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The International Criminal Court

Elements of Crimes and Rules of Procedure and Evidence

Edited by
Roy S. Lee

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Most complicated was the issue of the Court's jurisdiction over offences under article 70 and the relationship between the Court and State Parties in such cases. Due to different interpretations of article 70, Rule 162 does not conclusively answer the question of concurrent jurisdiction, but it clarifies some aspects of the Court's exercise of jurisdiction. Moreover, it was made clear that the principle of complementarity does not apply to the offences under article 70. In addition, Rule 167 contains special provisions regarding international cooperation and judicial assistance, which underpin the special scheme set forth in article 70, paragraph 2, while, at the same time, they build upon, to the extent possible, what is stipulated in Part 9 of the Statute. An important consequence of this is that State Parties must ensure that their regular laws on extradition and international legal assistance are applicable also to requests from the Court (art. 88).

With the rules that have been developed, articles 70 and 71 have now been put in context and the Court has been provided with a procedural framework for their application. However, in common with most other provisions of the Statute and the Rules, certain issues remain to be elaborated by the Court through its case law.

CHAPTER 12

COMPENSATION TO AN ARRESTED OR CONVICTED PERSON

Gilbert Bitti[1]

I. INTRODUCTION

Compensation to an arrested or convicted person is dealt with in article 85 of the Statute, which reads as follows:

> 1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
>
> 2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
>
> 3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

Paragraph 1 of article 85 is identical to article 9, paragraph 5 of the International Covenant on Civil and Political Rights (ICCPR)[2] and paragraph 2 is almost identical to article 14, paragraph 6 of the same instrument. While the first two paragraphs of article 85 give a right to compensation to the arrested or convicted person, the third paragraph confers no right to compensation but merely the possibility for the Court to award compensation at its discretion. The provision contained in the third paragraph, which, was inspired by national legislations, does not exist in the ICCPR or other major international human rights instruments. It represents, therefore, an improvement of international law. However, a number of concerns were raised, particularly regarding the possible costs associated with paragraph 3, that required lengthy and complex negotiations.[3]

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1. The author wishes to thank Jennifer Schense, legal adviser to the Coalition for an International Criminal Court, for her very useful notes.

2. For more information, see D. McGoldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (1991).

3. Indeed, the following footnote to the third paragraph of this article is contained in the report of the Working Group on Procedural Matters at the Rome Conference, Document A/CONF.183/

It is important to note that the draft Statute prepared by the International Law Commission did not contain a provision similar to current article 85 and that nothing similar is contained in the Statutes or in the Rules of the ICTY or the ICTR. The absence of rules on compensation is indeed a big problem for those Tribunals, and recently the Presidents[4] of the two Tribunals have called for an amendment of the Tribunals' Statutes to provide compensation to persons whom the Tribunals have wrongly detained, prosecuted or convicted.

In a letter sent to the United Nations Secretary-General Kofi Annan in October 2000, the President of the ICTR, Navanethem Pillay, recalled that in the past five years, three instances of deprivation of liberty[5] had caused concern, and she stated that the judges at the ICTR "consider it desirable that the Statute of the Tribunal be amended to provide for compensation."[6]

As stated by one author,[7] the curious feature of article 85 of the Statute is its lack of detail. Indeed the article is just a statement of general principles with no concrete procedures for their practical implementation and, even though only the third paragraph makes a reference to the Rules to provide for criteria to award compensation, clearly much remained to be dealt with in the Rules.[8]

C.1/WGPM/L.2/Add.7 (13 July 1998) which reads: "There are delegations which believe that there should not be an unfettered right to compensation where a person is acquitted or released prior to the end of the trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Others delegations considered this text to be too restrictive."

4. Judge Jorda, President of the ICTY, has outlined three situations that would warrant compensation:

> (1) Where someone has suffered punishment as a result of a final decision by the Tribunal which is subsequently reversed by the Tribunal or through a pardon resulting from new evidence proving that a miscarriage of justice has taken place;
>
> (2) When someone who has been detained under the Tribunal's authority has been subsequently acquitted or released following a decision to end the proceedings in circumstances that reveal a miscarriage of justice;
>
> (3) Where persons have been arrested or detained, under the Tribunal's authority, in a way that violates their right to liberty and security.

This wording is indeed very similar to that of the ICC Statute and even broader. If the Security Council approves the amendments permitting compensation, the UN General Assembly will have to approve the necessary funds for the budgets of the tribunals. *See Bulletin of Legal Developments*, No. 19, 16 October 2000, The British Institute of International and Comparative Law.

5. For example, see *Barayagwiza*, the Appeals Chamber's Decision on the Prosecutor's Request for Review or Reconsideration, 31 March 2000.

6. Letter sent to UN Secretary-General Kofi Annan, October 2000.

7. Christopher Staker, "Article 85," *in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes—Article by Article* 1042 (Otto Triffter ed.,1999).

8. This was also the conclusion by the Working Group on Procedural Matters at the Rome Conference. *See* footnote 8 to art. 85, para. 1, *supra* note 3, which reads: "The Rules shall address the procedures for enforcing this right."

II. NEGOTIATING HISTORY

At the first session of the Preparatory Commission, Australia submitted proposals on revision and compensation.[9] The Australian proposal did not, however, contain any specific provision regarding compensation but only the general idea that "the Prosecutor must have standing to participate in" the process dealing with compensation. The French delegation believed that it was necessary to elaborate further on this matter and proposed three rules[10] as a basis for discussion during the second session of the Preparatory Commission. No other delegation submitted proposals on this topic.

As a result of informal consultations, a new joint proposal was put forward at the third session of the Preparatory Commission by Australia and France.[11] The negotiations then began at the very end of that session and a Discussion Paper was proposed by the Coordinator,[12] which was incorporated in Annex II[13] of the Report of the Preparatory Commission.

Some substantive changes were introduced[14] during the fourth session of the Preparatory Commission and some technical changes were also made at the intersessional meeting held in Mont Tremblant, Canada.[15] The rules on compensation to an arrested or convicted person were not discussed at the fifth session of the Preparatory Commission and the result of the Mont Tremblant meeting now appears as Rules 173 to 175 of the finalized draft text of the Rules. Rules 173 and 174 relate to the entire article 85 of the Statute, while Rule 175 only deals with paragraph 3 of that article.

III. REQUEST FOR COMPENSATION

Rule 173: Request for compensation

1. Anyone seeking compensation on any of the grounds indicated in article 85 shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the request. These judges shall not have participated in any earlier judgement of the Court regarding the person making the request.

2. The request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning:

(a) The unlawfulness of the arrest or detention under article 85, paragraph 1;

(b) The reversal of the conviction under article 85, paragraph 2;

9. Chapter 13 in PCNICC/1999/DP.1 (26 January 1999).

10. Rules A–C in PCNICC/1999/WGRPE/DP.7 (6 July 1999).

11. PCNICC/1999/WGRPE/DP.47 (13 December 1999).

12. PCNICC/1999/WGRPE(8)/RT.2 (16 December 1999).

13. Rules 8.13–8.15 in PCNICC/1999/L.5/Rev.1/Add.1 (22 December 1999).

14. PCNICC/2000/L.1/Rev.1/Add.1 (10 April 2000).

15. PCNICC/2000/WGRPE/INF/1 (24 May 2000).

(c) The existence of a grave and manifest miscarriage of justice under article 85, paragraph 3.

3. The request shall contain the grounds and the amount of compensation requested.

4. The person requesting compensation shall be entitled to legal assistance.

A. Presentation of the Request

Rule 173 does not specify who can make a request under article 85 of the Statute. However, article 85 gives guidance in this respect: a request can be made by a person who has been the victim of unlawful arrest or detention (para. 1), a person who has suffered punishment as a result of a conviction which is subsequently reversed (para. 2), or a person who has been released from detention following a final decision of acquittal or a termination of proceedings because there has been a grave and manifest miscarriage of justice (para. 3). The right to seek compensation is limited to the person who was actually arrested or convicted, and this right cannot be exercised by others or passed on to others.

It may be of interest to note that in accordance with article 84 (revision of conviction or sentence), spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused are entitled to seek revision of a final judgement of conviction or sentence after the death of the convicted person. However, these persons may not request compensation on behalf of a deceased convicted person under article 85 and Rules 173 to 175.

Pursuant to Rule 173, the request, in writing, shall be submitted to the Presidency of the Court—a condition which came from the original French proposal and was not changed during the discussions.[16] The basic idea was to avoid those judges who had participated in the decision where it was determined that the arrest or detention was unlawful, that there was a grave and manifest miscarriage of justice, or that the conviction was reversed. Therefore, the only possibility was to refer the matter to the Presidency, which, according to article 38, is responsible for the proper administration of the Court.[17] It must be emphasized that the function of the Presidency here is a purely administrative one: the Presidency has no power to reject the request and only designates a Chamber to consider the request.

The designation of the organ to which the case should be referred gave rise to some debate. The original French proposal and the subsequent joint Australian and French proposal made only reference to "three judges of the Court,"[18] but this was criticised during the discussions in the Preparatory Commission as too vague and was thus replaced by the reference to "a Chamber composed of three judges of the Court."[19]

16. Rule A(a), *supra* note 10.

17. Note also that according to art. 61, para. 11, the Presidency shall constitute a Trial Chamber responsible for the conduct of the proceedings after the confirmation hearing.

18. Rule A(a), *supra* notes 10 and 11.

19. Rule 8.13(a), *supra* note 12. The reference to "of the Court" was deleted in the Mont Tremblant document since it was obviously not necessary.

The fact that Rule 173 uses the word *"designate"* instead of the word *"constitute"* as used in article 61, paragraph 11, seems to indicate that the Presidency shall designate a Chamber which already exists and is composed of three judges. This means that it could be a Pre-Trial or a Trial Chamber.

The condition in sub-rule 1 is important, according to which "these judges shall not have participated in any earlier judgement of the Court regarding the person making the request." This is to ensure that the Chamber dealing with the request for compensation would be completely impartial. This requirement was broader than the original French proposal, which suggested that "none of these three judges shall have participated in the decision of the Court on the basis of which the person has submitted an application for compensation."[20] The French proposal was then changed by the joint Australian and French proposal which stated "none of these judges shall have participated in a previous decision of the Court concerning the applicant."[21]

This main idea was, however, retained after the discussions in December 1999 but with a different wording which is now, after a slight change made in the Mont Tremblant document, integrated into the final version. There is, however, a certain lack of clarity as to the exact scope of this provision. Deviating from the joint Australian and French proposal, the English version of Rule 173, sub-rule 1, refers to judges who have participated in a previous "judgement"[22] instead of "decision," i.e., a less generic term than intended in the proposal. On the other hand, the French version, for example, uses the word "décision" and not "arrêt," the latter being the word used in French for decisions by the Appeals Chamber in the Statute.[23] Nonetheless, the general intention here was to cover all relevant decisions by the Court rendered at the pre-trial, trial or appeals stages.

B. Conditions for the Presentation of the Request

Delegations acknowledged that the trigger for the presentation of a request for compensation was the existence of a prior decision of the Court stating that the arrest or detention was unlawful, or reversing a previous conviction, or releasing the person from custody because there had been a grave and manifest miscarriage of justice. However, the drafting of sub-rule 2 of Rule 173 took some time and reflection.

In the joint Australian and French draft, there was only a general reference to "the decision of the Court which gives rise to the application."[24] But during the

20. Rule A(a), *supra* note 10.

21. Rule A(a), *supra* note 11.

22. Indeed, in English the term "judgement" is used in the Statute for decisions by the Appeals Chamber (*see* art. 83), whereas art. 74 uses the term "decision" in relation to the Trial Chamber. Thus, a correction might be necessary in the English version of the text so that "judgement" be replaced by "decision."

23. The Spanish version is equivalent to the French and uses the term *"fallo"* and not *"sentencia,"* the latter being used in the Statute for decisions by the Appeals Chamber.

24. Rule A(a), *supra* note 11.

discussions in December 1999, delegations found such a general reference to be too vague and confusing. Therefore, in the Coordinator's Discussion Paper, the sub-rule was divided into three subparagraphs,[25] one for each of the cases mentioned in article 85. Although it was difficult to be much clearer, there was still some additional discussion at the following session of the Preparatory Commission on the drafting of these three subparagraphs, in particular with respect to the six month time limit for making a request.

This time limit was first introduced in the joint Australian and French draft[26] and was accepted, although with some reluctance by some delegations, especially China, during the discussions in December 1999. A problem was the proper determination of the starting point of this six month period, particularly in respect of the Court's decision concerning the unlawfulness of the arrest or detention, i.e., sub-rule 2(a) of Rule 173. On this particular point, Japan raised a concern because of the use of the wording "decision concerning the unlawfulness of the arrest or detention," which in the view of the Japanese delegation was not clear and could be understood to mean the decision on conviction. China proposed a new wording stating that "the request for compensation shall be submitted not more than six months from the date when the person was released or notified of the Court's reversal of the conviction, whichever is later." It was clarified in the debate, however, that the relevant decision whereby the Court declares the arrest or detention unlawful could be made not only when the question of guilt is decided upon after trial, but also long before the commencement of the trial. As an example, reference was made to the *Barayagwyza* case before the ICTR.[27]

Of course, the problem here stems from the fact that Rule 173 covers all three paragraphs of article 85 and thereby three very different situations. In that respect, the starting point for the time period concerning the situation envisaged in paragraph 2 of article 85 is quite easy to determine because it will simply be the decision on the revision of the conviction in accordance with article 84. The situation is somewhat more complicated in the situations covered by paragraphs 1 and 3 of article 85, because the starting point could either be a decision taken at the pre-trial stage or at the time of the decision on guilt at the trial or appeal stages. Nevertheless, the drafting of Rule 173, sub-rule 2, makes the time limit applicable irrespective of when the relevant decision is taken.

C. The Content of the Request

Sub-rule 3 of Rule 173, which deals with the content of the request, gave rise to some discussion, especially in relation to the evidence to be provided to substantiate the request.

25. Subparagraphs (i)–(iii) which later became (a)–(c) in sub rule 2.

26. Rule A(a), *supra* note 11.

27. The Appeals Chamber's Decision of 3 November 1999, and its Decision on the Prosecutor's Request for Review or Reconsideration of 31 March 2000, *supra* note 5.

Under the original French proposal, the request had to contain "the amount of the compensation claimed, together with all written evidence substantiating that amount."[28] However, as it seemed conceivable that in some cases no evidence substantiating the compensation claimed and the amount of compensation sought would be available, the words "all available" were inserted in the joint Australian and French proposal before the word "evidence" and the provision was no longer restricted to "written evidence."[29]

The required content of the request was made more general during the discussions in December 1999, by deleting the reference to "evidence" and referring instead to "all the elements justifying the request and the amount requested."[30] This amendment was criticised again during the March session in 2000 by the delegation of China, which argued that this requirement was too burdensome for the applicant, and by the delegation of Australia, which found that the reference to "elements" was too vague. As a result of this debate, the present wording of sub-rule 3 emerged. Consequently, it is not a requirement that the request must be substantiated by "elements" or evidence. The request shall contain the grounds and the amount of compensation requested. As for the grounds, the person who presents the request simply refers to the decision of the Court reversing the conviction or stating that the arrest or detention has been unlawful. Insofar as paragraphs 1 and 2 of article 85 give a right to compensation, the mere fact that such a decision exists is a ground for compensation.

The situation could be more difficult in the case described in paragraph 3 of article 85, where the Court may in its discretion award compensation. Compensation is in this case restricted to "exceptional circumstances" and that might depend on the Court actually stating in its decision that there had been a grave and manifest miscarriage of justice. Additionally, a person who seeks compensation for the salaries lost or some other specific damage will have to provide some evidence of such harm to the Court irrespective of the ground on which he or she is claiming compensation under article 85.

D. The Right to Counsel

Sub-rule 4 of Rule 173 on legal assistance originates from the French proposal, which was not contested during the discussions.[31] Although some redrafting was made, the final result is very close to the initial draft and it provides that the person is entitled to legal assistance during the entire procedure and not only "when submitting the request," which was a limitation contained in earlier drafts of the rule.[32]

28. Rule A(b), *supra* note 10.

29. Rule A(a), *supra* note 11.

30. Rule 8.13(c), *supra* note 12.

31. Rule A(c), *supra* note 10.

32. That was the drafting after the fourth session of the Preparatory Commission, *supra* note 13, but the reference to "when submitting the request" was fortunately deleted in the Mont Tremblant document.

This specific rule on the right to counsel in compensation proceedings was necessary because article 67, rights of the accused, does not apply to compensation proceedings. That article is restricted to proceedings for "the determination of any charge,"[33] and article 85, which only refers to the compensation of an arrested or convicted person, frequently applies when there are no longer any charges against the person seeking compensation.

An important question is whether the expression "be entitled to legal assistance" in sub-rule 4 also provides for free legal assistance assigned and paid for by the Court, similar to what is the case according to article 67 for an accused (or for a "suspect" according to article 55). Lacking clear guidance in the Statute or the Rules, the Court may have to take other sources of law into account, for example, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights.

It may be noted that the European Court of Human Rights has held that the right to compensation after the acquittal of a person who has been detained was a civil one,[34] and concluded that "the requirements inherent in the concept of 'fair hearing' are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge."[35] Nevertheless, certain principles concerning the notion of "fair hearing" in cases concerning civil rights and obligations emerge from this court's case-law. First and foremost, the European Court of Human Rights has held in the *Airey* case[36] that a State may be compelled to provide for the assistance of a lawyer free of charges when the person lacks sufficient means to pay for this legal assistance and such assistance proves indispensable for an effective access to the court by reason of the complexity of the procedure or of the case. Moreover, it has also held that the requirement of "equality of arms," in the sense of a "fair balance" between the parties, applies to cases concerning civil rights and obligations as well as to criminal cases.[37] This requirement implies "that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[38]

It is likely that the cases before the International Criminal Court will be complex and that the applicant for compensation will need the assistance of counsel in order to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his or her opponent, i.e., the Prosecutor. Taking into

33. This is taken verbatim from art. 14, para. 1 of the ICCPR.

34. *Georgiadis v. Greece*, Judgment of 29 May 1997, Reports 1997–111, 959, para. 36.

35. *Dombo Beheer B.V. v. The Netherlands*, Judgment of 27 October 1993, 274 Eur. Ct. H.R. (Ser. A) 19, para. 32.

36. *Airey v. Ireland*, Judgment of 9 October 1979, 32 Eur. Ct. H.R. (Ser. A) 16, para. 26.

37. *Feldbrugge v. The Netherlands*, Judgment of 26 May 1986, 99 Eur. Ct. H.R. (Ser. A) 17, para. 44.

38. *Dombo Beheer B.V. v. The Netherlands*, *supra* note 33, art. 19, para. 33.

account the jurisprudence of the European Court of Human Rights, this would mean that the Court would have to assign a counsel to the person free of charge if the person lacks sufficient means to pay for this legal assistance. However, this would be a right and not a obligation, and the person may choose not to ask for legal assistance and conduct his or her case before the Court without the assistance of counsel.

IV. PROCEDURE FOR SEEKING COMPENSATION

Rule 174: Procedure for seeking compensation

1. A request for compensation and any other written observation by the person filing the request shall be transmitted to the Prosecutor, who shall have an opportunity to respond in writing. Any observations by the Prosecutor shall be notified to the person filing the request.

2. The Chamber designated under rule 173, sub-rule 1, may either hold a hearing or determine the matter on the basis of the request and any written observations by the Prosecutor and the person filing the request. A hearing shall be held if the Prosecutor or the person seeking compensation so requests.

3. The decision shall be taken by the majority of the judges. The decision shall be notified to the Prosecutor and to the person filing the request.

A. The Participants

It was clear from the very beginning that "the Prosecutor must have standing to participate in this process," a provision of both the Australian and French proposals.[39] The reason is obvious: the decision on compensation may also very well be a decision on the Prosecutor's mistakes. In fact, during the negotiations, there was no discussion either on the Prosecutor's participation or on the exchanges of observations between the two participants. The original French proposal was simplified and redrafted in the joint Australian and French draft[40] which in turn was integrated almost *verbatim* into the Coordinator's Discussion Paper[41] and remained unchanged during the rest of the negotiations.

What is interesting to note is that nobody suggested that persons other than the person filing the request and the Prosecutor should participate in the compensation proceedings. However, as far as the victims are concerned, it is difficult to see why they should participate because their personal interests are not at stake here.[42] But of course, according to Rule 93, a Chamber may seek the views of victims on any issue.

In addition, in connection with the compensation proceedings the Court may also need observations from a State (or a third person), especially from the State where the arrest took place. This may be necessary when the applicant is requesting com-

39. *Supra* note 9., and Rule B(c), *supra* note 10.

40. Rule B(a), *supra* note 11.

41. Rule 8.14(a), *supra* note 12.

42. Compare, art. 68, para. 5.

pensation for moral damage due to the fact, for example, that the arrest was filmed by national authorities and repeatedly broadcast on television. The lack of specific provisions in Rule 174 does not rule out such observations, since according to Rule 103, sub-rule 1, "at any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."

In conclusion, whether persons other than the person filing the request and the Prosecutor may participate in the proceedings on compensation to an arrested or convicted person will be up to the Chamber to decide.

B. The Hearing

According to the initial French proposal, the judges were given discretion to decide whether to hold a hearing.[43] This was changed in the joint Australian and French draft, however, as a result of informal consultations where some delegations raised concerns about the compatibility of this discretion given to the judges with international human rights standards, in particular with article 6 of the European Convention on Human Rights. Indeed, in the *Werner* case,[44] the European Court of Human Rights held that the Austrian Compensation Act was not in conformity with article 6 of the European Convention on Human Rights because it did not provide for a public hearing. The joint Australian and French proposal stated: "The three judges designated [. . .] may organize a hearing at which the applicant and the Prosecutor shall be entitled to make submissions. A hearing has to take place if so requested by the applicant or the Prosecutor."[45]

The principles contained in the joint proposal were accepted during the December session in 1999 but the wording was slightly changed in the Discussion Paper proposed by the Coordinator: "The Chamber designated [. . .] shall hold a hearing to permit the submission of the written observations by the Prosecutor and the person filing the request. A hearing must be held if the Prosecutor or the person filing the request so requests."[46]

However, during the March session in 2000, Austria pointed out that a mistake in the first sentence should be corrected so that the Chamber may either hold a hearing or determine the matter only on the basis of written observations. The second sentence was not changed.[47] The result is current sub-rule 2 of Rule 174.

43. Rule B(b), *supra* note 10.

44. *Werner v. Austria*, Judgment of 24 November 1997, Reports 1997–VII, at 2511, para. 51.

45. Rule B(b), *supra* note 11.

46. Rule 8.14(b), *supra* note 12.

47. A small change was made in the Mont Tremblant document in order to replace "the person filing the request" by "the person seeking compensation."

It should be noted that the rule is silent regarding public pronouncement of the decision.[48] Since there is nothing pertaining to this either in the Statute or in the Rules, the Chamber shall, according to article 21, paragraph 1(b) apply "applicable treaties and the principles and rules of international law." Again, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights may provide guidance. According to article 6 of the former and relevant case law,[49] such a decision must be delivered in public. Likewise, it is to be hoped that the decision of the Court on the compensation of an arrested or convicted person will be delivered in open court.

C. The Motivation (or Reasoning) of the Decision

The provisions in sub-rule 3 of Rule 174 that the decision shall be taken by a majority vote and that it shall be transmitted to the Prosecutor and the applicant were already contained in the initial French proposal[50] and were never contested.

On the other hand, the issue of the motivation or reasoning of the decision was discussed at length. The initial French proposal required the decision to contain "a full and reasoned explanation of the findings of the three judges on the evidence and the pleas."[51] This requirement was reduced and simplified in the joint Australian and French draft, which stated that the decision "shall be in writing and shall contain reasons."[52] However, during the December session in 1999, it appeared that this also was unacceptable to some delegations. Russia and Spain asked for deletion of the requirement, stating that compensation should be a discretionary decision taken by the Chamber and that the proposal was overburdening for the judges. The text was then redrafted in the Discussion Paper proposed by the Coordinator to read as follows: "The decision shall be adopted by a majority, shall be recorded in writing and shall contain the conclusions. The decision shall be notified to the Prosecutor and to the person filing the request."[53]

The discussion on this matter started again at the March session in 2000. On the one hand, France suggested replacing "conclusions" with "reasons" and, on the other hand, Canada suggested making a reference to article 83, paragraph 4.[54] The reasoning behind the Canadian proposal was that no appeal was possible in this matter

48. On the other hand, art. 74, para. 5; art. 76, para. 4; and art. 83, para. 4, all state that decisions and sentences pronounced by the Trial Chamber and judgements by the Appeals Chamber shall be delivered in open court.

49. *Szücs v. Austria*, Judgment of 24 November 1997, Reports, 1997–VII, at 2468. In this case, the European Court of Human Rights also examined whether the Austrian Compensation Act was in conformity with art. 6 of the European Convention on Human Rights.

50. Rule B(c), *supra* note 10.

51. *Id.*

52. Rule B(c), *supra* note 11.

53. Rule 8.14(c), *supra* note 12.

54. Indeed, this was done for the rules on revision. *See* Rule 161.

according to article 82, so the decision on compensation by the Chamber would be final. It would therefore be logical to refer to article 83, paragraph 4, which applies to the final judgments issued by the Appeals Chamber.

Everyone agreed that the decision on compensation should be final and that no appeal was possible under article 82, but there was no agreement on referring either to "reasons" or to article 83, paragraph 4. Hence, the unfortunate result was the deletion of the entire sentence on the motivation of the decision. So nothing, according to the Rules, obliges the Chamber to give reasons for its decisions on compensation.

The omission of an obligation on the Court to give reasons for its decision could possibly be attributed to some confusion among delegations, especially during the negotiations at the December session in 1999, between paragraphs 1 and 2 of article 85 and paragraph 3 of the same article. However, only the last one refers to the discretion of the court to award compensation, while the first two paragraphs clearly state that the person who has suffered unlawful arrest or detention or punishment as a result of a conviction which is subsequently reversed has a *right* to compensation. Again, the difficulty stems from the fact that one and the same rule covers different legal situations.

In comparison, according to the jurisprudence of the European Court of Human Rights, article 6 of the European Convention on Human Rights is applicable when there is a right to compensation under national law, and this article "obliges courts to give reasons for their decisions."[55]

It is not completely satisfactory that rules of the International Criminal Court, that will be seen as a model in international law, do not appear to be in conformity with major international instruments on human rights. It is to be hoped that the Court, when dealing with each case, will follow international human rights instruments for the proper interpretation of these rules, as provided for in article 21, paragraph 1(b) of the Statute.

V. AMOUNT OF COMPENSATION

Rule 175: Amount of compensation

In establishing the amount of any compensation in conformity with article 85, paragraph 3, the Chamber designated under rule 173, sub-rule 1, shall take into consideration the consequences of the grave and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request.

Unlike Rules 173 and 174, Rule 175 on the amount of compensation applies only to compensation in accordance with article 85, paragraph 3, as well as the criteria for the determination of the amount of the compensation. These criteria do not apply to the determination of the amount under the first two paragraphs of article 85.[56]

55. *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994, 288 Eur. Ct. H.R. (Ser. A), para. 61.

56. *See infra*.

The initial French proposal was, however, more restrictive and contained two sub-rules:[57]

(a) In order to determine the amount of the compensation pursuant to article 85, paragraph 3, the three judges of the Court designated pursuant to Rule A (a) shall take into account the manifestly unusual and particularly grave material or moral harm suffered by the person concerned. The judges may, in particular, take into consideration the impact of a miscarriage of justice on the personal, familial, social and professional status of the person concerned.

(b) The compensation granted pursuant to article 85 shall under no circumstances exceed the sum of (X) euros.

The reference in the French proposal to "the manifestly unusual and particularly grave material or moral harm" was rejected as too restrictive and did not appear in the joint Australian and French draft. Neither was the idea of a maximum amount adopted, although it received some support, in particular in relation to paragraph 3 of article 85. It must also be noted that the list of criteria given in the French text was merely indicative for the Chamber, whereas the list in the joint Australian and French draft, which was the same and appears now in the final text, was an imperative, exhaustive one.

Further, the joint Australian and French draft stated: "In order to determine the amount of compensation pursuant to article 85, paragraph 3, the three judges designated [...] shall give due consideration to the impact of a miscarriage of justice on the personal, familial, social and professional status of the person concerned."[58] This proposal was integrated in the Coordinator's Discussion Paper with some slight changes to take into consideration the result of the discussions of the December session in 1999 and more faithfully reflect the Statute which refers to a "grave and manifest miscarriage of justice" and not merely to a miscarriage of justice.[59]

During the March session in 2000, some delegations wondered why this rule should apply only to article 85, paragraph 3, and asked for some criteria to be established for the situations envisaged in the other paragraphs of the article. China and Chile especially were of the view that the rule should apply to article 85 in its entirety. This was quite logical, as it seems likely that the Chamber will also take into consideration the consequences of the unlawful arrest or detention or of the punishment suffered as a result of a conviction which is subsequently reversed, and the personal, family, social and professional situation of the person filing the request in order to establish the amount of compensation in the cases envisaged in the first two para-

57. Rule C, *supra* note 10. There was also a footnote to sub-rule (b) explaining that the maximum amount should apply to the three possibilities envisaged in art. 85.

58. Rule C, *supra* note 11.

59. The text of the Discussion Paper, Rule 8.15, *supra* note 12, read: "In establishing the amount of the compensation in conformity with article 85, paragraph 3, the Chamber designated under rule 8.13 (a) shall take into consideration the consequences which the grave and manifest miscarriage of justice has had for the personal, family, social and professional situation of the person filing the request."

graphs of article 85. However, the scope of the rule was left unchanged, as it was found to reflect the wording of the Statute, which only requires the establishment of criteria for article 85, paragraph 3. Consequently, much more flexibility is left to the Chamber for the application of the two first paragraphs of this article in order to establish the amount of compensation.

Only one amendment was made to the text during the session in March 2000. At the request of Austria, the word "any" was added before "compensation" in order to take into account that the compensation here is not a right of the person filing the request but is left to the discretion of the Chamber which may decide not to award compensation.

VI. CONCLUSION

In conclusion, article 85 and Rules 173 to 175 constitute very good and useful texts for the future International Criminal Court. The lack of such provisions in the Statutes of the two *ad hoc* Tribunals for Rwanda and former Yugoslavia has indeed raised problems in those Tribunals. In respect of certain procedural issues mentioned above, the text of the rules should be supplemented by important principles that are set forth in major international instruments on human rights, such as the European Convention on Human Rights.

CHAPTER 13

INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Frederik Harhoff and Phakiso Mochochoko

I. INTRODUCTION

Chapter 11 of the Rules of Procedure and Evidence implements Part 9 of the Rome Statute and addresses sensitive issues involving the obligation of States Parties to cooperate with the Court and to provide judicial assistance. The rules on these matters are of critical importance to the Court as they reflect the delicate interplay between the Court's jurisdiction and that of States Parties. As many had foreseen after the Rome Conference, the drafting of the rules on these particular issues presented some of the most difficult obstacles to reaching consensus through the Preparatory Commission's drafting process. The draft rules were eventually adopted by consensus on June 30, 2000.

Negotiations on the Rules relating to Part 9 of the Statute began during the third session of the Preparatory Commission held from 29 November to 17 December 1999 on the basis of proposals from Australia, France and Italy.[1] Discussions continued at the fourth session in March 2000, during which the texts of most of the rules for Chapter 9 were finalized. Only a few outstanding issues relating to article 93 and in particular to article 98 remained to be discussed at the fifth session in June 2000.

From the beginning of the discussions, memories of the difficult negotiations in Rome were still fresh in the minds of experts on these issues. All recalled the complexities of the issues and the delicate compromises that resulted from protracted and sometimes frustrating negotiations. Delegations were eager not to disturb those delicate balances by insisting on additional refinement in the Rules. Delegations thus adopted a cautious approach to the rules on Part 9 and many shared the view that most of the articles were sufficiently clear and detailed and did not require any further elaboration. Another consideration was to avoid tying the hands of the Court by formu-

1. Chapter 11 originally appeared as Part 11 in the draft Rules proposed by Australia (*see* PCNICC/1999/DP.1 (26 January 1999)), as supplemented by Italy (*see* PCNICC/1999/WGRPE (9)/DP.1 (23 August 1999)), and then by France (*see* PCNICC/1999/WGRPE(9)/DP.2 (19 November 1999)). This chapter then emerged as Chapter 14 in the Preparatory Commission's draft Rules. *See* PCNICC/2000/WGRPE/L.14 (21 June 2000). In the final compilation of the Rules after the fifth meeting of the Commission in June 2000, however, the chapter came out as Chapter 11.

CASSESE
GAETA
JONES

The Rome Statute of the International Criminal Court

VOLUME II

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:

A COMMENTARY

VOLUME II

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COMPENSATION TO AN ARRESTED OR CONVICTED PERSON

Salvatore Zappalà

I. Introduction

Article 85 of the ICC Statute provides for a right to compensation for unlawful arrest (and detention), unjust conviction and unjust detention, implying a miscarriage of justice.[1] These guarantees are to a large extent an implementation of international human rights rules on the right of compensation. However, in respect of the right to compensation for unjust detention (Article 85(c)), the ICC Statute has gone beyond international human rights law.

Article 85 lays down three distinct rights. On the one hand, compensation for unlawful arrest, which presupposes a formal assessment as to respect for the rules that set the criteria and govern the procedure for the arrest and detention of an individual. On the other hand, the ICC Statute provides for a right of compensation for unjust conviction and for unjust detention due to a grave and manifest miscarriage of justice. These forms of compensation go beyond a formal evaluation of respect for certain rules and are generally based on a more concrete judgement as to the overall justice of the outcome of the proceedings.

[1] On this issue, see generally the comments by C. Staker, 'Article 85', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999).

While the right to compensation is provided for in international human rights treaties, such as the ICCPR,[2] the ECHR,[3] and the ACHR,[4] there was no mention of such a right either in the Charter of the Nuremberg Tribunal,[5] or in the Charter of the Tokyo Tribunal.[6] The Statutes of the UN *ad hoc* Tribunals also did not provide for this right.[7] Recently an amendment of the Statutes to this effect was proposed.[8] This seems a very important step; nonetheless, it is submitted that it might have been sufficient to amend the Rules of Procedure and Evidence. In any event the ICC Statute is the most advanced text in terms of protection of the right of compensation, even compared to the provisions of the international conventions on human rights.

II. The Right to Compensation: A General Rule under International Human Rights Law

The right to compensation, both for unlawful arrest and/or detention, and for miscarriage of justice, can be found in most of the provisions on the rights of persons involved in criminal proceedings contained in international conventions on human rights.

There are in general two kinds of rights that entail compensation: on the one hand, the right to compensation for unlawful arrest or detention; on the other hand, the right to be compensated for unjust conviction. The first right is provided for by Article 9(5) of the ICCPR. This provision states that '[anyone] who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. The second right is contained in Article 14(6) of the ICCPR. The provisions of this rule establish that a person who has been convicted of a criminal offence by a final decision, which turns out to be unjust, shall be compensated. The person may request compensation if his or her conviction has been reversed, on the ground of new or newly discovered evidence showing that there has been a miscarriage of justice. This right is limited to the case that the non-disclosure of the unknown fact in time is not wholly or partly attributable to the person requesting compensation.

Similar rights are provided for by the European and American Conventions on human rights. Article 5(5) and Article 3, Protocol VII, of the ECHR and Article 10 of the ACHR contain provisions to this effect. The European Convention originally contained only the right to compensation for unlawful arrest or detention, subsequently the right to be compensated for unjust conviction has been provided for by Protocol VII. The text of this rule follows to the letter the provisions of Article 14(6) of the ICCPR.

The interpretation of these provisions does not create particular problems, as their meaning is relatively plain.[9] However, a trait common to the provisions on the right to be compensated for unjust conviction resulting from a miscarriage of justice is the fact that they are rather narrowly drafted.[10] This can certainly be explained by the intention to avoid the multiplication of proceedings. Nevertheless, it might be questioned whether it would be possible or not to extend their scope by means of interpretation.

It is interesting to note that the right to be compensated for a detention, not necessarily unlawful from a strictly formal point of view, but due to a grave and manifest miscarriage of justice does not seem to be provided for by international instruments. In general, it can be said that international human rights law provides only for two types of rights of compensation: the right to be compensated for unlawful arrest or detention, and the right to be compensated for unjust conviction. With its provisions the ICC Statute has extended the protection to the case of a person who has been detained due to a grave and manifest miscarriage of justice and finally has been released by a final decision of acquittal. It does not seem that a similar protection is explicitly granted under international human rights treaties.

III. The Practice of International Criminal Tribunals

No provisions on the right of compensation to defendants for unlawful arrest (or detention), unjust conviction, or unjust detention due to miscarriage of justice

[2] Cf. Arts. 9 and 14 International Covenant on Civil and Political Rights (ICCPR); Art. 14(6) ICCPR, 'When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

[3] Cf. Art. 5 European Convention on Human Rights (ECHR) and Art. 3 Protocol VII.

[4] Cf. Art. 10 American Convention on Human Rights (ACHR), 'Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice'.

[5] For the Nuremberg Charter, cf. the Internet site of the Avalon Project at Yale, <http://www.yale.edu/avalon>.

[6] For the Tokyo Charter, cf. <http://www.yale.edu/avalon>.

[7] The Statutes of the Tribunals can be read respectively on the web page of the Tribunals, <www.un.org/icty> and <www.ictr.org>; the Tribunals were created by UN SC Res. 825 (1993) and 955 (1994) and their Statutes were attached to the relevant resolution.

[8] Cf. Address of the President of the ICTY to the UN GA, IT SB / S.I.P/ 512-e) (20 June 2000).

[9] In this sense, cf. F. G. Jacobs and R. White, *The European Convention on Human Rights* (2nd edn., 1996) at 171.

[10] Ibid.

can be found in the Charters of the Nuremberg and Tokyo Tribunals and in the Statutes of the UN *ad hoc* Tribunals.

The lack of such provisions in the Charters of the post-World War II Tribunals is not surprising, especially in consideration of the overall legal framework and of the prevailing circumstances at that time. As mentioned elsewhere in this commentary,[11] this can probably be explained by the absence of international provisions on the rights of individuals in the administration of justice and lesser emphasis on the importance of the due process guarantees (both in national and international trials).

It is more surprising that no provisions on compensation exists in the Statutes of the *ad hoc* Tribunals, or in their Rules of Procedure and Evidence. There have been cases before the Tribunals where the existence of such norms could have been useful and it seems that, in the near future, the Security Council may consider the adoption of some form of rules on compensation for the Statutes of the *ad hoc* Tribunals.

The discussion of two cases of the ICTY and one of the ICTR on matters related to the issue of compensation for unlawful or unjust detention may shed some light on the perspective of having some rules on compensation in the system of the *ad hoc* Tribunals.

In the *Lajić* case, before the ICTY, a person was arrested and detained under the authority of the Tribunal and it subsequently turned out that he was the wrong person. In that case the counsel of the person unjustly detained wanted to ask for compensation but the proceedings were never started. Actually, it seems that under the rules of the ICTY there would have been absolutely no opportunity for such a request and that the UN—in application of the agreements on privileges and immunities of the United Nations—would have been immune from legal process in proceedings before national courts. This was at least the official position of the United Nations Office for Legal Affairs, but, as the person who had wrongfully been detained did not pursue his claim, it was never presented before a court.

Another case that could be of some interest in respect of the question of compensation is the case against *Delalić* (IT-96-21-A). This accused was acquitted at first instance and his acquittal confirmed in the appeal proceedings.[12] The Tribunal may have to face a problem of request of compensation, since the defendant spent almost two years in pre-trial detention, during which time his

[11] Cf. the chapter on the rights of the accused, in this Commentary, Ch. 31.3 above.
[12] Cf. Trial Chamber Judgment, *Delalić and others*, IT-96-21-T, 16 November 1998 and Appeals Chamber Judgment, 20 February 2001.

business collapsed as a direct result of his incarceration. It would be very difficult (and unfair) at that stage, especially considering the adoption of thorough guarantees of the rights of persons in the ICC Statute, not to provide for compensation.

Certainly the most interesting case, in particular for the developments it may have on the regulatory framework of the Tribunals, is the *Barayagwiza* case.[13] This case led to the formulation of a proposal to amend the Statutes of the UN Tribunals to explicitly provide for a right of compensation for unlawful arrest or detention, unjust conviction, or miscarriage of justice.[14]

In *Barayagwiza*, the accused had been arrested and kept in detention in Cameroon for almost two years, before being transferred to the seat of the Tribunal. The accused then spent four months in detention at the Tribunal without an initial appearance, and without being ever brought before a judge. He subsequently filed two motions, the first of which was never decided upon, the second resulted in the decision under examination. The accused challenged the authority of the Tribunal to continue the proceedings against him on the grounds that his fundamental rights had been grossly violated. The Trial Chamber denied this motion, but the Appeals Chamber, seized of an appeal by the accused, reversed the first decision. The Appeals Chamber found that the violations of the rights of the accused had been so egregious that it was justified to strike out the case with prejudice for the Prosecution and immediately release the accused.[15] This extreme measure was intended as a sanction for the serious breaches of fundamental guarantees of which the Prosecution was found to be responsible. As a consequence of this decision the government of Rwanda violently protested and threatened to suspend cooperation with the Tribunal. Meanwhile, the Appeals Chamber, as the Prosecutor had announced the intention to impugn the decision, decided that the accused would not be immediately released and ordered the stay of execution of its decision.

Subsequently, the Prosecutor filed with the Appeals Chamber a motion for revision of its previous decision. The Chamber followed the interpretation of the Statute and the Rules given by the prosecution, in the sense of allowing the discussion of such motion irrespective of the absence of any explicit provision to this effect. At the end of this *sui generis* 'revision proceeding', the Appeals Chamber reversed its first decision, on the grounds that the new facts presented by the prosecution had shown that the violations of the rights of the accused had been of a less serious nature than previously found. The Chamber, however, recognized that

[13] In this case there are two important decisions of the Appeals Chamber: the first in the appeals proceeding (3 November 1999, *infra* note 15) and the second at the outcome of a revision procedure (31 March 2000, *infra* note 16).
[14] Cf. Address of President Jorda to the UN General Assembly, *supra* note 8.
[15] Cf. Decision of the Appeals Chamber, 3 November 1999, ICTR-97-19-AR72.

material violations of the defendant's right had indeed occurred and it established the principle that in case of conviction the Trial Chamber would have to take into consideration in the determination of the sentence the fact that the accused's rights had been violated. Finally, the Appeals Chamber stated that in the case of an acquittal, the accused should be adequately compensated for the unjust detention.[16]

After the innovative decision of the Appeals Chamber of the Tribunals,[17] a proposal was made to the effect that the Statutes of the *Ad Hoc* Tribunals should be amended to explicitly provide for such a right of compensation. It seems, however, that while the Security Council will be examining this proposal, the judges could already amend the Rules and provide for such a right. After all, this amendment would simply be an implementation of the rights of the accused as internationally protected by all international conventions on human rights. Moreover, the fact that the provisions of the ICC Statute explicitly recognize a wide right of compensation to the accused should facilitate the task of the judges of the *Ad Hoc* Tribunals in amending the Rules. This said, it should be recognized that there are several reasons that would require in any case the intervention of the Security Council or, at least, its implicit agreement with an amendment to the Rules (such as, for example, making it easier to provide for a specific budget for compensation).

IV. The Rome Statute

Article 85(1) of the ICC Statute establishes that 'anyone who has been the victim of *unlawful arrest or detention* shall have an enforceable right to *compensation*'. This text reproduces the wording of international provisions, such as Article 9(5) of the ICCPR or Article 5(5) of the ECHR. However, it does not seem clear what the purpose is of such a provision in the ICC Statute with a view to its implementation within the system of the ICC itself. In other words, while it seems rather obvious that the ICCPR and the ECHR adopt those terms, as they are intended to impose on States the obligation to implement in their own municipal system a mechanism that enables the victim of an unlawful arrest or detention to obtain compensation, it would not have seemed necessary to state that the unlawfully detained should have 'an enforceable right to compensation' in the ICC system. It would have been enough to explicitly provide for such right.

Article 85(2) of the ICC Statute provides for the right of a person, convicted by a final decision, to obtain compensation, when subsequently such conviction is

[16] Cf. Decision of the Appeals Chamber, 31 March 2000, ICTR-97-19-AR72, paras. 71 *et seq.*
[17] The Appeals Chamber followed the same approach in *Semanza*, 30 May 2000.

reversed on the grounds that a new or newly discovered fact shows conclusively that there has been a *miscarriage of justice*. The person loses such right to compensation if it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her. In this respect it should be noted that wide discretion should be left to the Chamber to determine whether a person to whom non-disclosure is partly attributable should still receive a certain amount (proportionally reduced) of compensation.

Article 85(3) of the ICC Statute establishes that in exceptional circumstances, where a grave and manifest miscarriage of justice has occurred, the Court may award compensation to a person 'who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason'. This kind of compensation can hardly be considered as amounting to an individual right. Not only compensation under paragraph 3 may be granted solely in exceptional circumstances, but also the decision as to award or not to award compensation is left to the wide discretion of the Court. Of course, it seems correct to argue that the Court will have to respect in its decisions the principles of equality and non-discrimination. Therefore, similar cases will have to be treated in conformity with the same principles. However, it would have been appropriate to have more stringent criteria for the exercise of such power by the Court.

Additionally, it seems that the fact of being victim of a grave and manifest miscarriage of justice should be considered *ipso facto* an 'exceptional circumstance' within the meaning of the provisions of Article 85(3) of the ICC Statute. It seems reasonable to argue that the draftspersons used the formula 'in exceptional circumstances' more as a wish than as a limitation of the scope of the rule. In other words, it is hoped that 'grave and manifest miscarriages' of justice will occur only in exceptional circumstances, but it would seem that in every case of 'grave and manifest' miscarriage of justice, some sort of compensation should be foreseen.

The Rules of Procedure and Evidence have to a large extent supplemented the ICC Statute. The provisions on compensation are contained in Chapter 10, entitled 'compensation to an arrested or convicted person' (Rules 173–175) and devoted exclusively to this topic. Rule 173, relies by way of principle on the system of the double procedure. First, the interested person must obtain a decision of the Court affirming that the arrest or detention was unlawful (Article 85(1)), or that the conviction had been reversed on the grounds of a new fact (Article 85(2)) or that there was a grave and manifest miscarriage of justice (Article 85(3)). Moreover, the request shall contain all elements justifying the request and the amount requested. Additionally, it is stated that the person requesting compensation has the right to legal assistance, but it is not specified whether he or she would also be entitled to legal aid if indigent. In such cases, it would seem reasonable to conclude that he would.

The Rules of Procedure and Evidence also establish the procedure to be followed, which requires that a person seeking compensation under Article 85 of the ICC Statute shall file a request to the Presidency. This request must be filed in writing, which seems to reinforce the idea that such a request cannot be made in the course of the proceeding on the unlawfulness of the detention or in the revision proceeding. Another element that would seem to go in this direction is the fact that the request shall be made to the Presidency who will then designate a special chamber (composed of three judges). A time limit of six months from the date the person requesting compensation was notified has also been set for the presentation of the request. The procedure is adversarial: the Prosecutor shall be notified of the request and any accompanying materials in order to present his or her observation (Rule 174 ICC RPE). Subsequently the Chamber designated shall hold a hearing to permit the submission of the written observations by the Prosecutor and the person filing the request. A further hearing must be held if either party so requests.

Rule 175 of the ICC RPE contains the criteria for establishing the amount of compensation. This rule, however, is apparently drafted only for compensation under paragraph 3 of Article 85. Nothing seems to prevent the interpretative extension of this norm to all the other kinds of compensation. After all it seems that every case, in which compensation should be granted, can be considered as entailing a form of miscarriage of justice. Rule 175 establishes that the Chamber shall take into consideration the consequences which the grave and manifest miscarriage of justice has had for the personal, family, social, and professional situation of the person filing the request.

It seems that the provisions of the Rules of Procedure and Evidence exclude that the request for compensation can be discussed and decided over within the proceedings on the lawfulness of the detention or the revision proceedings. On the contrary, it would have seemed more reasonable to provide explicitly for the possibility of deciding on the request of compensation, within the same proceeding (either the proceeding on the unlawfulness of the arrest or detention, or the revision proceeding). Finally, it is submitted that it would have been preferable to attribute competence to decide on compensation to the same Chamber that determines the unlawfulness of the arrest or detention, or decides on the motion for revision. This solution would have ensured more speed in doing justice to the victim of an unlawful arrest or unjust conviction. Moreover, it would have had the interest of speeding up the activities of the Court as a whole, as it does not seem appropriate to burden the system of the Court with several micro-proceedings unrelated to the main object of its jurisdiction.

V. Conclusion

The above discussion has shown how international criminal procedure is progressively becoming more and more protective of the rights of individuals. It is clear that there has been progress from Nuremberg and Tokyo to The Hague and Arusha. It seems that the evolution in the protection of fundamental rights has not stopped and this is also confirmed by the provisions of the ICC Statute on the right of victims of unlawful arrest or unjust conviction or detention. These provisions certainly represent a positive model.

The establishment of a clear and effective mechanism makes it certainly easier for persons appearing before the Court to concretely enjoy this right. However, there still are some questions that remained unsolved. First, one may wonder whether the right to seek compensation may be exercised by the relatives or the heirs of the victim of the violation, in particular when the victim dies in custody or shortly after release. Second, it seems that the Prosecutor should file such a request in the interest of the victim, if the victim (and or his or her relatives or inheritors) is unable, for whatever reason, to do so. Finally, it still is unclear whether it is absolutely necessary to have two distinct proceedings. It is suggested that in the practice of the Court it will be appropriate to make an effort to have the request for compensation examined by the same Chamber that decides on the grounds for compensation.

The provisions of the Rome Statute alone were not particularly clear, but the Rules of Procedure and Evidence shed sufficient light on the procedure to be followed for compensation, on the competent organs and on the criteria for compensation. If there are other *lacunae*, they will be of such nature that the judges will solve on a case by case basis. Of course, it would be appropriate to add provisions on the maximum possible amount of compensation and on financial resources for compensation. Finally, a norm could have been added to the provisions of the Rome Statute, imposing on States the obligation to adopt all possible measures to restore, insofar as possible, the *status quo ante* in respect of an accused wrongfully detained or convicted, or victim of a miscarriage of justice.

'the interests of the accused and the rights of defence are a primary concern . . . in the jurisprudence of the *ad hoc* Tribunals [which are] brilliantly analysed . . . by Salvatore Zappalà' Professor G. Abi-Saab, *Journal of International Criminal Justice*

This book takes a procedural approach to human rights guarantees in international criminal proceedings and covers both the systems of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda and the International Criminal Court. It analyses the rights conferred on individuals involved in international criminal trials from the commencement of investigations to the sentencing stage, as well as the procedural rights of victims and witnesses.

The study focuses on problems which have emerged in three main areas: (i) length of proceedings; (ii) absence of specific sanctions and other remedies for violation of procedural rules; (iii) the need to strengthen the protection of the accused from undue interference with his rights (likely to be caused by a variety of factors, such as conflicting governmental interests, the presence of malicious witnesses, or inadequate legal assistance). Three general suggestions are made to reduce the impact of these weaknesses. First, it could be helpful to adopt specific sanctions for violation of procedural rules (such as, the exclusion of evidence as a remedy for violations of rules on discovery). Secondly, (as has already been provided for in the ICC Statute,) the Prosecutor of the *ad hoc* Tribunals should play a proactive role in the search for the truth by, among other things, gathering evidence that might exonerate the accused. Thirdly, the right of compensation for unlawful arrest (or detention) and unjust conviction, provided for in the ICC Statute, should be extended to other serious violations of fundamental rights and, in addition, should be laid down in the Statutes of the ICTY and ICTR.

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Salvatore Zappalà

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HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS

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General Editors' Preface

Criminal proceedings are widely regarded as an epitome of the power of the State. Steps are commonly taken to prevent the abuse of that power by the entrenchment of constitutional safeguards against violations of fundamental human rights and by the answerability of police powers to democratic processes. In recent years international criminal tribunals of various kinds have been established, which sit aside from the safeguards ordinarily secured within natural legal systems. The question of the manner in which the rights of persons who are tried by those tribunals are to be secured is an important one, which will have to be resolved if international criminal tribunals are to succeed in their task of delivering justice. Dr Zappalà's study is an important and timely contribution to the debate on this topic.

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explicitly raised before the ICTY. In *Dokmanović*, the defendant claimed that he had been surreptitiously arrested by the UN Transitional Administration for Eastern Slavonia (UNTAES). The Trial Chamber, however, dismissed the objections and held that the arrest was lawful and the rights of the accused had not been violated.[136] In *Todorović*, the accused claimed that he had been kidnapped by Stabilization Force (SFOR) troops on the territory of the FRY. The accused raised issues ranging from the infringement of individual rights to the violation of the sovereignty of the Federal Republic of Yugoslavia. Eventually, however, all motions by Todorović, challenging the legality of his arrest, were withdrawn as a result of an agreement with the Prosecutor and his entering a guilty plea on 13 December 2000.[137] The same issue was raised in *Nikolić*, but also in this case the Trial Chamber rejected the motion.[137a]

In all instances the defendants sought the dismissal of their cases on the grounds that their rights had been violated. Their submissions were incorrect and inappropriate for two main reasons. First, none of those alleged violations was really imputable to the Tribunal, unless one proved that the order of the Tribunal implied the need to resort to unlawful methods. Secondly, from a procedural viewpoint, the accused was at most entitled to release and/or, where applicable, exclusion of the evidence collected in violation of fundamental rights; instead, he had no right to dismissal of the proceedings.[138] Additionally, these kinds of violations should also be redressed through compensation.[139] Of course, the problem would be far more serious if one could prove a consistent pattern of violations of the rights of individuals by State or international authorities performing arrests at the request of *ad hoc* Tribunals.[140] In this case it could be argued that the Tribunals should react vigorously, for example by adopting a specific rule providing for the quashing of proceedings based on arrests inconsistent with individual rights.[141]

[136] See Decision on the Motion for Release, *Dokmanović* (IT–95–13a-PT), 22 October 1997. On the Dokmanović case see also L.C. Green, 'Erdemović, Tadić, Dokmanović: Jurisdiction and Early Practice of the Yugoslav War Crimes Tribunal', in 27 *Isr. YHR* (1997) 313–364, at 362–364, where the author criticizes the decision of the Trial Chamber.

[137] For more details on the *Todorović* case see ICTY *Eight Annual Report*, UN doc. A/56/352 17 September 2001, paras. 141–144.

[137a] Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Nikolić* (IT–95–2–PT), 2 October 2002.

[138] This would be in line with normal remedies under international law: see F. A. Mann, 'Reflections on the Prosecution of Persons Abducted in breach of International Law', in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (Dordrecht: Nijhoff, 1989), at 411.

[139] This was also the solution adopted by the Tribunal in *Barayagwiza* when the organs of the Tribunal bore a certain degree of responsibility for the violations of the rights of the accused. For a more detailed discussion of this case see Chapter 4 below.

[140] G. Abi-Saab, 'Droits de l'homme et juridictions pénales internationales: Convergences et tensions', in R.-J. Dupuy, *Mélanges Valticos—Droit et Justice* (Paris: Pedone, 1999), discusses the *Dokmanović* case, warning on the risks of a consistent pattern of illegal arrests, at 252.

[141] In this case the Tribunal would be making a policy choice, in that it would try to prevent violations by clearly indicating that the effect of such violations would be counterproductive in that it would make not only the arrest vain, but also the entire proceedings.

On the issue of personal liberty, criticism may be directed at the ICC Statute. In spite of the generally very advanced model in terms of protection of individual rights, the protection of the right to liberty is not sufficiently developed. Although the Statute does not contain provisions contrary to international human rights standards in respect of detention on remand, it does not explicitly recognize the right to personal liberty and leaves unclear, for lack of specific norms, the conditions of provisional detention. The reasons justifying arrest and detention may be inferred from Article 58, paragraph 1, ICC St.,[142] but in the interests of achieving greater clarity the Statute should have been more detailed with a specific article devoted to the issue.

It can be maintained that the right to liberty and provisional detention are certainly areas where the evolution from the Nuremberg model towards more developed forms of international criminal justice has been less remarkable.[143]

Article 55, paragraph 1 letter d), of the ICC Statute provides that '[a] person shall not be subjected to arbitrary arrest or detention; and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute'. This rule is based on generally recognized international norms in respect of deprivation of personal liberty in criminal proceedings. Nevertheless, its main defect lies in being too faithful to the other international texts. In particular, this fidelity becomes a defect when the ICC norm refers to other rules of the Statute without explicitly specifying which rules ('on such grounds and in accordance with such procedures as are established in the Statute'). While this kind of drafting was necessary in international instruments concerning inter-State judicial cooperation (the drafters could not have been aware of the content of national laws on arrest and detention), the same reasoning does not apply to the Statute. Hence, it is not appropriate to refer to the criteria set forth in the Statute, without referring either to the criteria themselves or to the Article(s) in which they are spelled out. As it stands, this provision is not precise and it is therefore necessary to look at other rules of the Statute to identify the precise regulation to be applied to such cases. The grounds for arrest and

[142] Article 58, para. 1, ICC St. reads: '[a]t any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are *reasonable grounds to believe* that the *person has committed a crime* within the jurisdiction of the Court; and (b) 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' (emphasis added).

[143] Naturally, this can be explained by the peculiar nature of these tribunals, the absence of enforcement agents, difficulties in securing the presence of defendants, and so on. This, however, in spite of its being a serious problem should not be a justification for not complying with internationally recognized standards to be applied in the administration of criminal justice.

guarantees for persons arrested are provided for elsewhere in the Statute. For example, Article 58 specifies that the arrest warrant must contain concise information for the arrested person concerning the reasons for the arrest and the crimes allegedly committed. The grounds on which the Pre-Trial Chamber may issue a warrant of arrest are also laid down in Article 58. There must be reasons for believing that the person has committed crimes.[144] The arrest must be necessary to ensure the attendance of that person at trial, to prevent obstruction of investigations, and, where applicable, to prevent the commission of other related crimes. These criteria, in conformity with international standards, must be construed as exhaustive and cannot be extended by means of interpretation.

This system of reference to other provisions reinforces the suggestion that there is a precise need to extend the right to legal assistance to all instances of arrest. Therefore, the right to legal assistance, including free assistance for indigents provided for by Article 55.2(c), should also be applicable to situations under Article 55.1(d). Moreover, recent decisions of both the ICTR and the ICTY show that there are problems due to the absence of clear and specific provisions regulating decisions of the Chambers on issues relating to the lawfulness of detention or arrest.[145] Thus, it is confirmed that the need for appropriate legal advice is very strong from the earliest stages of the proceedings.

Finally, it must be emphasized that there is an additional right which has been inserted into the Statute of the ICC. This is the right to compensation for unlawful arrest or detention. Article 85, paragraph 1, ICC St. provides that '[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. This is an improvement when compared with the system of the *ad hoc* Tribunals, in which no such protection was afforded to individuals. In *Lajić*, for example, an individual was arrested and transferred to the ICTY. Subsequently, after a couple of weeks it turned out that there had been an error as to that person's identity and the person erroneously arrested was released.[146] Lajić wanted to ask for compensation but the proceedings were never started. Actually, it seems that under the rules of the ICTY it was not possible to file such a request and that the UN—in application of the agreements on privileges and immunities of the United Nations—would have been immune

[144] This is a requirement which already puts the warrant outside the scope of Article 55.1, because, if there are reasons to believe that the person has committed the crime, then he or she is also entitled to all the other rights provided for by para. 2.

[145] The judges progressively articulated the solution through the Tribunal's case law in the *Dokmanović*, *Todorović*, *Brdjanin* and *Talić* cases, at the ICTY, and *Barayagwiza* and *Semanza* cases, at the ICTR, all mentioned elsewhere.

[146] See Order for the Withdrawal of the Charges Against the Person Named Goran Lajić and for His Release, *Lajić* (IT–95–8-PT), 17 June 1996. It is shameful that this person remained in detention for more than two months (he was arrested by German authorities on 18 March 1996 and released by the Tribunal on 17 June 1996).

from the legal process in The Netherlands. This was at least the official position of the UN Office for Legal Affairs, but, as the person who had wrongfully been detained did not pursue his claim, it was never presented before a court.

The ICC Statute provisions on compensation for unlawful arrest certainly need to be supplemented and spelled out in the Rules of Procedure. The Rules clarify the procedure to be followed, including provisions specifying whether or not the request for compensation must be discussed within the proceedings on the lawfulness of the detention or must be separate. In this respect the Rules have opted for a separation of the proceedings on determination of unlawfulness and the decision on compensation (Rule 173.2 ICC Rules). Moreover, these provisions offered guidance on the criteria that the judges had to follow in specifically determining forms and amounts of compensation. On the question of determining the amount of the compensation, the Rules require the competent Chamber to 'take into consideration the consequences which the grave and manifest miscarriage of justice has had for the personal, family, social and professional situation of the person filing the request'. The term 'grave and manifest miscarriage of justice' should not be read in the narrow sense of referring only to Article 85, paragraph 3, ICC St. and Rule 173.2 (c) of the ICC RPE, but also more generally to all cases of compensation provided for in Article 85 and Rule 173.2. Finally, it would have been preferable to attribute competence to decide on compensation to the same Chamber that determined the unlawfulness of the arrest or detention. It does not seem appropriate to burden the system of the Court with several micro-proceedings unrelated to the main object of its jurisdiction.

In the *ad hoc* Tribunals systems there are no specific provisions for *habeas corpus* motions or for compensation for unlawful arrest or detention.[147] However, the practice of Chambers has shown that the judges are willing to admit such motions, irrespective of the lack of express provisions, in accordance with international human rights law.[148] Furthermore, as regards the right of compensation the Appeals Chamber of the Tribunal held that where the rights of the accused were violated he or she had to receive compensation.[149] Hence, only through practice did such a fundamental principle find its way into the Tribunal system. However, it is submitted that a right to compensation for violation of human rights by the Tribunals should be specifically provided for through an amendment to the Rules.[150]

[147] See in this respect Wladimiroff, note 92 above, at 450 note 118.

[148] Cf. Appeals Chamber Judgment, *Barayagwiza* (ICTR–97–19-AR72), 3 November 1999, para. 88, and Trial Chamber Decision on petition for a writ of Habeas Corpus on Behalf of Radoslav Brdjanin, *Brdjanin and Talić* (IT–99–36PT), 8 December 1999, paras. 3 and 7.

[149] Cf. Appeals Chamber Review Judgment, *Barayagwiza* (ICTR–97–19-AR72), 31 March 2000, and *Semanza* (ICTR–97–20-A), 31 May 2000, the disposition of the decision.

[150] Such an amendment would justify assigning specific budgetary resources to this end. The President of the ICTR submitted a proposal to the UN Secretary General for the amendment of the Tribunal's Statute, see *ICTR Seventh Annual Report* note 90 above, para. 92.

6. *The right to be informed of the reasons for arrest*

The right to be informed of the reasons for arrest is part of the due process guarantees and completes the right to personal liberty. It is laid down in both the UDHR and the ICCPR. Moreover it is also recognized by regional human rights conventions.[151]

The norms of the *ad hoc* Tribunals provide for prompt information on the reasons for arrest. In general it is required that at the moment of execution of the arrest warrant the accused must be informed of the cause for his or her arrest. Usually, persons arrested pursuant to a warrant issued by the Tribunal receive a copy of the indictment, so they are immediately informed of the reason for the arrest. It is uncertain what happens with those who spontaneously surrender. It seems that they are provided with the indictment at the moment of placement in detention. The same requirements are also required under Rule 40-*bis*.

The *ad hoc* Tribunals' Appeals Chamber held that 'international standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him. The right to be promptly informed . . . serves two functions. First, it counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. In this respect the suspect needs to be promptly informed of the charges . . . in order to challenge his detention. . . . Second, the right to be promptly informed gives the suspect the information he requires in order to prepare his defence.'[152]

Often there is confusion between the right to be informed of the reasons for arrest and pre-trial detention and the right to receive all details and to be sufficiently informed to prepare a defence. The latter is a distinct right, which in the system of the *ad hoc* Tribunals, and also in the ICC procedure, will be fulfilled through the process of discovery. The difference is important, because of course the detail of information received is not the same. A concise statement may be sufficient for the purpose of satisfying the right to be informed of the reasons for arrest, whilst it would certainly be insufficient as regards the information on the charges. It seems that the Appeals Chamber in the case mentioned above erred in merging the two concepts. However, in that case both issues were at stake, because the suspect had subsequently become an accused and had not been duly informed of the charges against him for the purpose of the preparation of his defence.

In the system of the ICC the right to be informed of the reasons for arrest is not specifically provided for in any rule. Arguably, however, this right can be inferred from the provisions of Article 58 ICC St. on the execution of an

[151] Cf. the ECHR, ACHR, and the other conventions mentioned above at Chapter I, Section II.

[152] Cf. Decision of Appeals Chamber, 3 November 1999, *Barayagwiza*, note 148 above, para. 80.

arrest warrant issued by the Court. It is true that the provision does not state that the accused has a right to be informed. It provides, however, for the requirements of the arrest warrant, and among them it specifies the need for a reference to the crimes for which the arrest is sought and a concise statement of the facts that would constitute those crimes. Naturally this is not equivalent to a specific provision on the right to be informed of the reasons for the arrest; it nonetheless represents the content of that right.

Moreover, it must be remembered that the fact that Article 85 of the ICC Statute provides for a right to compensation for unlawful arrest necessarily implies the existence of a right to challenge the lawfulness of arrest. It is also well known that to challenge the lawfulness of an act it is necessary to know what are the reasons for that act, as recognized by the ICTR Appeals Chamber decision quoted above. Therefore, it can be argued that the right to be informed of the charges must also be recognized as a sort of corollary to the right to challenge the lawfulness of arrest and detention. This right certainly exists in the system of the ICC because the right to obtain compensation for unlawful arrest or detention is provided for.

7. *The right not to be compelled to incriminate oneself or to confess guilt, and to remain silent*

The multifaceted dimension of the right to remain silent depends on the status of individuals to whom the right is granted and on the phase of the proceedings in which the right is triggered.[153] Different names are given to the various aspects of the right to remain silent. Sometimes it is called a right to silence or privilege against self-incrimination, sometimes a right not to confess guilt, but in any event the core substance appears to be the same. Coming from the Anglo-Saxon tradition this right can be given either a narrow or a wide interpretation.[154] In the earlier stages of the investigation and pre-trial proceedings it consists of a general right not to be compelled to incriminate oneself or to confess guilt, which includes the prohibition of any form of pressure (either physical or psychological) on the person. Subsequently, however, when the Prosecutor thinks there are grounds for believing that the person has committed a crime within the jurisdiction of the Court and when that person is being questioned, this right becomes a right to remain silent. At the trial stage it means that the accused can refuse to testify, but on a wider reading it may even imply that the accused has a sort of *right to lie* (provided of course that he or she does not take the oath as a witness).[155]

[153] Cf. sub-section 3 above.

[154] On the right to silence see A. Ashworth, *The Criminal Process—An Evaluative Study* (Oxford: OUP, 1994), at 112–118.

[155] Cf. M. Ayat, 'Le silence prend la parole: la percée du droit de se taire en droit international pénal', in *RDIDC* (2001), at 237, where the author writes '*relevons que durant tout le procès pénal*