guarantee from the government must be treated with caution”).

\textsuperscript{198} Prosecutor v. Lučić \& Lučić, Case No. IT-98-32/1-PT, Decision on Sredoje Lučić’s Motion for Provisional Release, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 13, 2006), available at http://icr.icty.org (acknowledging that the State and Tribunal must work together to satisfy the requirements of Rule 65).

ICCPR); DeFrank, \textit{supra} note 20, at 1430 (discussing ICTY Judge Robinson’s view that to read Rule 65 in a manner consistent with human rights norms, the burden of proof must be on the prosecution). Various Trial Chambers in early cases stated that the “exceptional circumstances” requirement was a reflection of the tribunal’s incorporation of the notion of preventive detention in light of the “extreme gravity of the crimes for which [the accused] are being prosecuted.” Prosecutor v. Kupreskic, et al., Case No. IT-95-16-PT, Decision on Motion for Provisional Release Filed by Zorna Kupreskic, Mirjan Kupreskic, Drago Josipovic and Dragam Papić (Joined by Marinko Katava and Vladimir Santic), ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 15, 1997), http://www.icty.org/x/cases/kupreskic/tdec/en/71215pr2.htm.

WALD \& MARTINEZ, \textit{supra} note 20, at 245; see also Prosecutor v. Krajisnik \& Flavic, Case No. IT-00-39 & 40-PT, Decision on Momcilo Krajisnik’s Notice of Motion for Provisional Release, ¶ 18 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2001), available at http://icr.icty.org (noting that “until there is evidence of arrests, any guarantee from the government must be treated with caution”).
The ICTY’s Statute and Rules provide no basis for compensation for unlawful detention. However, the Appeals Chamber has held that compensation would be appropriate for a defendant who is both unlawfully detained and acquitted.\(^{199}\) Reversing an earlier decision to release the defendant based on several violations of his rights,\(^{200}\) the Appeals Chamber in the ICTR case Prosecutor v. Baraygwaiza found that the appropriate remedy was compensation if the defendant was acquitted or a reduced sentence to reflect the violation of his rights if he was convicted.\(^{201}\)

Still, ICTY law makes no provision for compensation of a defendant who is acquitted, if the detention was lawful. ICTY Appeals Judge Schomburg has recently explained that:

It is deplorable that the UN ad hoc International Tribunals are not at least in the position to grant financial compensation to accused parties who have been acquitted, in particular when the deprivation of liberty over years of pre-trial detention and detention pending appeal is in whole or in part attributable to the Tribunal.\(^{202}\)

Providing compensation to acquitted defendants detained for long periods of time would express respect for the human rights compromised by lengthy detention.

B. Judicial Discretion on Provisional Release

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200. Baraygwaiza v. Prosecutor, Case No. ICTR-97-19, Decision, ¶¶ 100–101, 104, 113 (Int’l Crim. Trib. for Rwanda Nov. 3, 1999), http://liveunictr.altmansolutions.com/Portals/0/Case%5CEnglish%5CBarayagwiza%5Cdeci sions%5Cdc09991103.pdf; see also ZAPPALA, supra note 3, at 256 (noting that in the Appeals Chamber’s first ruling it had dismissed the indictment with prejudice due to the seriousness of the violations of the defendants’ rights).

201. Baraygwaiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), ¶ 75 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2000), http://liveunictr.altmansolutions.com/Portals/0/Case%5CEnglish%5CBarayagwiza%5Cdeci sions%5Cdc02000331.pdf; see also ZAPPALA, supra note 3, at 256–57 (discussing the Appeals Chamber’s decision in Baraygwaiza).

202. See Schomburg, supra note 6, at 77 (conceding that international human rights law requires compensation only after a conviction is reversed and not after an acquittal).
The broad discretion of ICTY judges to deny release raises international human rights problems. ICTY judges may detain defendants even if they pose neither a risk of flight nor a danger. If “it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person . . . . Release may be ordered by a Trial Chamber.” 203 The rule is a baseline and sets out “the minimum requirements necessary for granting provisional release.” 204 Trial Chambers interpreting the rule have clarified that a Trial Chamber may exercise its discretion to deny provisional release even where an accused meets the requirements of Rule 65(B). 205

ICTY case law provides guidance to judges in deciding risk of flight or danger but may do little to cabin the discretion of judges in denying release for reasons other than risk of flight or danger. Trial Chambers are to make a case-by-case assessment on release based on the concrete situation of the accused. 206 They must consider not only the circumstances as they are at the time of the release decision but also as they are expected to be at the time of the accused’s return to the tribunal if released. 207

Although “[i]n deciding whether the requirements of Rule 65(B) have been met, a Chamber must consider all of those relevant factors that a
reasonable Chamber would have been expected to take into account before coming to a decision [and] provide a reasoned opinion indicating its view on those relevant factors," 208 almost all of the factors set out in the case law pertain to flight or danger, and judges are not restricted to considering these factors. 209 According to tribunal jurisprudence, the following factors are relevant to the provisional release inquiry:

1. Whether the accused is charged with serious criminal offences;
2. Whether the accused is likely to face a long prison term, if convicted;
3. The circumstances of the accused’s surrender; 210
4. The degree of cooperation given by the authorities of the State to which the accused seeks to be released;
5. The guarantees offered by those authorities, and any personal guarantees offered by the accused;
6. The likelihood that, in case of breach of the conditions of provisional release, the relevant authorities will re-arrest the accused if he declines to surrender; 211 and
7. The accused’s degree of cooperation with the Prosecution. 212


209. Id. ("What the relevant factors are, as well as the weight to be accorded to them, depends upon the circumstances of each case.").

210. See Prosecutor v. Krajisnik & Plavsic, Case No. IT-00-39 & 40-PT, Decision on Momcilo Krajisnik’s Notice of Motion for Provisional Release, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2001), available at http://icr.icty.org (quoting the Trial Chamber decision stating, “[i]n the earlier cases in which provisional release was granted, the accused in both cases had surrendered voluntarily”); cf. Prosecutor v. Muvunyi, Case No. ICTR-00-55A-R65, Decision on Defence Motion for Reconsideration of Decision Denying Provisional Release, ¶ 15 (Int’l Crim. Trib. for Rwanda Apr. 3, 2009), http://liveunictr.altmansolutions.com/Portals/0/Case%5CEnglish%5CMuvunyi%5Cdecision s%5C090403.pdf (denying motion to reconsider decision denying provisional release and noting that “the Chamber must take into account the fact that he did not voluntarily surrender to the Tribunal, but was apprehended in London”).

211. See Prosecutor v. Haradinaj, Balaj, & Brahimaj, Case No. IT-04-84-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, ¶¶ 23, 25 (Int’l Crim. Trib. for the Former Yugoslavia June 6, 2005), http://www.icty.org/x/cases/haradinaj/tdec/en/050606.htm (noting that Chambers must take into consideration the position the accused held prior to his arrest, since it “could have an important bearing upon a State’s willingness and readiness to arrest that person if he refuses to surrender himself”).

In addition, judges should take into account “any suggestion that the accused has interfered with the administration of justice since the confirmation of the indictment against him;”[213] “the health condition and considerations regarding treatment of ill detainees;”[214] and the complexity of the case.[215] Of these factors, only the last two are unrelated to risk of flight or danger.

B. The ICTY’s De Facto “Detention for Trial” Regime

In theory, the standard for release is the same whether or not trial has begun. The ICTY Appeals Chamber has held that “Rule 65(B) applies to provisional release issues arising during the trial, just as it applies during pre-trial and pre-appeal proceedings.”[216] Nevertheless, early in the tribunal’s existence, an ICTY Trial Chamber stated that “generally it would be inappropriate to grant provisional release during trial because, inter alia, release could disrupt the remaining course of the trial.”[217]

In practice, there appears to be a shift in the standard once trial begins. Although pre-trial release has become increasingly common, all
defendants, other than a few charged only with contempt, remain in custody of the UNDU during trial. Perhaps because all ICTY defendants charged with genocide, crimes against humanity, or war crimes start out detained and return to the UNDU for trial is made a condition of their pre-trial release, defendants do not appear to fight this de facto detention for trial regime. The fight then is merely over whether they are released during court breaks or due to illness or other discrete “humanitarian circumstances.”

ICTY judges seem more comfortable releasing defendants, even for short periods, before trial than after trial has begun. In the case of Prosecutor v. Stanisic & Simatovic, the Trial Chamber characterized the case as being in the pre-trial stage before granting release, even though the parties had given opening statements and a witness had testified.

If a case is near its inception, courts will still grant release by applying the ordinary Rule 65(B) risk of flight or danger standard. For example, early in the case of Prosecutor v. Perisic, the Trial Chamber granted

218. See supra note 5 (providing examples of two defendants who were summoned to appear in lieu of being held in contempt).


222. Id. Although the parties had given their opening statements and a witness had been called, the Trial Chamber stated that, in its view, “the case [was then] properly described as being in the pre-trial stage of the proceedings.” Id. at ¶¶ 6, 42, 63. The Appeals Chamber stated that it was within the Trial Chamber’s discretion to determine that the case was in the pre-trial stage, but found its reasoning inadequate. The Appeals Chamber nevertheless upheld release. Prosecutor v. Stanisic & Simatovic, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, ¶¶ 43, 72–73 (Int’l Crim. Trib. for the Former Yugoslavia June 26, 2008), http://www.icty.org/x/cases/stanisic_simatovic/acdec/en/080626.pdf.

Perisic provisional release for the period of the winter break from December 22, 2008 to January 9, 2009 and refused additional security measures, such as twenty-four-hour surveillance.\textsuperscript{224}

As the trial proceeds, courts grow even more reluctant to release defendants even for court breaks. In December 2006, the Appeals Chamber in \textit{Prosecutor v. Milutinovic}\textsuperscript{225} upheld the Trial Chamber’s denial of provisional release based on the increased risk of flight due to the amount of evidence that had come in at trial.\textsuperscript{226} According to the Prosecution, “since the Defendants had now heard the serious evidence against them, they had a higher incentive to abscond, particularly considering the potential penalties that might follow a conviction.”\textsuperscript{227}

Although the defendants had been released previously and returned for trial, the Trial Chamber found that the risk of flight had increased since the previous provisional release, because “17 weeks of trial ha[d] elapsed, and 85 witnesses ha[d] given evidence relating to multiple alleged crimes committed throughout Kosovo for which the Accused are said to be responsible.”\textsuperscript{228}

The same Trial Chamber refused to consider whether the weight of the evidence, including, according to the defendant, the weakening of the prosecution’s case, decreased the risk of flight in the defendant’s subsequent application for provisional release based on compassionate grounds.\textsuperscript{229} In response to the Accused’s argument that the Prosecution’s case had weakened, the Chamber noted

For the Chamber to agree with the Accused’s point about the purported weakening of the Prosecution case, it would have to weigh the evidence adduced by the Prosecution against that of the Accused, and this is a task


\textsuperscript{226} \textit{Id.}

\textsuperscript{227} \textit{Id.} at ¶ 14.

\textsuperscript{228} \textit{Id.}

reserved for the Chamber’s final assessment of all the evidence at the conclusion of the trial, not at this stage.\footnote{230} Apparently, it is permissible to quantify the prosecution’s evidence—number of witnesses, documents, and the like—to assess the likelihood that a defendant be inclined to flee, but not to assess the strength or weakness of the evidence against the accused for the same purpose.

The named accused in the case, whom the Trial Chamber refused to release based on the amount of the evidence against him, Milutinovic, was later acquitted.\footnote{231} Worse still than the earlier denial of provisional release, the Trial Chamber denied release to Milutinovic for the time between the end of trial and the delivery of the judgment—a period of six months—only to finally release him upon the delivery of the judgment.\footnote{232}

The ICTY, despite recognizing the defendants’ rights to a speedy trial,\footnote{233} has come under fire for delays in completing trials.\footnote{234} If everyone is detained for trial, long trials means long periods of detention.

Worrying though it may be, lengthy detention before judgment is not, by itself, a human rights violation, at least according to the ECtHR.\footnote{235} As ICTY judges have noted, the ECtHR has upheld pre-trial detention of several years in some circumstances.\footnote{236} However, the ECtHR has found violations of Article 5(3) where the reasons for detention offered by governments were insufficient.\footnote{236} The beginning of trial is, indubitably, insufficient ground to justify detention where there is neither risk of flight nor danger.

\footnote{230} \textit{Id.} at ¶ 2.
\footnote{232} \textit{See id.}
\footnote{233} ICTY Statute, supra note 59, art. 21(4)(c) (acknowledging that the accused has the right “to be tried without undue delay”).
\footnote{234} \textit{See Jean Galbraith, The Pace of International Criminal Justice, 31 Mich. J. Int’l L. 79, 82 (2009) (criticizing the slow pace of international criminal justice and surveying the literature discussing the length of international criminal proceedings).}
\footnote{236} \textit{See, e.g., Letellier v. France, 207 Eur. Ct. H.R. (ser. A), at 9, ¶¶ 13, 33 (1991) (finding that, despite the gravity of the alleged crime, murder for hire, and the potentially lengthy sentence the defendant faced, there was insufficient evidence of risk of flight or obstruction or danger to the public order to justify her continued detention); Neumeister v. Austria, 8 Eur. Ct. H.R. (ser. A), at 39, ¶ 10 (1968) (finding insufficient evidence of risk of flight to justify seven years of detention during the investigation and trial).}
C. Release, a Moving Target: The “Sufficiently Compelling Humanitarian Circumstances” Requirement after the Close of the Prosecution’s Case

After the close of the prosecution’s case, if a Trial Chamber declines to issue a judgment of acquittal on all counts, release even on court breaks becomes more difficult. In March 2008, the ICTY Appeals Chamber added a new requirement for provisional release, not stated in Rule 65, for cases in which Trial Chambers have declined to enter a judgment of acquittal at the end of the prosecution’s case. At this stage, for an accused to be released, not only must a trial chamber conduct a new assessment of the risk of flight in light of the 98 bis decision, but also it must find that there exist “serious and sufficiently compelling humanitarian reasons” for the release.

With one exception, subsequent Appeals Chamber decisions confirmed that “serious and compelling humanitarian circumstances”

237. As at all of the international tribunals, ICTY defendants have an opportunity to seek a judgment of acquittal at the close of the prosecution case. See Schabas, supra note 62, at 516 (linking this opportunity to the presumption of innocence and the prosecutor’s burden of proof). Rule 98 bis of the Rules of Procedure and Evidence for the ICTY provides: “At the close of the Prosecutor’s case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.” Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, Rule 98 bis, U.N. Doc. IT/32/Rev. 43 (July 24, 2009), available at http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence.


239. Id. at ¶ 20 (“The Appeals Chamber considers that the 98 bis Ruling in this case constitutes a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of flight posed by the accused pursuant to Rule 65(B) of the Rules.”).

240. Id. at ¶ 21 (holding that the accused did not set forth “sufficiently compelling” humanitarian justifications for release).

241. In the Pusic Appeals Chamber decision, reached by a different panel of judges, the majority stated:

Because Rule 65(B) of the Rules does not require ‘sufficiently compelling’ humanitarian reasons for provisional release, this Bench understands the Prlic Decision of 11 March 2008 to have ruled that it is only when a Trial Chamber, having considered all the circumstances of the case and the impact of the significant change of circumstances constituted by the 98 bis decision, cannot exclude the existence of flight risk or danger, that “sufficiently compelling” humanitarian reasons, coupled with necessary and sufficient measures to alleviate any flight risk or danger, can constitute a basis for resolving uncertainty and doubt in favour of provisional release.

Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, & Pusic, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “Decision Relative a la Demande de Mise en Liberte Provisoire de L’accuse Pusic“, ¶ 15 (Int’l Crim. Trib. for the
indeed amounted to an additional requirement to the other Rule 65(B) requirements (the absence of flight or danger) after the 98bis stage. The Appeals Chamber also added a requirement that the duration of the release be proportional to the circumstance warranting the release—"for example, the need to visit a seriously ill family member in the hospital would justify provisional release of a sufficient time to visit the family member" and no longer. This requirement flips the international human rights notion of proportionality—that the measure should be no more restrictive than necessary to assure that a defendant appear for trial and pose no danger—on its head.

Various judges objected to the new "sufficiently compelling humanitarian circumstances" requirement in dissents on the basis that it is absent from the rule; it elides the distinction between the standard for those already convicted and those who merely stand accused and thereby contravenes the presumption of innocence; and essentially adds back into the rule the old "exceptional circumstances" requirement.

Judge


244. See supra note 161 (describing the three-factor test for whether an international law is proportionate: suitability, necessity, and reasonableness).

245. See, e.g., Prosecutor v. Prlic et al., Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from Decision relative a la demande de mise en liberte provisoire de l'accuse Petkovic Dated 31 March 2008," ¶ 4 (Apr. 21, 2008) (Guney, J., dissenting in part); see also Prosecutor v. Popovic et al., Case Nos. IT-05-88-AR65.4 to 65.6, Decision on Consolidated Appeal Against Decision on Borovcanin’s Motion for a Custodial Visit and Decisions on Gvero and Miletic’s Motions for Provisional Release During the Break in the Proceedings, ¶ 3 (May 15, 2008) (Liu, J., dissenting in part) (“As for what exactly ‘compelling humanitarian reasons’ are, although they have not been defined by the Majority, they seem to amount to the same as the previous ‘exceptional circumstances’ in practice.”).
Schomburg noted that it also would make little sense to defendants and their families to, on the one hand, be told that a Trial Chamber “excludes the risk of flight and the risk of suppression of evidence and nevertheless in the same decision exercises its discretion by ordering the ongoing deprivation of liberty in the UNDU after the expiration of release for a ‘fixed period.’”246 Finally, Judge Schomburg objected to the new rule insofar as it appeared to be creating a new type of “temporary release” before a judgment of guilt or innocence neither provided for in the rule, nor seen in domestic jurisdictions.247

These new judicially-created rules resulted in a spate of filings centering on the highly factual inquiry into circumstances warranting release. Ultimately, the filings turned into a fight over the sickness and propinquity of relatives.248 After failing before, defendants beefed up their cases for humanitarian circumstances. When the Appeals Chamber overturned an

246. Prosecutor v. Prlic et al., Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “Decision de l’accuse Pusic” Issued on 14 April 2008, ¶ 10 (Apr. 23, 2008) (Schomburg, J., dissenting). In his dissent, Judge Schomburg noted that he had answered this dilemma in a previous dissenting opinion in the Prlic case. Id. ¶ 10 n.12. Unfortunately, as the dissent is confidential, his solution will remain a mystery to the public. See Email from Stuart Lester, Int’l Crim. Trib. for the Former Yugoslavia Media Office, to author (Sept. 10, 2009, 01:06 PDT) (on file with author).

247. Prosecutor v. Prlic et al., Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “Decision de l’accuse Pusic” Issued on 14 April 2008, ¶ 1 (Apr. 23, 2008) (Schomburg, J., dissenting). In his dissent from the Pusic Appeals Judgment, Judge Schomburg contended that these humanitarian releases, which he dubbed “temporary release,” are “an artefact [sic] in principle not foreseen in criminal proceedings” in either the law of the ICTY or in domestic jurisdictions other than for convicted persons. Id. at ¶ 1. Citing time constraints in issuing the decision, Schomburg gave only one German source for the proposition that “temporary release” did not exist in domestic jurisdictions. Id. at ¶ 1 n.1. In fact, the U.S. federal system provides at least one example of a jurisdiction that allows for temporary release. The U.S. Bail Reform Act allows for “temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense or for another compelling reason.” 18 U.S.C. § 3142(i) (2006).

order releasing an accused because he had offered no humanitarian circumstances justifying his release, not surprisingly, by the next court break, he had found some humanitarian reasons to support his release.

This back and forth on whether or not the humanitarian circumstances were sufficiently compelling reflects the notion that “motions for provisional release are fact intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.” Case-specific factual inquiries on release are indeed appropriate and consistent with human rights norms, but the ICTY’s focus on humanitarian circumstances has detracted from the bigger issue—the defendant’s right to liberty itself—which should mean release absent a significant public interest in detaining him or her.

The focus on “sufficiently compelling humanitarian circumstances” has also engendered some rather bold defense motions. Deeming irrelevant the fact that he had been on the lam for years, Vujadin Popovic sought release on the basis of “sufficiently compelling humanitarian circumstances.”

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249. Gvero had argued that he should be released simply because he was neither a risk of flight nor a danger. Prosecutor v. Prlic et al., Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “Decision de l’accuse Pusic” Issued on 14 April 2008, ¶¶ 23–24 (Apr. 23, 2008).

250. Prosecutor v. Popovic, Beara, Nikolic, Borovcanin, Miletic, Gvero, & Pandurevic, Case No. IT-05-88-T, Decision on Gvero’s Motion for Provisional Release, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2008), http://www.icty.org/x/cases/popovic/tdec/en/080721b.pdf (granting release based on Gvero’s poor health and that of his sister); see also Prosecutor v. Popovic, Beara, Nikolic, Borovcanin, Miletic, Gvero, & Pandurevic, Case No. IT-05-88-T, Decision on Gvero’s Motion for Provisional Release, ¶¶ 6–8 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 2008), http://www.icty.org/x/cases/popovic/tdec/en/081210a.pdf (noting that Gvero submitted that “his well-being has deteriorated during the course of proceedings” and that Gvero “highlight[ed] that the Trial Chamber [wa]s approaching one of the most critical points in the trial for Gvero, namely the presentation of his own case, and stresses the importance for him to be able to participate in his own defense and more particularly, his ability to be in top psychological condition during the course of his own case.”) (internal quotation marks omitted).

251. Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, & Pusic, Case No. IT-04-74-AR65.8, Decision on “Prosecution’s Appeal From Decision Relative a la Demande de Mise en Liberte Provisoire de L’Accuse Prlic Dated 7 April 2008”, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 25, 2008), http://www.icty.org/x/cases/prlic/acdec/en/080425.pdf (explaining the factors that must be considered in deciding whether the Rule 65(B) requirements have been met).

252. See W. v. Switzerland, 254 Eur. Ct. H.R. (ser. A) 15 (1993) (stating that “the reasonable time cannot be assessed in abstracto,” but rather that “the reasonableness of an accused person’s continued detention must be assessed in each case according to its special features”).

Perhaps the most audacious motion was that of Milan Lukic. One month after being convicted of crimes against humanity and war crimes for burning alive approximately 120 women, children, and elderly people; killing several Bosnian-Muslim men; beating Bosnian-Muslim men in detention; and killing a Bosnian-Muslim woman at point blank range. Lukic filed for release on compassionate grounds to allow him to visit his “ailing and elderly parents” whom he had not seen since 1998. The reason he had not seen his parents for seven years was that he was actively evading arrest by the Tribunal before his arrest in Argentina in 2005. As one member of the Office of the Prosecutor facetiously stated off the record, “[p]erhaps one could argue that conviction for crimes against humanity is traumatic enough to be considered a factor supporting release on humanitarian grounds?”

The ICTY’s explanation for the heightened release standard post-98 bis is also troubling in light of the presumption of innocence. The courts have justified it based on the increased risk of flight, but one wonders whether flight is really the issue. Indeed, four of the defendants in the case of Prosecutor v. Prlic argued that it was hard to see how the Trial Chamber finding against them could have affected their perceptions of the risk of conviction since they had not made any Rule 98 bis submissions, which indicated that they already believed they would not win on a motion for judgment of acquittal after the prosecution rested. The language of the decision denying him release to visit his ailing mother and arguing that “his whereabouts before his surrender to the Tribunal have no bearing on whether he currently poses a flight risk”).


255. See Prosecutor v. Lukic and Lukic, Case No. IT-98-32/1-A, Decision on Milan Lukic’s Motion for Provisional Release, ¶¶ 2, 4 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 28, 2009), http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/acdec/en/090828.pdf (arguing that because his parents were ill, he “‘should be entitled, at a minimum, to the same compassion as that granted to other accused’”).

256. Id. at ¶ 6 (providing the Prosecution’s reasons for opposing the defendant’s motion for provisional release).

257. Email from OTP lawyer, to author (July 30, 2009) (on file with author).


259. Id. (mentioning that of the six defendants, Pusic and Coric were the only ones who had moved for a judgment of acquittal). Likewise, in the Perisic case, the defense argued that the “sufficiently compelling humanitarian grounds” did not apply since “there [had been] no Rule 98 bis submissions and consequently no pronouncements by the Trial
Perisic Trial Chamber in rejecting the defense argument that the absence of a 98 bis ruling made the “sufficiently compelling humanitarian circumstances” standard inapplicable supports this argument. It stated:

Rule 98bis is used when the Defence is of the view that there is no evidence capable of supporting a conviction. The corollary is that when the Defence does not use this provision, it is of the view that it does have a case to answer.260

This language lends support to the notion that a defendant who presents not Rule 98 bis submissions already believes that he or she has a case to answer and would not be surprised by a judicial decision saying so.

Although the judges claimed otherwise, it is difficult to escape the conclusion that the heightened standard reflects a sentiment about the increased likelihood of conviction. In one dissent, Judge Schomburg stated that the relevant inquiry was whether “this specific 98 bis Ruling, which dismissed [the defendant]’s motion to enter a judgment for acquittal had an effect on [the defendant]’s readiness and willingness to appear again for trial.”261 However, in another, Judge Liu noted that the probability of conviction plays a role in the provisional release decision.262

The great disparities in the strictness of the “sufficiently compelling humanitarian circumstances” requirement from trial chamber to trial chamber appears to reflect the judges’ profound ambivalence or perhaps

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262. Prosecutor v. Popovic, Beara, Nikolic, Borovcanin, Miletic, Gvero, & Pandurevic, Case Nos. IT-05-88-AR65.4 to 65.6, Decision on Consolidated Appeal Against Decision on Borovcanin’s Motion for a Custodial Visit and Decisions on Gvero’s and Miletic’s Motions for Provisional Release During the Break in the Proceedings, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia May 15, 2008), http://www.icty.org/x/cases/popovic/acdec/en/080515.pdf (Liu, J., dissenting in part) (stating “like the Majority’s new ‘compelling humanitarian reasons’, the Trial Chambers in determining the existence of ‘exceptional circumstances’ considered the probability of a conviction when they considered ‘whether there is reasonable suspicion that [an accused] committed the crime or crimes charged’” (quoting Prosecutor v. Delalic, Mucic, Delic, & Landzo, Case No. IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 25, 1996), http://www.icty.org/x/cases/mucic/tdec/en/60925PR2.htm)).
disagreement about the propriety of letting defendants on trial for war crimes out at all. In most instances, judges demand that defendants offer humanitarian circumstances beyond the length of the trial and their detention alone. However, the release of one accused, well after the 98 bis decision, suggests that some judges are more disturbed by the lengthy detention of accused during trial and are seeking to address the problem in the only manner allowed by tribunal jurisprudence. Citing the Registrar’s Report on the problems associated with lengthy detention, the Prijic Trial Chamber found that “the long time spent in provisional detention and the foreseeable length of the trial . . . constitute[d] a sufficiently compelling humanitarian reason for granting [the defendant] provisional release.” The Trial Chamber ordered the defendant’s release over the month-long summer court recess.

D. Victims’ Rights and Provisional Release at the ICTY

The ICTY does not allow victims any participation rights. However, the provisional release decisions reflect a concern over victims’ rights to protection and their interests generally. The decision to require “sufficiently compelling humanitarian circumstances” seems in no small part motivated by concern for victims. Even though the rules of the ICTY do not require judges to consider the interests of victims, the Appeals Chamber has counseled judges to consider the prejudicial effects on victims and witnesses living in the region to which the accused will be released before granting release. The Appeals Chamber also has defined broadly the interests of victims it seeks to protect:

263. Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, & Pusic, Case No. IT-04-74-T, Redacted Version of “Decision on Slobodan Praljak’s Motion for Provisional Release (2009 Summer Judicial Recess)”, ¶¶ 32–34 (Int’l Crim. Trib. for the Former Yugoslavia May 25, 2009), http://www.icty.org/x/cases/prlic/tdec/en/090525.pdf (citing the Registrar’s Report on Detention and noting that Praljak had been detained since the beginning of the proceedings, which amounted to over three years, and that he had not been released for the past year and a half, and concluding that, since “in such a lengthy trial, the good physical and mental health of the Accused is particularly important in ensuring that the proceedings go forward smoothly and efficiently. . . . [A] short period spent with his relatives would help ease the negative effects of lengthy detention on the Accused Praljak”).

264. Id. at ¶ 34. The Trial Chamber noted that Praljak had been held in the UNDU since the beginning of the proceedings and had not been provisionally released in a year and a half. Id. at ¶ 31.

265. See DOAK, supra note 121, at 136 (“It has been suggested that the minimalist nature of participatory rights granted to victims in the ad hoc tribunals is attributable to fears that the presence of victims could cause undue delay in the trial process, thereby jeopardizing the rights of the accused to be tried expeditiously.”); see also ZAPPALA, supra note 3, at 220 (citing ICTY and ICTR Rules Of Procedure 2 and noting that, unlike the ICC, the ad hoc tribunals defined “victims” very narrowly as persons “against whom a crime over which the Tribunal has jurisdiction has allegedly been committed”).
The perception that persons accused of international crimes are released, for a prolonged period of time, after a decision that a reasonable trier of fact could make a finding beyond any reasonable doubt that the accused is guilty (this being the meaning of a decision dismissing a Rule 98bis motion), could have a prejudicial effect of victims and witnesses.\textsuperscript{266}

In his dissent from the Pusic Appeals Decision, Judge Schomburg noted that it is “difficult for alleged victims and their relatives to comprehend that alleged war criminals [are] permitted to be in the region whilst they would expect him to answer his case before the International Tribunal.”\textsuperscript{267}

Judge Schomburg has articulated what seems to be a concern about the effect of provisional release on the “expressive” function of international tribunals to condemn war crimes, crimes against humanity, and genocide by releasing defendants who are on trial for such crimes. Arguing against releasing defendants for court breaks, Judge Schomburg argued that such a regime “would in practical terms convey the impression, particularly to the people in the States on the territory of the former Yugoslavia that accused before the International Tribunal are let out on holidays.”\textsuperscript{268} The worry is, presumably, not only over victim dissatisfaction with the tribunal, but also that this “impression” risks sending the message of the insignificance of the crimes and thus undermining the expressive function and the potential transitional justice benefits of the trials. At the ICC, victims have voiced the same concern.\textsuperscript{269} However, as discussed below in Part IV.5, the place for sending the message on the gravity of the crimes is sentencing, not release, where defendants are presumed innocent.


\textsuperscript{268} Id. at ¶ 17.

\textsuperscript{269} See, e.g., Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06 OA 12, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Mr. Thomas Lubanga Dyilo”, ¶ 28 (Int’l Crim. Ct. Oct. 21, 2008), http://www.iclklamberg.com/Caselaw/DRC/Dyilo/Appeals/1487.pdf (noting victims’ argument that the release of the defendant could “create the impression that the conscription, enlistment or use of child soldiers is not a serious offence”); see also id. at ¶ 9 (Pikis, J., dissenting) (noting the victims’ arguments against Lubanga’s release including that it would “cultivate a sense of impunity on the part of perpetrators of grave crimes”).
III. PROPOSALS FOR REFORM OF PROVISIONAL RELEASE AT INTERNATIONAL CRIMINAL TRIBUNALS TO PROMOTE INTERNATIONAL HUMAN RIGHTS

A number of reforms could help international tribunals better serve as a model of respect for human rights. Below, I evaluate a series of measures in light of the human rights issues identified above, including the rights to be presumed innocent, to bail (or at least a bail hearing), to liberty and security of the person, and to a speedy and fair trial, as well as victims’ rights. I also assess the measures against the balance struck on these rights by the ECtHR and national courts. No one measure does away with the human rights problems associated with decisions on provisional release, but each represents a step in the right direction.

A. Streamlined and Possibly Sequential Trials

1. Streamlined trials

As many have recognized, whether any other reforms of provisional release occur, “speedier and shorter trials” would help address the human rights concerns associated with the lengthy detention before conviction of international defendants.270 The ICTY has already implemented a number of procedural changes in an attempt to reduce the length of trials. It has hired ad hoc judges and given judges more flexible assignments.271 Controversially, it has changed its rules to allow documentary evidence and out-of-court statements in lieu of in-court testimony.272 Judges are increasingly limiting the number of witnesses and length of testimony allowed.273

270. E.g., Prosecutor v. Prlic, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “Decision Relative a la Demande de Mise en Liberte Provisoire de l’accuse Pusic”, ¶¶ 10–11 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 23, 2008) (Schomburg, J., dissenting) http://www.icty.org/x/cases/prlic/acdec/en/080423.pdf (suggesting that the answer to the dilemma of detention during long trials lays in having expeditious trials, not in releasing defendants); see also WALD & MARTINEZ, supra note 20, at 245 (advocating shorter trials); Iain Bonomy, The Reality of Conducting a War Crimes Trial, 5 J. INT’L CRIM. JUST. 348–51 (2007) (discussing the need for strict trial management by judges and a lesser reliance on the adversarial system to make international trials more efficient).

271. WALD & MARTINEZ, supra note 20, at 245.

272. See ZAPPALA, supra note 3, at 253–54 (noting that the flexibility should help address the problem of lengthy trials).

273. Bibas & Burke-White, supra note 11, at 699; see also Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, Decision on the Application of Rule 73 bis, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2009), http://www.icty.org/x/cases/karadzic/tdec/en/091008.pdf (noting that the Chamber had ordered the Prosecution to make written submissions on reducing the size of the trial and that the Prosecution had reduced the number of witnesses, locations, and the estimated time needed for its examination-in-chief).
There is also an increasing recognition that the mega-trials, in which many defendants and/or charges are joined together, may make speedy trials extremely difficult to deliver. Mega-trials make it hard to get cases ready for trial and, ultimately, to complete the trial quickly.274

Even if mega-trials increase efficiency for a tribunal as a whole and better judicial control can make them shorter, for any given accused, being a part of a multi-defendant mega-trial inevitably leads to a longer trial than he or she otherwise would have had. Not all prosecution evidence will relate to all accused. Moreover, each defendant may wish to cross-examine separately prosecution witnesses and call witnesses in his or her defense.275 If all defendants are detained during trial, this effect necessarily makes for longer detention. Thus, unless release during trial becomes a more realistic option, the mega-trial seems to pose a grave challenge to the human rights of defendants.

Backing the tribunal’s guarantee of speedy rights with rules with teeth also would help to push prosecutors to engage in the necessary streamlining. Tribunals should consider instituting a speedy trial clock whereby cases must be completed within a certain period of time, which would reduce the length of detention for those detained for trial.276

Overall, streamlining trials scores well in a human rights evaluation. Smaller cases help to ensure that the defendant receives a speedy trial.277

274. See Bibas & Burke-White, supra note 11, at 699 (noting that even though the court statutes provide a right to a speedy trial, international defendants can have waits of several years before their trials are concluded). It bears noting though that some multi-defendant mega-trials have been completed reasonably quickly and the experience and style of the judges may be a more critical factor than the number of defendants or charges. See PATRICIA M. WALD, TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM 20 (2009), http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/tyrants_20090911/tyrans_20090911.pdf (noting that the Omarska trial with five defendants lasted only 113 trial days); Prosecutor v. Sainovic, Ojdanic, Pevkovic, Lazarevic, Lukic, & Milutinovic, Case No. IT-05-87, Case Information Sheet, 5, http://www.icty.org/x/cases/milutinovic/cis/en/cis_sainovic_al_en.pdf (showing that the Milutinovic case, now known as the Sainovic case since Milutinovic’s acquittal, with six defendants, lasted less than two years).

275. The ICTY mega-trials bear out this possibility.

276. In the United States federal system, for example, the Speedy Trial Act of 1974 requires that trial begin “within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.” 18 U.S.C. § 3161(c)(1) (2006).

277. See Prosecutor v. Prlic, Stojic, Praljak, Petkovic, Coric, & Pusic, Case No. IT-04-74-AR65.6, “Decision de L’accuse a la Demande de Mise en Liberte Provisoire de L’accuse Pusic”, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 23, 2008) (Schomburg, J., dissenting), http://www.icty.org/x/cases/prlic/acdec/en/080423.pdf (noting that an accused has the right to a speedy trial). Judge Schomburg argued that, therefore, “periods where a Trial Chamber does not conduct hearings must be as short as possible, taking into account only the parties’ needs for preparing their cases but not the wish of the accused for ‘temporary release.’” Id.
The prosecution and defense will need less time to get ready for trial, and the trial should take less time. The streamlined trial does not do away with fair trial concerns about a defendant’s ability to prepare a defense while incarcerated, but it addresses the problems associated with lengthy detention discussed above.

Bringing fewer charges and trying fewer defendants at once will improve compliance with other core defendants’ rights. Since the presumption of innocence and the right to liberty go away if a defendant is convicted in a final judgment on the merits and given prison time, the shorter the trial before a conviction, the less time a defendant is detained (even if all defendants are detained for trial) while he or she is presumed innocent.

Despite the defendants’ rights benefits of shorter trials, the ECtHR has been very deferential to national courts in their decisions joining defendants and charges.\footnote{278}{E.g., Neumeister v. Austria, 8 Eur. Ct. H.R. (ser. A) at 42 (1968).} In Neumeister v. Austria,\footnote{279}{Id.} for example, the ECtHR seemed reluctant to impeach Austria’s decision to join the defendant’s case with those of several others even though “[t]he course of the investigation would probably have been accelerated had the Applicant’s case been severed from those of his co-accused.”\footnote{280}{Id.} The court reasoned that “nothing suggests that such a severance would here have been compatible with the good administration of justice.”\footnote{281}{Id.} The court may have shown less deference had the defendant still been detained.\footnote{282}{See STEYTLER, supra note 61, at 146 (citing Stogemuller v. Austria, 9 Eur. Ct. H.R. (ser. A) at 40, (1969)) (arguing that where an accused is detained pending trial, the court and the prosecution should employ special diligence to ensure the expeditious completion of the case). But see Ferrari-Bravo v. Italy, App. No. 9627/81, Eur. Comm’n H.R. Dec. & Rep. 15, 39–40 (1984) (finding no violation of Article 5(3) for detention on remand of 4 years and 11 months and that the considerable period of detention on remand involved in that case was “inextricably bound up with the duration of the criminal proceedings themselves,” which was enlarged “due to the fact that the judicial authorities decided to combine the various proceedings in a single trial, which assumed substantial proportions in consequence”).} Nevertheless, streamlining cases has its drawbacks. Severing the trials of accused whose conduct is related and reducing the number of counts and incidents charged against each individual accused means that trials are unlikely to create a full historical record of events.\footnote{283}{See Michael P. Scharf & Ahran Kang, Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL, 38 CORNELL INT’L L.J. 911, 919–20 (2005) (arguing that the Iraqi Tribunal should avoid “mega trials” dealing with events “occurring in many places and spanning over long periods of time” and conceding that doing so “will not help to establish a comprehensive historic record of the atrocities committed under the regime of Hussein,” but maintaining that other institutions like truth commissions would be better suited to doing so).}
prioritizing the aim of promoting respect for human rights and the rule of law through international criminal justice, this cost is one that tribunals may have to accept. Other mechanisms, such as truth commissions, which are typically considered better means of creating a historical record, should be used to complement international criminal trials as a means of creating a historical record.284

Further, streamlining cases by dropping charges or factual allegations against defendants may distort sentencing. Although one might think that the penalty for war crimes, crimes against humanity, and genocide would always be life imprisonment, often defendants receive significantly shorter sentences than they would likely receive for murder in many domestic jurisdictions.285 Since conviction of an international crime usually does not mean a life sentence, the fewer crimes charged, arguably, the lower the sentence a defendant may face. For example, the Appeals Chamber in *Prosecutor v. Dragomir Milosevic*286 found that its reversal of his convictions for a few shelling incidents reduced “Milosevic’s overall culpability” because fewer victims could be imputed to him even though the findings behind the reversal “d[id] not change the fact that the entire population of Sarajevo was the victim of the crime of terror committed under Milosevic’s command.”287 A defendant’s sentence may only reflect the gravity of his or her actions if the full scope of his or her activities is presented to the court.

Finally, streamlining cases may produce other human rights costs by reducing opportunities for victims to participate in trials.288 The vocal opposition of victims’ groups to the streamlining of the case against Radovan Karadzic demonstrates that victims may not be pleased with this

284. *See supra* note 37 (noting scholars’ arguments that truth commissions are a better means of creating a historical record).

285. *See* Harmon & Gaynor, *supra* note 56, at 688–89 (stating that “[i]t appears that some ICTY sentencing Chambers apply either a remarkably low formula to calculate the length of time to be spent in prison in relation to the total quantum of human suffering caused, or afford quite extraordinary weight to mitigating factors”); *see also* Drumbl, *supra* note 28, at 154–55 (explaining that “[a]t both the national and international levels, sentences for multiple international crimes are generally not lengthier than what national jurisdictions award for a single serious ordinary crime”).


287. *Id.* at ¶ 335.

288. *See* ZAPPA, *supra* note 3, at 221 (noting that “one of the central traits of a system that does not allow for direct participation of victims in the process is that the Prosecutor may, albeit involuntarily, instrumentalize victims. In other words, there is the risk that victims will be allowed to participate only in so far as their claims are useful to the overall strategy of Prosecution”).
reform. A member of the group “Mothers of Srebrenica and Zepa Enclaves” told reporters that “victims will no longer appear as witnesses at trials. We will ignore them. We will not take part in the work of the Tribunal. They know they cannot go on without our help. So, they should then release Karadzic.”

Then again, long trials may not serve victims’ interests in justice since the longer the trials, the fewer defendants can be tried and, at least in some cases, defendants may die before judgment. Moreover, mechanisms other than long trials, such as explicit participation rights, are a more targeted and effective means of addressing victim participation.

2. Sequential trials

Even though the Saddam Hussein trial is considered “one of the messier trials in legal history,” its approach of tackling incidents one by one is worth considering. The issue of bail and its attendant human rights implications, including the presumption of innocence, disappear once a person is convicted of a crime, assuming that his or her sentence is sufficiently long to allow for a trial on remaining indictments. Holding sequential trials also addresses the concerns about victims’ rights to participation and to a remedy and about inadequate sentencing, since more charges and incidents can ultimately be adjudicated than if they are dropped altogether.


290. BalkanInsight.com, supra note 289.


292. Of course, Saddam Hussein was sentenced to death and executed after his first trial, so no further trials occurred. See Galbraith, supra note 234, at 133 n.199 (noting that “Kurds were frustrated that Hussein was executed for a conviction in relation to atrocities against 148 Shiites before the completion of his trial for atrocities committed against vast numbers of Kurds during the Anfal campaign’’). Since the international tribunals allow for a maximum sentence of life imprisonment, further trials will be possible. See, e.g., Rome Statute, supra note 59, art. 77 (providing for a maximum sentence of life imprisonment).
However, this proposal may raise other human rights problems for prosecution of the later charges. If international tribunals give teeth to their guarantees of a speedy trial and follow the ECHR’s conception of the right to a speedy trial—the right to have the process against one concluded expeditiously—sequential trials may run afoul of the right to a speedy trial.293 Issuing new charges only once a trial nears the end may be a way around this problem, but it raises other concerns about practicality and the fairness of the trial associated with pre-indictment delay.

B. Revamping the Release Inquiry

The inquiry into risk of flight and danger must be reworked for tribunals to reflect better international human rights norms. This effort need not throw out the risk of flight or danger inquiries altogether, but rather must address the issues at their margin, such as the extent of judicial discretion, judicial rule-making, and the burden of proof.

1. Limiting the unbridled discretion of courts to detain

Judges’ discretion must be limited. Judges should not be able to detain defendants if the grounds for detention set out in their tribunals’ rules or statutes are not met. Marking a significant human rights improvement over the ICTY, ICC judges have much less discretion on release than do ICTY judges. At least in theory, if the requirements for detention are met,294 an accused must be detained. If not, he or she must be released.295

Limiting judicial discretion comports with the jurisprudence of the ECtHR and national courts, which condemn boundless discretion of courts

293. See Burke-White, supra note 53, at 84 (explaining that proactively encouraging prosecutions in domestic jurisdictions could save the ICC resources it needs to conduct investigations and prosecutions).

294. The ICC provides for provisional detention where “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and . . . the arrest of the person appears necessary: (i) To ensure the person’s appearance at trial, (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.” Rome Statute, supra note 59, art. 58(1), 60.

295. See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 (OA 7), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled “Decision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”, ¶ 134 (Int’l Crim. Ct. Feb. 13, 2007), http://www.icc-cpi.int/iccdocs/doc/doc248155.PDF (“[T]he decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute is not of a discretionary nature.”); see also Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 OA 2, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo”, ¶ 59 (Int’l Crim. Ct. Dec. 2, 2009), http://www.icc-cpi.int/iccdocs/doc/doc787666.pdf (recalling the decision of Prosecutor v. Dyilo to acknowledge that Article 58(1) must be read with Article 60(2)).
on release.\textsuperscript{296} Restricting judges to detention only where provided by the rules also increases transparency in the decision-making process on release, which supports the defendant’s right to a fair trial.\textsuperscript{297}

2. \textit{Eliminating the “Sufficiently Compelling Humanitarian Circumstances” Requirement}

The ICTY should do away with and other tribunals should not adopt the “sufficiently compelling humanitarian circumstances” requirement.\textsuperscript{298} This measure again increases transparency of the decision-making process on release and places the focus back on the central question recognized by the ECtHR and domestic courts—whether there is a valid public interest in detaining the defendant that outweighs the defendant’s liberty interest—rather than on whether the defendant has some special liberty interest stemming from “humanitarian circumstances,” like a sick relative.\textsuperscript{299}

To the extent that judges find that their rules on detention and release are inadequate, they should adhere to the normal procedures for changing them. Adherence to the rules of the tribunal, again, increases transparency and is and appears fairer than when rules are created for a particular case.

3. \textit{Placing the burden of persuasion to show the defendant is a flight risk or danger on the prosecution}

Arguably, to comport with international human rights norms, the burden should be on the prosecution to prove risk of flight and danger. Dissenting from a provisional release decision, Judge Robinson contended that the ICTY’s Rule 65(B) should be read to place the burden of proof regarding flight risk or danger on the prosecution, but his view did not prevail.\textsuperscript{300} In a commentary on Judge Robinson’s dissent, one scholar instead proposed amending the rule to explicitly place the burden of proving risk of nonappearance or danger to the community on the prosecutor.\textsuperscript{301}

\footnotesize

\textsuperscript{296} See supra notes 91–93 and accompanying text.

\textsuperscript{297} See Amann, supra note 120, at 212, 214–15 (noting that judicial independence, which can enhance impartiality, includes following procedure, and that impartiality and transparency help ensure that decisions are fair).

\textsuperscript{298} See supra notes 239–240 and accompanying text (describing the holding in Prlic).

\textsuperscript{299} See supra notes 248–250 and accompanying text.

\textsuperscript{300} Judge Robinson also maintained that the Trial Chamber lacked the discretion to refuse to grant provisional release unless the prosecution could demonstrate that the accused would not appear for trial and would pose a danger. DeFrank, supra note 20, at 1442 (discussing Prosecutor v. Krajisnik & Plavsic, Case No. IT-00-39-40-PT, Decision on Momcilo Krajisnik’s Notice of Motion for Provisional Release (Int’l Crim. Trib. for the Former Yugoslavia Oct. 8, 2001) (Robinson, J., dissenting)).

\textsuperscript{301} Id. at 1457. Unlike Robinson, DeFrank argues that the Trial Chamber should retain the discretion to deny release even if the accused is neither a risk of flight nor a danger, which allows the Trial Chamber to “serve[] as the final protector against risky or ill-advised provisional releases.” Id. at 1461.
Shifting the burden of proof to the prosecution addresses several aspects of the defendants’ rights concerns about provisional release at the ICTY. Consistent with the strictest formulation of the presumption of innocence, a defendant would not be put in a position of having to prove anything—including the absence of a risk of flight or danger.\textsuperscript{302} As noted above, putting the burden of proof on the prosecution to show factors warranting detention is consistent with human rights jurisprudence at the ECtHR and in some national jurisdictions.\textsuperscript{303} Further, by making release more likely, the proposal promotes defendants’ liberty and fair trial rights (since detention makes defending oneself harder).

This approach may raise problems for victims’ rights to protection and participation. By making release more likely, this measure may jeopardize victims’ rights to protection.\textsuperscript{304} Arguably, if the inquiry is meaningful, it should not. To the extent that there is a danger to victims that no conditions for release can obviate, a defendant should not be released. If prosecutors do their job in collecting and presenting evidence to show a danger or a flight risk, victims should still be protected. By forcing the prosecution to beef up its case on danger, the proposal also could increase victim participation in release decisions by making witness testimony more critical at this stage.\textsuperscript{305} However, the difficulty in providing concrete evidence that a defendant poses a risk of flight or danger may make shifting the burden of proof problematic.

The middle ground staked out by the United States federal system may provide a human rights-compatible compromise. Pursuant to this approach, the defendant is presumed to present a flight risk or danger in certain serious cases, but the presumption is rebuttable.\textsuperscript{306} The prosecution still bears the burden of proving by clear and convincing evidence that the defendant poses a flight risk or danger.\textsuperscript{307} This approach avoids running afoul of the presumption of innocence’s implication that the defendant should not have the burden of proving anything and is consistent with ECtHR precedent.

\textsuperscript{302} See supra note 68 (discussing the presumption of innocence and the burden of proof on issues not related to the ultimate determination of guilt or innocence).
\textsuperscript{303} Id.
\textsuperscript{304} See DeFrank, supra note 20, at 1460 (noting that “the Tribunal only prosecutes ‘serious violations of international humanitarian law’").
\textsuperscript{305} However, the victims’ participation would still be defined in a conventional, non-victim-focused manner by placing control in the hands of the prosecution. See supra note 288.
\textsuperscript{307} Id. § 3142(f).
C. Compensation

International tribunals should make explicit the right to compensation for unlawful detention and recognize the right to compensation for lengthy detention following an acquittal.

Although the ICTY’s statute and rules are silent on the possibility of compensation after unlawful detention, compensation for unlawful detention appears to be a tool that is increasingly available at international courts. As noted above, the Appeals Chamber has held that a defendant who is unlawfully detained and acquitted is entitled to compensation. The ECCC arrived at the same proposed remedy for the unlawful eight-year pre-trial detention of defendant Kaing Guek Eav’s (commonly known as “Duch”).

The ICC has formalized the right to compensation for unlawful detention through Article 85 of its statute. The ICC’s rules provide that a Chamber of three judges, with no prior involvement in the accused’s case, determine the lawfulness of the detention and the amount of compensation. To determine compensation, the Chamber must consider: “the consequences of the grave and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request.” Still though, the ICC provides no compensation to defendants who were detained lawfully, but were acquitted after lengthy detention.

International courts should consider providing compensation for lengthy detention if a defendant is acquitted. Compensation mitigates some of

308. Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), ¶ 75 (Int’l Crim. Trib. for Rwanda Mar. 31, 2000), http://liveunictr.altmansolutions.com/Portals/0/Case%5CENGLISH%5CBarayagwiza%5CDecisions%5CDecs20000331.pdf; see also ZAPPALA, supra note 3, at 256–57 (discussing the Appeals Chamber’s decision in Barayagwiza). See also supra notes 301–03 (discussing Barayagwiza).


310. See Rome Statute, supra note 59, art. 85(1) (providing that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”); ZAPPALA, supra note 3, at 74–75 (noting that the ad hoc tribunals lacked such a provision); Gordon, supra note 139, at 664 (citing Article 85, which affords victims of unlawful arrest or detention the right of compensation).

311. ICC Rules Of Procedure, supra note 184, Rules 173–75; see also ZAPPALA, supra note 3, at 75 (noting the Rules have separated the proceedings to determine unlawfulness and compensation).

312. ICC Rules Of Procedure, supra note 184, Rule 175.

313. See Johan David Michels, Compensating Acquitted Defendants For Detention
the harm done to a defendant’s rights through lengthy detention followed by an acquittal.\textsuperscript{314} It acknowledges the deprivation of his or her right to liberty and provides redress for the lost time.\textsuperscript{315} It also can fold in a measure of accountability for excessively lengthy trials by increasing the compensation based on the duration of the detention. However, compensation does little to address the fair trial problems associated with detention before and during trial and, of course, cannot give back lost liberty. Although victims may feel that paying a defendant compounds the injustice done by an acquittal,\textsuperscript{316} compensation in no way undermines the victims’ rights to protection or participation.

\textbf{D. Recognizing Victims’ Rights}

To reflect the legitimacy of victims’ rights among the panoply of human rights associated with criminal trials, the rules of provisional release should explicitly address victims’ rights. At the ICTY, victims’ rights to protection are already largely addressed in the danger or future crime prong of the release inquiry.\textsuperscript{317} Courts should continue to examine carefully potential danger to victims in releasing international defendants. In addition, victims should be given some participation rights in release decisions. Embracing this emerging norm, both the ICC and the ECCC have afforded victims the right to participate in release decisions in some manner.\textsuperscript{318}

\textsuperscript{314} Michels, \textit{supra} note 313, at 418 (stating that compensation may give acquitted accused a sense of “moral satisfaction”).

\textsuperscript{315} Michels, \textit{supra} note 313, at 417 (explaining that an acquitted person has paid society with pre-trial detention but he does not owe society any debt because he was not convicted, and therefore, society will be unjustly enriched if he is not compensated).

\textsuperscript{316} The angry reactions to the five year sentence of one defendant and acquittal of another in the \textit{Mrksic} case in 2007, in which defendants had been accused of participating in killing 200 patients from the Vukovar hospital, might well have been even worse had the defendants been compensated for their lost time. \textit{Croatian anger at Vukovar verdict: Croatia reacted angrily at verdicts pronounced by the UN war crimes tribunal in The Hague in the cases of three former Yugoslav Army officers}, BBC NEWS, Sept. 28, 2007, http://news.bbc.co.uk/2/hi/7017758.stm. For information on the case generally, see the ICTY’s main page regarding the \textit{Mrksic} case, \textit{The Cases: \textit{Mrksic et al.} (IT-95-13/1)} “Vukovar Hospital”, ICTY, http://www.icty.org/case/mrksic/4 (last visited July 17, 2010).

\textsuperscript{317} See DeFrank, \textit{supra} note 20, at 1431 (noting that Rule 65(B) still requires the defense to show that the defendant would not pose a danger to victims if released).

\textsuperscript{318} \textit{See} Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 OA 2, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of
Recognizing victims’ rights to participate does not mean giving victims carte blanche to decide release. Rather, they are given an opportunity to give their views. It is the court’s decision, not the victims’ submissions, that must be “sober and objective.” As a practical matter, courts may adopt any number of procedural measures to keep victims from introducing more delay into the process. For example, limiting victim participation to written submissions may represent a way to prevent delay in the proceedings. The victims should have an opportunity to be heard, but not to take over the show.

In addition, as Jonathan Doak puts it, courts are used to balancing competing rights and there is no reason to assume that weighing victims’ rights against a defendant presents challenges any greater than weighing the state’s rights against a defendant’s rights, which courts do all the time in the provisional release context.

Further, since victims’ submissions should be limited to the inquiry at hand—the risk of flight, danger or other factor set out in the tribunal’s statute or rules—express participation rights may in fact improve defendants’ chances. It avoids judicial speculation on powerful if nebulous concerns about victims’ “perceptions” and interests that appear to have influenced the ICTY’s decisions requiring “sufficiently compelling humanitarian circumstances” for release.


321. See supra text accompanying note 266.
E. Measures to Make Release Feasible

The difficult question—are we willing to let defendants accused of the heinous crimes of genocide, crimes against humanity, and war crimes out on provisional release—has already been answered in the affirmative. At the ICTY and the ICC, defendants have been released before trial and during breaks in their trials. The leap to allowing them to remain free during trial seems a philosophically small, if logistically complicated, one.

If defendants are to be released during trial, then some practical matters must be addressed. As long as international tribunals are far from the defendants’ homes, defendants must find a place to stay. If they have the funds to rent an apartment in the host country, then they should be permitted to do so. ICTY decisions seldom addressed the issue of cost in releasing defendants to their home countries pre-trial or during court breaks. When they did, courts ordered the home country to bear the cost of transporting the defendant from Schiphol airport in the Netherlands.


323. It seems that they often will be. With cases involving defendants from all over the world, the ICC faces the problems of distance. Moreover, ad hoc tribunals appear not to be a thing of the past. The Lebanon tribunal, a mixed international and Lebanese tribunal, is just now setting up operations in The Hague. See SPECIAL TRIBUNAL FOR LEBANON, THE STL, SIX MONTHS ON: A BIRD’S EYE VIEW 1 (2009), http://www.stltsl.org/x/file/TheRegistry/Library/presidents_reports/SixMonthReport_En.pdf (describing the activities of the Special Tribunal for Lebanon in its first six months and its next steps).

324. In the ICTY’s one instance of house arrest in lieu of pre-trial detention at the UNDU for the first defendant to voluntarily surrender to the tribunal, Tihomir Blaskic, the defendant, bore the costs of detention. Prosecutor v. Blaskic, Case No. IT-95-14, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaskic, ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 17, 1996); see also WALD & MARTINEZ, supra note 20, at 235. Blaskic was ordered to return to the UNDU for trial. Sean D. Murphy, Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, 93 AM. J. INT’L L. 57, 78 (1999).

325. See, e.g., Prosecutor v. Haradinaj, Balaj, & Brahimaj, Case No. IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 2007), http://www.icty.org/x/cases/haradinaj/tdec/en/071214.pdf (discussing the various responsibilities of the accused, the Registrar and security officers of the tribunal and UNMIK in transfer of Haradinaj to and from Kosovo, but not mentioning costs).

This funding mechanism worked for the defendants before the ICTY, who still enjoyed popular support in their home countries, but has been and will continue to prove problematic for those, like the Rwandan defendants, who do not.\(^{327}\)

International tribunals must address the matter of housing for defendants who cannot afford to pay for accommodations in the host country. The tribunal should either provide some dormitory where defendants can live or it should pay for modest accommodations. Released defendants should be allowed considerably greater freedom of movement than the ICTY’s detention center.

Of course, this dormitory or tribunal-funded housing option runs the risk of being perceived as an agreeable UN-funded holiday by those back in the regions from which the defendants come, who may be living in even more modest accommodations themselves. As noted above, the facilities in which ICTY and ICC defendants are detained, dubbed the “Hague Hilton,” have already attracted bad press for being too pleasant for alleged war criminals and genocidaires.\(^{328}\)

This perception risks undermining the tribunals’ expressive function of condemning the crimes for which the defendants are charged. However, defendants have an incentive to behave in a respectful manner. Should they be convicted, their conduct while on release may be taken into consideration in sentencing.\(^{329}\) Moreover, the time for expressing condemnation of the crimes is at sentencing, not through detention before a conviction.

Another significant obstacle is the willingness of the host country to have international criminal defendants loose on its soil. Early in the ICTY’s existence, the Netherlands stated that an accused who is released to the Netherlands during a trial must apply for a residence permit.\(^{330}\) More

\(^{327}\) See Rearick, supra note 4, at 592–93 (noting that the “Tutsi-dominated government [of Rwanda] has no incentive to accept Hutu detainees for provisional release” and the responsibilities of a host country discourage other countries from volunteering).

\(^{328}\) See, e.g., Carvajal, supra note 16.

\(^{329}\) Concededly, in some cases where defendants face extremely lengthy sentences, a couple of years here or there may seem little incentive to behave.

recently, the Dutch authorities have made it clear that their acquiescence to provisional release of defendants is contingent on the defendants leaving the Netherlands.\textsuperscript{331} The recent decision of the ICC’s Appeals Chamber in \textit{Bemba}, which set aside the Pre-Trial Chamber’s decision to release Bemba and held that release could not be decided without specifying workable arrangements, most importantly identifying a country willing to take the defendant,\textsuperscript{332} indicates that the Netherlands is not alone in its reluctance to host international criminal defendants.\textsuperscript{333}

Tribunals must seek to overcome the hostility of host and other countries to absorbing, even temporarily, defendants accused of international crimes who meet the standard for release. They should actively seek to make arrangements with the host country to allow international defendants on their territories outside of detention, preferably before the tribunals agree to set up shop there.\textsuperscript{334} The tribunals should also make arrangements in advance on the supervision of released defendants. The tribunal should consider creating a division akin to pre-trial services in the United States federal system that is charged with assisting domestic authorities in monitoring released defendants. Should the Netherlands or other host countries be unwilling to allow international criminal defendants on their soil, at a bare minimum, international tribunals should negotiate arrangements with other countries for release and supervision of defendants before trial and during court breaks, much as they negotiate with countries to take international defendants to serve their sentences.

\textbf{CONCLUSION}

Although the ICTY’s limited release regime represents significant progress over the mandatory detention regime of the post-World War II

\textsuperscript{331} See, \textit{e.g.}, Prosecutor v. Brdjanin & Talic, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 20, 2002), http://www.icty.org/x/cases/brdanincond/en/20155759.htm (noting that the Dutch authorities had informed the Trial Chamber that they had no objection to Talic’s release as long as he did not reside in the Netherlands thereafter).

\textsuperscript{332} Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 OA 2, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, ¶ 90 (Int’l Crim. Ct. Dec. 2, 2009), http://www.icc-cpi.int/iccdocs/doc/doc787666.pdf (holding that the Pre-Trial Chamber had erred when it granted release without finding a state willing to take Bemba).

\textsuperscript{333} See \textit{id}.

\textsuperscript{334} Unfortunately, it is too late for the ICC to negotiate such an agreement in advance. ICC officials will have to do their best to negotiate with the Netherlands even though the tribunal is now firmly entrenched there.
tribunals, there remains room for improvement. For tribunals to achieve the important goal of promoting respect for human rights, changes are necessary.

The ICC appears to be moving in the right direction. The ICC rules have tamped down on the ICTY’s broad judicial discretion to deny release. ICC Pre-Trial Chambers, despite granting victims a voice in the decision, thus far have been open to keeping defendants out of custody, at least before trial, where there the grounds for detention are not met. Finally, the ICC also has provisions to compensate defendants if they are illegally detained.

Nevertheless, the recent ICC Appeals Chamber decision in _Bemba_ shows that pressures on the tribunals to detain defendants remain strong. The decision demonstrates that practical constraints not addressed in advance may thwart ambitious human rights aims. Moreover, it remains to be seen whether ICC defendants allowed to remain at liberty pre-trial will be permitted to remain at liberty during their trials. The ICC should avoid the ICTY’s precedent whereby the standard for release and detention changes as trial progresses. Finally, the ICC and other emerging tribunals, like the Special Panel for Lebanon, would be well advised to consider in advance the arrangements to be made for the release of a defendant for whom no valid grounds for detention exist.

335. _See supra_ note 295 and accompanying text.
336. For example, the first defendant to voluntarily appear before the ICC on a summons, Abu Garda, was never detained. He arrived at the court, and the ICC “assigned” him a location where he should stay while he was in The Hague for his initial appearance. Press Release, ICC, Confirmation of charges hearing in the case of The Prosecutor v. Bahr Idriss Abu Garda scheduled to start on Monday, 12 October 2009 (May 19, 2009), available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/press%20release/confimation%20of%20charges%20hearing%20in%20the%20case%20of%20the%20prosecutor%20v.%20bahr%20idriss%20abu%20garda%20scheduled. The location remained confidential and “[w]as considered an extension of the Court’s premises.” Press Release, ICC, Bahr Idriss Abu Garda arrives at the premises of the Court (May 17, 2009), available at http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050209/press%20release/abu%20garda%20arrived%20at%20the%20premises%20of%20the%20court. Abu Garda was “ordered not to leave the premises of the Court during his stay in The Netherlands without specific permission of the Chamber.” _Id_. After the hearing, Abu Garda left the Netherlands. Press Release, ICC, _supra_.

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