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The Precedent of Pretrial Release at the ICTY: A Road Better Left Less Traveled

Megan A. Fairlie*

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Megan A. Fairlie

Abstract

This Article facilitates just such an inquiry by tracking the progression of pretrial provisional release at the ICTY. This Article first considers pretrial release (or release pursuant to bail) in the abstract along with those rights that may theoretically be implicated by an act of pretrial detention. It then examines the relevant activity of the ICTY's predecessors, interim advancements in human rights law and the absence of a release-based statutory provision at the Yugoslav Tribunal. The applicable rule adopted by the ICTY is then assessed, along with subsequent amendments. At each stage, specific regard is given to the rights affected by the approaches that govern the release of detainees. In brief, this work comprehensively vets the legitimacy of ICTY practice in the context of pretrial release and questions its precedential value by noting instances of internal inconsistency, misleading pronouncements, and often sharp variances with international standards.

ARTICLES

THE PRECEDENT OF PRETRIAL RELEASE AT THE ICTY: A ROAD BETTER LEFT LESS TRAVELED

*Megan A. Fairlie**

INTRODUCTION

In August 2009, a single judge of Pre-Trial Chamber II at the International Criminal Court (“ICC”) granted the interim release of alleged warlord Jean-Pierre Bemba.¹ The decision turned heads around the world, as Bemba was then poised to become the first accused in ICC custody to be awarded pretrial release.² In support of this noteworthy decision, the single judge remarkably availed herself of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia³ (“ICTY” or the “Yugoslav Tribunal”), an approach that is not

* Assistant Professor of Law, Florida International University College of Law; Visiting Assistant Professor of Law, Albany Law School, 2010–2011. Ph.D. (law), 2007, LL.M., 2003, Irish Centre for Human Rights, National University of Ireland, Galway; J.D., 1996, Washington and Lee University College of Law.

1. Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo, ¶ 77 (Aug. 14, 2009).

2. *E.g.*, PhD Studies in Human Rights, <http://humanrightsdoctorate.blogspot.com/> (Aug. 15, 2009, 11:18) (describing the decision as “a generous one, that sits on the fault line of the fundamental rights of the defendant and the imperatives of international justice.”). The prosecutor’s subsequent appeal of the release decision was granted suspensive effect. *Bemba*, Decision on the Request of the Prosecutor for Suspensive Effect, ¶ 15 (Sept. 3, 2009). The decision to release Bemba was later reversed on several bases, including that there was no statutory change in circumstances that necessitated the release. *Bemba*, Case No. ICC-01/05-01/08 OA2, Judgment on the Appeal of the Prosecutor (Dec. 2, 2009).

3. *Bemba*, Decision on the Interim Release of Jean-Pierre Bemba Gombo, ¶¶ 72, 88. For the Statute of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), see Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute].

unique in the context of release determinations at the ICC.⁴ This method of operation underscores the value of the Yugoslav Tribunal's experience to the practice of present day international criminal justice institutions.⁵ This potentially powerful influence of ICTY practice upon a growing field of courts and tribunals⁶ makes it timely to question whether the work of the Yugoslav Tribunal with regard to its pretrial release scheme provides a framework that is worthy of replication.

This Article facilitates just such an inquiry by tracking the progression of pretrial provisional release at the ICTY.⁷ This

4. *See, e.g.*, Prosecutor v. Lubango-Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubango-Dyilo Against the Decision of Pre-Trial Chamber I, ¶¶ 123, 126 (Feb. 13, 2007); *Bemba*, Public Decision on Application for Interim Release, ¶ 49 (Apr. 14, 2009).

5. The practice of "mining" ICTY precedent "by more recently established courts for 'best practices' replication," is an ongoing one. Patricia M. Wald, *Tribunal Discourse and Intercourse: How the International Courts Speak to One Another*, 30 B.C. INT'L & COMP. L. REV. 15, 20 (2007); *see also, e.g.*, WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 44 (2006) (remarking upon the legacy of the work of the ICTY and its sister court, the International Criminal Tribunal for Rwanda ("ICTR"), and noting that "the case law of the international criminal tribunals will provide immense guidance to the International Criminal Court"). The ICTR was established under the Statute of the International Criminal Tribunal for Rwanda. *See* Statute for the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598. The Rules of Procedure and Evidence adopted by the ICTR reflect those of the ICTY *mutatis mutandis*. *Id.* art. 14. Accordingly, the framework and practice of the ICTR closely tracks that of the ICTY.

6. These include the Special Court for Sierra Leone, Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138; and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Jun. 6, 2003, 2329 U.N.T.S. 117. As noted by one prominent international jurist,

Beyond the various areas of international law, international humanitarian law, and international criminal law and procedure that have benefited from the ICTY's rich legacy, it should be noted that even the recently established Extraordinary Chambers in the Court of Cambodia, a hybrid institution essentially within the Cambodian domestic legal system, cites the case law of the ICTY in matters of procedure and fairness.

Fausto Pocar, *Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY*, 6 J. INT'L CRIM. JUST. 655, 662 (2008) (citing Prosecutor v. Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on Appeal against Provisional Detention Order of Nuon Chea (March 20, 2008)).

7. Although provisional release at the ICTY is available in other contexts, such as release throughout the course of trial proceedings or during the appeal process after conviction, this Article does not substantively engage with these aspects of ICTY practice.

Article first considers pretrial release (or release pursuant to bail) in the abstract along with those rights that may theoretically be implicated by an act of pretrial detention. It then examines the relevant activity of the ICTY's predecessors, interim advancements in human rights law and the absence of a release-based statutory provision at the Yugoslav Tribunal. The applicable rule adopted by the ICTY is then assessed, along with subsequent amendments. At each stage, specific regard is given to the rights affected by the approaches that govern the release of detainees. In brief, this work comprehensively vets the legitimacy of ICTY practice in the context of pretrial release and questions its precedential value by noting instances of internal inconsistency, misleading pronouncements, and often sharp variances with international standards.

I. IS THERE A "FUNDAMENTAL RIGHT TO BAIL"?

In order to properly evaluate the activity of the Yugoslav Tribunal in the area of pretrial release, it is essential to first determine those rights implicated by pretrial detention and the relevant standards associated therewith. As a general starting point, courts and academics often speak of a "fundamental right to bail."⁸ This is a phrase repeated often enough so as to necessitate close consideration. In short, the core question is whether there is authority to support the assertion that accused persons are entitled to an opportunity for release. Even if one accepts the proposition that under "general principles of law, custody pending trial shall be regarded as an exceptional measure,"⁹ the question remains whether the right to bail may be deemed to exist in and of itself.

8. See, e.g., *Augustus v. Roemer*, 771 F. Supp. 1458, 1465 (E.D. La. 1991) (averring that, in the United States, there is a "limited fundamental right to bail" that entails "fair access to the bail system to those who . . . qualify for pretrial release"); Kurt X. Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 400 n.3 (1996). U.S. Ambassador David J. Scheffer includes the right to "provisional release pending trial" in his list of hard fought due process rights presently denied to terror suspects. *Advancing U.S. Interests with the International Criminal Court*, 36 VAND. J. TRANSNAT'L L. 1567, 1571 (2003).

9. Commission of the European Communities, Green Paper on Mutual Recognition of Non-Custodial Pre-Trial Supervision Measures 3, COM (2004) 562 final (Aug. 17, 2004). If this is, in fact the case, as will be seen *infra*, the ICTY's approach to provisional release stands somewhat at odds with the its judiciary's asserted attempt, in

To engage in a debate on the issue of whether bail is a “fundamental” right is seemingly to reject the assertion that there is no hierarchy among international human rights. By its very nature, attempting to delineate such an order presents its own challenge because, as Meron points out, “the lack of generally agreed standards makes it extremely difficult to select such fundamental rights.”¹⁰ As “international guarantees” are relatively novel creations when considered alongside their domestic counterparts, one might be inclined to search for an analog in the domestic realm, where such rights have assumed a place in relevant constitutions for centuries.¹¹ There, too, however, one finds that those attributes that elevate a right to attain fundamental status are difficult to discern. For example, what can be gleaned from the assertion that “fundamental rights” can be distinguished from other rights owing to the fact that the former are rights “in the strong sense”?¹² Indeed, in the United States alone, the term “fundamental right” enjoys several distinct definitions.¹³

Fortunately, the question posed regarding a right to bail is more basic than this type of analysis. Of concern here is not whether the right to bail enjoys some type of heightened status,

drafting the Tribunal’s Rules of Procedure and Evidence, to “reflect[] concepts that are generally recognized as being fair and just in the international arena.” The Secretary-General, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, ¶ 53, *delivered to the Security Council and the General Assembly*, U.N. Doc. A/49/342, S/1994/1007 (Aug. 29, 1994) [hereinafter *First Annual Report of the ICTY*].

10. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 6 (1986).

11. Dietrich Schindler, *The International Committee of the Red Cross and Human Rights*, INT’L REV. RED CROSS, Jan.–Feb. 1979, at 3, *available at* <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList141/B680303DCEAF5E06C1256B6600590D7A> (noting that “today the constitutional law of every country contains such guarantees”).

12. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 190 (1977). Dworkin, of course, elaborates upon what is meant by the use of this term and this work’s reference to it is not meant to undermine the value of that author’s contribution to constitutional discourse. Rather, the aim is to illustrate that, despite the usefulness of such elaboration, the term itself remains amorphous and, thereby, elusive. *Id.*

13. *See, e.g.*, W. Kent Davis, *Answering Justice Ginsburg’s Charge that the Constitution is “Skimpy” in Comparison to our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law*, 39 S. TEX. L. REV. 951, 954–55 (1998) (observing that such rights have been described in many ways including “essential to individual liberty”, “implicit in the concept of ordered liberty” and “rights deeply rooted in [the] Nation’s history and tradition” and lamenting the fact that “there is no perfect definition” (citations omitted)).

but rather whether it exists as an enforceable right on its own. This inquiry accepts the fact that bail plays a role in many municipalities and that its existence is recognized on an international level. It then considers whether bail or release is a standalone right or, in the alternative, it exists as a mechanism that buttresses or ensures the enforcement of a widely recognized right or group of rights.

A foray into the realm of municipal constitutions is arguably instructive when it comes to making this determination. In this respect, it is remarkable that Bassiouni's seminal comparative work on national constitutions makes no mention of the right to bail or pretrial release.¹⁴ Rather, Bassiouni's test¹⁵ seems to militate against the assertion that there is a right to bail. By contrast, related rights, which will be considered in turn, appear in a multitude of national constitutions. For example, the right to be presumed innocent, dubbed by Bassiouni as "inextricably linked to fairness in criminal due process," can be found in more than sixty-seven national constitutions.¹⁶ In addition, the right to liberty or freedom, while admittedly not a right that derives from any instrument,¹⁷ is expressly embodied in sixteen national instruments and exceptions to the right to liberty are delineated in 119 constitutions in provisions that prohibit arbitrary arrest and detention.¹⁸ Similarly, liberty interests are also protected by constitutional guarantees of trial without undue delay, a right

14. See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 285 (1993). Moreover, even when access to bail is facilitated by a constitutional provision, this does not necessarily give rise to the existence of bail as a right. See, e.g., *United States v. Salerno*, 481 U.S. 739, 752 (1987) ("The Eighth Amendment addresses pretrial release by providing merely that '[e]xcessive bail shall not be required.' This clause, of course, says nothing about whether bail shall be available at all.").

15. Bassiouni, *supra* note 14, at 239–40 (dictating that a general principle derives from instrument recognition of a right on both the national and international level).

16. *Id.* at 267 (observing that other constitutions, such as that of Ethiopia, employ the more restrictive guarantee that an accused will not be presumed guilty).

17. As Justice Stevens of the U.S. Supreme Court notes, this would make all persons "creatures of the state." *Meacham v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting). To the contrary, for all persons, liberty is a "cardinal unalienable right" and "relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen." *Id.*

18. See Bassiouni, *supra* note 14, at 256–57 (noting that the right to inviolability of the person, which can be deemed to incorporate the rights to life, liberty and security of the person, can be found in thirteen additional constitutions).

that can be found in forty-three domestic instruments.¹⁹ It is, therefore, within this fluid milieu that the pretrial right to bail, or release, will be evaluated, considering the right, first and foremost, within the context of the right to liberty.

A. *Right to Liberty*

Examined carefully, the assertion that bail is a fundamental right is potentially misleading. It is beyond dispute that access to bail may be a statutory²⁰ or constitutional entitlement.²¹ But, considered in a holistic sense, what is the real right at issue? Is not the heart of the matter whether an accused may secure and enjoy his liberty interests? Considered in this light, the concept of bail can be seen not as the “right” it is generally assumed to be but, conversely, as a mechanism by which a state may qualify the liberty interests of an accused person. Viewing bail in this light does not overlook the fact that bail can inure to the benefit of an accused; it is clear that the opportunity to utilize the mechanism provides a far more attractive alternative than the forfeiture of one’s freedom.

The distinction regarding the manner in which the issue of release is considered is of seminal importance. If one deems release to be “the right at stake,” the right may well be viewed too narrowly and an ensuing analysis may, in turn, fail to conform to established standards.²² Thus, the inquiry needs to be approached from the perspective that it is a liberty interest that lies at the heart of the bail-release equation. From there, it

19. *See id.* at 285.

20. *See, e.g.*, The Bail Act, 1976, c.63, s.4 (Eng.).

21. *See, e.g.*, CONST. art. 21 (Liber.) (“All accused persons shall be bailable upon their personal recognizance or by sufficient sureties . . .”); CONST. art. 24 (Uganda) (providing that an accused is entitled to apply to be released on bail, that release on bail is required when the relevant trial has yet to occur and an accused has been remanded for a period of 120 days (in the case of lesser offenses) or 360 days), *reprinted in A COMPLETE GUIDE TO UGANDA’S FOURTH CONSTITUTION* (D. Mukholi ed. 1995). Equally, constitutional provisions can serve to authorize limitations on the right to bail. *See, e.g.*, Ir. CONST., 1937, art 40 (sanctioning laws that provide for the refusal of bail under certain circumstances).

22. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 341, 345–56 (1993) (Stevens, J., dissenting) (rebuking the majority for narrowly reading the right in question to be one involving “some insubstantial and non-fundamental right to be released” rather than “the right to be free from governmental confinement” and noting that this approach enabled the majority to violate the constitutional principle that the government bears the burden of proving that detention is necessary).

should be accepted as a necessary premise that an individual's liberty interests are not absolute and that entitlement to pretrial release may be conditioned upon the provision of some sort of guarantee or security.

Moreover, the connection between bail and the right to liberty of person is expressly recognized in international and regional human rights instruments. The International Covenant on Civil and Political Rights ("ICCPR") addresses the issue of pretrial detention under the heading of "Liberty and Security of Person"²³ as does the European²⁴ and American²⁵ conventions on Human Rights (respectively, "ECHR" and "ACHR"). In a manner akin to the domestic documents that preceded them, these instruments do not present personal liberty as an inviolable right,²⁶ but rather guard against certain encroachments on that right. In this regard, as Nowak notes, the human right of personal liberty is a procedural guarantee which requires that, in order to guard against arbitrary and unlawful detention, legislation "define *precisely* the cases in which deprivation of liberty is permissible."²⁷

23. International Covenant of Civil and Political Rights art. 9(3), Dec. 16, 1966, S. TREATY DOC. NO. 95-29 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] ("It shall not be the general rule that persons awaiting trial shall be detained in custody. . . .").

24. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(3), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

25. American Convention on Human Rights art. 7(5), July 18, 1978, S. DOC. NO. 95-2 (1978), 1144 U.N.T.S. 123 [hereinafter ACHR]. The African (Banjul) Charter on Human and Peoples' Rights is less specific regarding pretrial release. The charter asserts the right to liberty of person and prohibits arbitrary arrest and detention as well as ex post facto laws that result in the deprivation of freedom. It also dictates that trials be held within a reasonable time, but makes no mention of release. African Charter on Human and Peoples' Rights arts. 6, 7, June 27, 1981, 1520 U.N.T.S. 217. However, a subsequent resolution issued by the African Commission interpreted article 7 to require that an accused be "tri[ed] within a reasonable time or be released." Afr. Comm'n on Human and Peoples' Rights Res. 4(XI)92, ¶ 2(c), OAU Doc. ACHPR/Res.4(XI)92 (Mar. 9, 1992).

26. The Magna Carta, for example, is often cited as one of the earliest instruments to recognize personal liberty interests. It does this repeatedly, but only insofar as it calls for due process and condemns the deprivation of liberty interests in the absence of a lawful judgment. See, e.g., Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 597 (2009).

27. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 211-12 (2d ed. 2005).

B. *Detention as an Exceptional Measure*

Notably, the plain language regarding release, as set out in all three of the instruments noted above, could give rise to the argument that a right to release exists solely as part of an “either/or” proposition: all three documents appear to describe release as a mutually exclusive alternative to “trial within a reasonable time.”²⁸ Despite this possibility, jurisprudential interpretation of the European provision has proved more generous than an ordinary meaning analysis.²⁹ Moreover, the language that comprises the relevant subarticle in the ICCPR is more expansive than its regional counterparts in that it also affirmatively recognizes that “it shall not be the general rule that persons awaiting trial shall be detained in custody.”³⁰ Merely because this sentiment appears in just one of the three documents does not discredit its import; the ICCPR is “the most useful as the product of long deliberation by a wide cross-section of States.”³¹ Notably, this avowed preference for release, in conjunction with the phrase that follows it, was acknowledged by its creators as one that “implicitly concede[s] . . . the right of a person charged with an offence to be released on bail.”³² This represented a strong step forward from a human rights perspective as, at the time of the final draft in 1958, the right to pretrial release was not universally recognized.³³

28. ACHR, *supra* note 25, art. 7(5) (“Any person detained . . . shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings.”); ICCPR, *supra* note 23, art. 9(3) (providing that “Anyone arrested . . . shall be entitled to trial within a reasonable time or to release”); ECHR, *supra* note 24, art. 5(3) (requiring reasonable suspicion for arrest or detention and providing that persons so held are entitled to trial within a reasonable time or release pending trial).

29. *E.g.*, *Neumeister v. Austria*, 8 Eur. Ct. H.R. (ser. A) at 37 (1968) (determining that the relevant “provision does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release—even subject to guarantees”).

30. ICCPR, *supra* note 23, art. 9(3); *see also* *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo, ¶ 36 (Aug. 14, 2009) (“[D]eprivation of liberty should be an *exception* and not a rule.”).

31. David Harris, *The Right to a Fair Trial as a Human Right*, 16 INT’L & COMP. L.Q. 352, 353 (1967).

32. *Report of the 3rd Committee of the General Assembly* § 56, 1958 Y.B. on H.R. 205, U.N. Doc. A/4045 [hereinafter *Report of the 3rd Comm.*]; *see* NOWAK, *supra* note 27, at 234 (remarking that the provision gives rise to an “*indirect entitlement to release from pretrial detention in exchange for bail or some other guarantee*”).

33. *Report of the 3rd Comm.*, *supra* note 32, § 56.

C. *Presumption of Innocence*

In addition, the presumption of innocence, one of the core components of due process,³⁴ assumes an important role in relation to pretrial release. The right to interim release has been regarded as “an accoutrement of the presumption of innocence,”³⁵ a “method of accommodating” the principle,³⁶ and a “manifestation” of the presumption.³⁷ The connection between these two concepts is, of course, very fitting: if a person is presumed innocent with regard to the charges filed against him, why should he be required to forfeit his liberty interests prior to conviction?³⁸

1. Pretrial Applicability

One cannot assume, however, that a presumption of innocence will necessarily be applied in the pretrial stages. For some, the presumption of innocence is neither so broad in scope nor so far-reaching in its effect. In this vein, the argument has been advanced that the presumption is an evidentiary principle, and, as such, should be limited to the trial phase. From this perspective, the presumption “does not mean that those who discharge executive or administrative functions *prior* to trial should be bound to act as though the suspect had behaved, and would, pending trial, behave as a law-abiding citizen.”³⁹ Given that opinions on the matter are not uniform, it may be helpful to turn to the history of bail, keeping in mind the presumption of innocence particularly, and to monitor its evolution in that vein.

34. *See id.* (“The principle of the presumption of innocence was considered so important that it was thought advisable to express it [in the ICCPR] in a separate paragraph.”)

35. Patricia Wald & Jenny Martinez, *Provisional Release and the ICTY: A Work in Progress*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD* 231, 231 (Richard May et al. eds., 2001).

36. Re S, (2005) 157 A. Crim R. 451, 452 (Austl.).

37. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 95 (2d ed. 2004).

38. As one author recognizes, “[I]f the presumption of innocence is to have substantive meaning, the scope and cost of pretrial sanctioning should be minimized for the maximum number of defendants.” ROY B. FLEMMING, *PUNISHMENT BEFORE TRIAL: AN ORGANIZATIONAL PERSPECTIVE OF FELONY BAIL PROCESSES* 2 (1982).

39. T.B. Smith, *Scotland: Bail Before Trial: Reflections of a Scottish Lawyer*, 108 U. PA. L. REV. 305, 309 (1959) (emphasis added).

The opportunity for pretrial release finds its roots in the common law and can be traced back to at least the eleventh century.⁴⁰ Yet whether its construction can be attributed in any meaningful way to the presumption of innocence is far from clear. At the time that bail was established, England's system of justice was rudimentary at best and accused individuals faced lengthy periods of incarceration prior to the resolution of the charges against them.⁴¹ This is the rationale that provided for the inception of bail, as reported by Sir James Stephen in his influential nineteenth-century work on the history of criminal law in England.⁴² Whether the presumption of innocence principle had a place in English law at that time is uncertain.⁴³ Nevertheless, at least one court has interpreted Stephen's account of bail's formation as owing to the presumption of innocence.⁴⁴

To be fair, a trace of the "golden thread" is arguably implicit in Stephen's observation that, in the absence of an opportunity for release, "arrest meant imprisonment without preliminary

40. See, e.g., JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 234 (London, MacMillan 1883) (tracing the history of the law of bail to the onset of the reign of King Edward I).

41. *Id.* at 233. Stephen writes:

When the administration of justice was in its infancy, arrest meant imprisonment without preliminary inquiry till the sheriff held his tourn at least, and, in more serious cases, till the arrival of the justices, which might be delayed for years, and it was therefore of the utmost importance to be able to obtain provisional release from custody.

Id.

42. *Id.* 233–34; cf. Smith, *supra* note 39, at 309 (asserting that "[t]he considerations which would justify the granting or refusing of bail in the 20th century are not necessarily identical with those of the 18th century when executive and judicial arrangements were less efficient, and when prison conditions in general were appalling").

43. The origin of the presumption is a matter of debate among scholars and may be discerned by numerous mechanisms. For a discussion on the issue, along with an assertion that the presumption was created and developed "in two parallel and independent routes in continental Europe and Anglo-American law," see Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 259–63 (2002).

44. See *Webster v. S. Austl.* (2003) 87 S.A. St. R. 17, 37. That Stephen himself would not draw the same conclusion seems plain; his limited commentary on the presumption of innocence reveals that he subscribed to the narrow view of the principle noted above. He attributes the creation of the presumption as owing, "to a considerable extent, [to] the extreme severity of the old criminal law, and even more to the capriciousness of its severity and the element of chance . . . introduced into its administration." STEPHEN, *supra* note 40, at 439.

inquiry,”⁴⁵ or perhaps might be inferred from the practice of release itself.⁴⁶ However a correlation between bail and the presumption of innocence is seemingly refuted in later Scottish jurisprudence. In *H.M. Advocate v. M’Glinchey*, a 1921 case that reached Scotland’s High Court of Justiciary, the court attributes the creation of bail to the fact that, prior to its inception, accused persons “had no efficient protection against prolonged incarceration before their case was brought to trial.”⁴⁷ Perhaps as a consequence of its perception of pretrial release as conceived solely to avoid prolonged pretrial imprisonment, that court opted “not to treat the matter as a question of [the] presumption [of innocence]” in rendering its bail determination.⁴⁸

A subsequent Scottish case cited *M’Glinchey* with approval to reject the proposition that the presumption of innocence plays a role in bail determinations. As an absolute application of the presumption would necessitate that every accused be afforded pretrial release, the Scottish High Court found no place for it in matters of granting bail.⁴⁹ Yet, as time passed and the right to a fair trial evolved,⁵⁰ so too did the assessment of release applications. While acknowledging that an absolutist view of the presumption of innocence would obviate the need for bail determinations, subsequent Scottish jurisprudence recognized the presumption as “one of the competing factors” in considering release,⁵¹ an approach mirrored in present day assessments by English courts.⁵²

45. STEPHEN, *supra* note 40, at 233.

46. Indeed, one academic avers that the presumption of innocence can found in ancient Hebrew law, citing the fact that the presumption was embodied in the then applicable law of detention, although “not referred to specifically.” Kitai, *supra* note 43, at 261 & n.17.

47. *H.M. Advocate v. M’Glinchey*, 1921 J.C. 75 (Scot.).

48. *Id.* at 102.

49. *McLeod v. Wright*, [1959] J.C. 12, 14 (Scot.). Of course, the chink in the armor of this argument ought to be somewhat readily apparent: the same rationale could equally be called upon to obviate the need for pretrial investigations and, indeed, trial proceedings themselves. The end result of interpreting the presumption in such a way would, in effect, negate the possibility of criminal proceedings in their entirety. Indeed, “[p]rohibiting an investigation and trial because the guilt of the accused has not yet been proven beyond a reasonable doubt would prevent any possibility of refuting the presumption of innocence and enforcing the criminal law.” Kitai, *supra* note 43, at 289.

50. See generally Harris, *supra* note 31.

51. *Smith v. M.*, 1982 J.C. 67, 69.

52. See, e.g., *R. v. Crown Court at Harrow* [2003] EWHC 868, *aff’d* [2006] UKHL 42, [2007] 1 A.C. 249 (appeal taken from Eng.).

In what can only be dubbed a counter-trend, however, the concept of the nonexistence of the presumption in the pretrial phase remains alive and well in the domestic jurisprudence of the United States. Indeed, even as continental systems—long known for limiting the application of the principle to trial⁵³—have begun to take a more expansive view of the presumption,⁵⁴ the U.S. Supreme Court has averred that the principle “has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”⁵⁵ This paradigm (backward) shift in U.S. jurisprudence is one that rightly was interpreted as setting the stage for a “substantial inversion” of the presumption of innocence.⁵⁶ As a result, the United States subsequently set in place a bail act deemed by the late Justice Marshall as “an abhorrent limitation on the presumption of innocence”⁵⁷—an act that has fostered an abundance of scholarly⁵⁸ and media criticism.⁵⁹

Illustrative of the fact that this narrow interpretation has not gone entirely out of style in jurisdictions other than the United

53. “While many, if not most, of the civil law countries provide for the principle of the presumption of innocence, they limit its application to protection for the accused at trial.” Louis M. Natali, Jr. & Edward D. Ohlbaum, *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 *TEMPLE L. REV.* 1225, 1228–29 & n.26 (1989) (citing the 1964 codification of C. PR. PÉN. art. 137–50 (Fr.)).

54. As of 2000, article 137 of the French Code of Criminal Procedure specifically cites the pretrial applicability of the presumption of innocence:

La personne mise en examen, présumée innocente, reste libre. Toutefois, en raison des nécessités de l’instruction ou à titre de mesure de sûreté, elle peut être astreinte à une ou plusieurs obligations du contrôle judiciaire. Lorsque celles-ci se révèlent insuffisantes au regard de ces objectifs, elle peut, à titre exceptionnel, être placée en détention provisoire.

C. PR. PÉN art 137 (2000). It has also recently been argued that, from a continental perspective, the presumption can be deemed a vital aspect of the pretrial stage as it may be interpreted as mandating a thorough and neutral enquiry. Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 *INT’L & COMP. L.Q.* 781, 791 (2002).

55. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

56. Jean Koh Peters, *Schall v. Martin and the Substantial Transformation of Judicial Precedent*, 31 *B.C. L. REV.* 641, 692 (1990) (maintaining that the “logical extension of the current trend leads to a system in which wrongly detained, unconvicted defendants will suffer a significant loss of liberty until proven innocent”).

57. *United States v. Salerno*, 481 U.S. 739, 761–64 (1987) (Marshall, J., dissenting).

58. See, e.g., Peters, *supra* note 56; M. Gray Styers, *United States v. Salerno: Pretrial Detention Seen Through the Looking Glass*, 66 *N.C. L. REV.* 616 (1988); LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence—A Brief Commentary*, 37 *CLEV. ST. L. REV.* 393 (1989).

59. See, e.g., *Dangerous Until Proven Innocent*, *N.Y. TIMES*, May 28, 1987, at A22; *Made in Which USA?*, *ST. PETERSBURG TIMES (Fla.)*, May 30, 1987, at 14A.

States, however, numerous observers, and evidentiary scholars in particular, have equated the principle solely with the burden of proving guilt beyond a reasonable doubt.⁶⁰ A similar argument was somewhat recently advanced by a respondent state before the European Court of Human Rights (“European Court”).⁶¹ Although the European Court did not entertain the assertion, it is likely safe to conclude that such an approach would not be endorsed, as that court has repeatedly recognized the relevance of the principle in its assessment of pretrial detention.⁶² In fact, the presumption of innocence has been dubbed the “Strasbourg starting-point” when bail determinations are at issue.⁶³

Indeed, this approach is the proper one, recognizing the fact that, regardless of the thoughts that accompanied bail’s creation, the presumption of innocence has come to be the “*raison d’être*” of the right to pretrial release.⁶⁴ Moreover, to disregard the presumption in the pretrial phase is to eliminate, at a crucial stage, a guiding principle designed to secure a necessary level of political morality and protection of human dignity.⁶⁵ Viewed in this manner, a comprehensive rather than constricted interpretation of the principle is called for, ensuring that the application of the presumption in later stages of the criminal

60. See Kitai, *supra* note 43, at 258 n.11. Indeed, Cassese asserts that the presumption’s principal meaning relates to the prosecutorial assignment of the burden of proof in criminal trials and, frequently, the standard of proof that must be met in fulfilling that burden and that the principle only “generally impl[ies] that an accused should remain at liberty unless and until he is convicted” Antonio Cassese, *The International Criminal Tribunal for the Former Yugoslavia and Human Rights*, 4 EUR. HUM. RTS. L. REV. 329, 334 (1997).

61. See the arguments of (ironically) the British government as noted in *Togher v. United Kingdom*, App. No. 28555/95, 25 Eur. H.R. Rep. 99 (1998), *reprinted in* 1998 EUR. HUM. RTS. L. REV. 636.

62. For example, the court has observed that, in determining whether the pretrial detention of an accused person has exceeded a reasonable time, national judicial authorities “must examine all the circumstances arguing for or against the existence of a genuine requirement of public interest justifying, *with due regard to the principle of the presumption of innocence*, a departure from the rule of respect for individual liberty” *Clooth v. Belgium*, 225 Eur. Ct. H.R. (ser. A), at 12 (1991) (emphasis added); *see also Kemmache v. France*, 218 Eur. Ct. H.R. (ser. A), at 20 (1991); *Calleja v. Malta*, App. No. 75274/01, Eur. Ct. H.R. ¶ 99 (2005), *available at* <http://www.echr.coe.int/echr/en/hudoc>.

63. Ian Dennis, *Bail and Human Rights*, 2000 CRIM. L. REV. 69, 69 (2000) (assigning the same prominence to the right to liberty).

64. *See* Canadian Supreme Court in *R v. Hall*, [2002] 3 S.C.R. 309, 370, 2002 SCC 64, at [96] (Iacobucci et al., dissenting).

65. Kitai, *supra* note 43, at 272–73.

process is neither compromised nor undermined by the treatment that has taken place beforehand.⁶⁶ Accordingly, the U.S. Supreme Court lost its way on this matter under the Rehnquist Court, having earlier gotten the issue right in regards to access to pretrial release and the presumption:

This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.⁶⁷

2. Presumption of Innocence and Bail Jurisprudence

Accepting, then, the pretrial applicability of the presumption of innocence, and noting its consequent relationship with pretrial release, one would assume that an evaluation of the presumption would serve as the backbone of the assessment undertaken in this Article. Yet, from a jurisprudential standpoint, relevant case law is far from abundant; this is partially explained by Nowak's apt observation that "allegations of a violation of the right to be presumed innocent are . . . difficult to prove in practice."⁶⁸

Another complication is that the presumption of innocence exists not only as a singular right, but also as a catalyst for a number of other aspects of a fair trial.⁶⁹ As such, it is likely to be

66. See, e.g., SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 84–85 (2003) (advocating for the broad application of the presumption, covering all situations in the criminal process, including the investigatory (precharge) phase and averring that the principle "should affect the overall *treatment of the individual*").

67. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

68. NOWAK, *supra* note 27, at 331. A rare exception to this remark can be seen in a case brought before the European Court of Human Rights in which two accused successfully waged claims asserting a violation of the presumption of innocence. The men, although acquitted, were denied compensation for their pretrial detention on the basis that they would have been convicted had their indictments included a lesser, related charge. *Del Latte v. Netherlands*, App. No. 44760/98, 41 Eur. H.R. Rep. 176 (2005); see also *Sekanina v. Austria*, 266 Eur. Ct. H.R. (ser. A) (1994).

69. See U.N. Human Rights Comm. [HRC], *General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art.14)*, at 143, U.N. Doc. CCPR/C/21/Add.3 (Apr. 13, 1984) (commenting that the presumption of innocence dictates that "[n]o guilt can be presumed until [a] charge has been proved beyond a reasonable doubt" and that "the presumption . . .

considered in conjunction with, or in part affecting, an alternative right. In this regard, the general rule of release required by ICCPR article 9(3) is seen as “articulating” the presumption by casting pretrial release as the norm⁷⁰ and, indicative of the fluid relationship between the two rights, the presumption has been deemed to generally embody the right to liberty.⁷¹

At the same time, regional case law has rightly recognized that the presumption of innocence may well be inverted in cases of unreasonably prolonged pretrial detention. For instance, the Inter-American Commission of Human Rights has found that the presumption “becomes increasingly empty and ultimately a mockery when pretrial imprisonment is prolonged unreasonably.”⁷² This same position was later endorsed by the Human Rights Committee. In *Cagas v. Philippines*, the Committee stated that excessive pretrial detention affects the right to be presumed innocent and found a violation of the right because the accused had endured a period of pretrial detention that lasted for nine years.⁷³

While the Committee did not elaborate upon its conclusion, it remains a beneficial exercise to consider why the presumption of innocence is affronted in such a case and, correspondingly, why similar violations are absent in periods of shorter pretrial detention. Put differently, the query raised relates to the manner in which the varying temporal element sets the two types of cases apart. Possibly, it is the sheer fact that extended periods of incarceration simply fail to rest comfortably alongside the notion

implies a right to be treated in accordance with this principle.” (emphasis added)), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 184, U.N. Doc. HRI/GEN/1/Rev.9(Vol.I); see also DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 405 (1994) (“This broad approach to the presumption of innocence is to be welcomed . . .”).

70. Human Rights Watch, Excessive Pretrial Detention, <http://www.hrw.org/legacy/advocacy/prisons/pretrial.htm> (last visited Apr. 7, 2010).

71. See *R v. Hall*, [2002] 3 S.C.R. 309, 2002 SCC 64, at [48] (Can.).

72. *Giminez v. Argentina*, Case 11.245, Inter-Am. C.H.R., Report No. 12/96, EA/Ser.L/V/II.91, doc. 14 ¶ 80 (1996).

73. HRC, *Communication No. 788/1997: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Cagas v. Philippines)*, ¶ 7.3, U.N. Doc. CCPR/C/73/D/788/1997 (Jan. 31, 2002) (specifying that it was the length of incarceration, rather than the initial denial of bail, that violated the presumption).

of presumed innocence—to claim the latter in the face of the former simply fails to pass the “straight face test.” Alternatively, perhaps it is the fact that, regardless of claims to the contrary, longer-term incarceration invariably crosses the line from an administrative necessity to outright punishment.⁷⁴

The jurisprudence of the Inter-American Court of Human Rights alludes to this argument by noting the incongruity of imposing “the severe penalty of the deprivation of liberty which is legally reserved for those who have been convicted,” upon those who are presumed innocent.⁷⁵ Accordingly, that court has advanced its discussion of the relevance of the presumption of innocence in cases of pretrial detention by holding that it is only permissible when strictly necessary.⁷⁶ To allow otherwise would be the equivalent of conferring upon an accused a sentence in advance of conviction.⁷⁷

The strict necessity requirement is endorsed here and, as a consequence, it is submitted that courts must carefully assess punitive and nonpunitive distinctions when they are made.⁷⁸ Failure to do so arguably invites governments to engage in a game of semantics, wherein the rhetoric of administration and regulation may well render the presumption of innocence void of its meaning in the pretrial context.⁷⁹ It is therefore insufficient that the relevant law can be said to have, or give lip service to, a nonpunitive purpose. This nonpunitive purpose must be established in the case at hand.

Moreover, for pretrial detention to comply with the presumption of innocence in a given case, the “nonpunitive” purpose that supports detention must be one that relates to the integrity of the judicial process. Such constraints ensure a fair

74. See FLEMMING, *supra* note 38, at 2 (“Punishment before trial . . . shares the same features as sentencing following conviction.”).

75. Giminez v. Argentina, Case 11.245, Inter-Am. C.H.R., Report No. 12/96, EA/Ser.L/V/II.91, doc. 14, ¶ 80 (1996), available at <http://wwwl.umn.edu/humanrts/cases/1996/argentina12-96.htm>.

76. See Suárez-Rosero v. Ecuador, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, ¶ 77 (Nov. 12, 1997).

77. See *id.* Although its discussion does not reference the presumption specifically, the European Court of Human Rights has likewise noted that invalid pretrial detention may (impermissibly) equate to anticipatory punishment. Letellier v. France, 207 Eur. Ct. H.R. (ser. A), at 21 (1991).

78. Similarly, as to arbitrary detention, see *infra* Part III.D.

79. See, e.g., *Leading Cases*, 101 HARV. L. REV. 119, 175–76 (1987).

and effective system of justice by requiring the presence of the accused at trial⁸⁰ and by providing a safeguard against witness and evidence tampering so that “the judicial process be free from prejudicial influences.”⁸¹ By contrast, pretrial detention that is designed to prevent an accused from committing a crime while released (other than one affiliated with interfering with the course of justice in the matter at hand) is a patent violation of the presumption.⁸² In sum, a broad and positive notion of the presumption of innocence is necessary.⁸³

II. NUREMBERG AND TOKYO—AN ABSENCE OF PRECEDENT

Despite the noted importance of liberty interests and the presumption of innocence, the right to release did not exist at the international tribunals that preceded the ICTY. As such, the practice and procedure employed at Nuremberg⁸⁴ and Tokyo⁸⁵ provide no workable precedent with regard to issues of liberty and detention.⁸⁶ Instead, the exercise of each of these post World War II tribunals does little more than highlight the fact that there then existed a real lacuna regarding defendants’ rights in this area of law. In contrast to normally acceptable procedure

80. See Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 404 (1970). Due process issues may be raised with regard to trials *in absentia*. See *Concerning the Arrest Warrant of 11 April 2000* (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121, ¶ 56 (Feb. 14) (joint separate opinion of Judges Higgins, Koojimans & Buergenthal) (“If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial . . .”).

81. Thomas C. French, *Is it Punitive or is it Regulatory? United States v. Salerno*, 20 U. TOL. L. REV. 189, 221 (1988).

82. French, like others before him, likens this situation to the experiences of Alice in Wonderland. French, *supra* note 81, at 219 (“[T]here’s the King’s Messenger. He’s in prison now, being punished: and the trial doesn’t even begin till next Wednesday: and of course the crime comes last of all. ‘Suppose he never commits the crime?’ said Alice. ‘That would be all the better, wouldn’t it?’ the Queen said.” (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 88 (1902))).

83. See Kitai, *supra* note 43, at 281–82 (describing a positive notion of the presumption as one that involves a partnership between the citizen and the state).

84. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

85. Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, April 26, 1946, 4 U.S.T. 27, 4 Bevans 20.

86. See, e.g., ZAPPALA, *supra* note 66, at 21 (noting the absence of both the right to provisional release and the right to remain silent at the tribunals following World War II).

with regard to detention, and owing to the then-existing circumstances, many defendants were taken into custody prior to the creation of the two military tribunals, let alone the issuance of indictments.⁸⁷ The incorporation of provisions that ensured respect for the liberty rights of those accused was most likely unthinkable at the time; with but one exception, pretrial detention was the rule for all accused.⁸⁸

Yet great strides in international human rights law came about in the period following the Second World War. Liberty standards advanced almost immediately with the adoption of the Universal Declaration of Human Rights in 1948,⁸⁹ and the rights of accused persons, in particular the right to liberty and the right to be free from arbitrary arrest and detention, were both recognized and refined over the fifty years that followed.⁹⁰ As a consequence, by the late twentieth century, at the time of the creation of the ICTY, international and regional human rights law regimes dictated the right to remain at liberty as the rule and pretrial detention the exception.⁹¹

87. *See id.* at 67.

88. *See* Salvatore Zappala, *Rights of Persons during an Investigation*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1181, 1186 (Antonio Cassese et al. eds., 2002) (observing, “it seems there was no chance to argue for provisional release”). Zappala notes that only one Nuremberg defendant, Gustav Krupp Van Bohlen, escaped pretrial detention. *Id.* n.10. Owing to Van Bohlen’s mental condition, the Tribunal granted his counsel’s request to indefinitely postpone the proceedings against him. 2 NUREMBERG TRIAL PROCEEDINGS 20 (Nov. 15, 1945).

89. Universal Declaration of Human Rights, G.A. Res. 217A, art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Everyone has the right to life, liberty and security of person.”).

90. *See, e.g.*, Zappala, *supra* note 66, at 1186–90 (explaining that the terse provisions found in the Universal Declaration of Human Rights “were the cornerstone for the subsequent codification of more detailed norms”).

91. *See, e.g.*, ACHR, *supra* note 25, art. 7(5) (establishing that anyone detained “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings”); ICCPR, *supra* note 23, art. 9(3) (“It shall not be the general rule that persons awaiting trial shall be detained in custody”); ECHR, *supra* note 24, art. 5(3) (requiring reasonable suspicion for arrest or detention and providing that persons so held are entitled to trial within a reasonable time or release pending trial). *See generally*, Christopher Lehmann, *Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post-Soviet Legal Systems*, 13 HARV. HUM. RTS. J. 191, 210 (2000) (noting the article’s silence as to the principle of proportionality and the absence of any requirement besides reasonable suspicion, such as risk of flight, but observing that the jurisprudence of the European Court of Human Rights has shored up some of these weaknesses). Lehmann states, “[i]f anything, the standards provided by Article 5 of the European Convention on Human Rights fall short of the

III. PRETRIAL RELEASE AT THE ICTY

Had the norm that pretrial detention is an exceptional measure been expressly incorporated into the statute of the tribunal, the ICTY's pretrial release regime would obviously have had to conform to its parameters. However, the ICTY Statute, which dictates that indicted persons are to be taken into custody pursuant to a warrant or order,⁹² makes no reference to pretrial release. Thus, the tribunal's judges, charged with the task of "adopt[ing] rules of procedure and evidence for the conduct of the pretrial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters,"⁹³ were left to address the issue of release as they saw fit. Remarkably, for some of the judges, this meant that the issue of release need not be addressed at all.

A. *Mechanism for Pretrial Release: Obligatory or Optional?*

Initially, some members of the tribunal ascribed to the point of view that pretrial release was an unnecessary facet for the administration of justice on the basis of the expectation that trials would proceed quickly;⁹⁴ others believed that the possibility for release ought not to exist, given that the crimes within the tribunal's jurisdiction⁹⁵ "were akin to murder or other crimes for which most [domestic] judicial systems would not allow bail anyway."⁹⁶ Experience, of course, has proved the former view groundless.⁹⁷ It remains a worthwhile endeavor, however, to address the latter issue before moving forward.

common Western norm, and of the specific performance provided in many Western nations." *Id.*

92. ICTY Statute, *supra* note 3, art. 20.

93. *Id.* at art. 15.

94. Indicative of the fact that, contrary to the jurisprudence of the European Court of Human Rights, the right to release was viewed by some judges as an alternative to "trial within a reasonable time." *See supra* note 29 and accompanying text.

95. *See* ICTY Statute, *supra* note 3, arts. 2–5 (conferring jurisdiction to adjudicate grave breaches of the Geneva Conventions, violations of certain laws or customs of war, genocide, and crimes against humanity).

96. Wald & Martinez, *supra* note 35, at 232.

97. *See, e.g.,* Dominic Raab, *Evaluating the ICTY and its Completion Strategy—Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 J. INT'L CRIM. JUST. 82, 84 (2005) (observing that ICTY proceedings have been slow and have given rise to "concerns about efficiency and the length of pretrial detention"); Alex Whiting, *In*

1. Severity of the Crimes

It is beyond dispute that those charged with egregious crimes in domestic systems generally do not enjoy pretrial release. Yet it is incorrect to assume that, as a consequence, it might be appropriate for a U.N. tribunal to assert that the types of crimes within the ICTY's jurisdiction automatically preclude any form of pretrial release. Such an approach would contradict the standards developed by the U.N. Human Rights Committee in the municipal realm⁹⁸ and, accordingly, would not be representative of "enlightened justice."⁹⁹ Of equal import, the denial of the right to release based solely upon the nature of the crime charged would fail to contribute to a human rights regime and thus would be an erroneous act on the part of the tribunal.

The case law of the European Court makes clear that legislation that removes judicial discretion in release considerations fails to meet established standards of fair trial. Such was the situation with regard to section 25 of the United Kingdom's Criminal Justice and Public Order Act 1994,¹⁰⁰ which precluded the possibility of pretrial release for those charged with one in a list of enumerated crimes if previously convicted of one of those crimes. In first addressing the matter, the European Court of Human Rights merely accepted the government's concession that the municipal provision was incompatible with article 5(3) of the convention.¹⁰¹ As explained by the opinion of the now defunct European Commission, attached in full to the court's decision, the relevant subarticle requires that the judicial figure before which an accused appears must have the authority

International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered, 50 HARV. INT'L L.J. 323, 323-34 (2009).

98. See, e.g., U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *Concluding Observations of the Human Rights Committee: Mauritius*, ¶ 15, U.N. Doc. CCPR/CO/83/MUS (Apr. 27, 2005) (noting "with concern that bail is not allowed under the Dangerous Drugs Act 2000 for persons arrested or held in custody for sale of drugs").

99. William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 516 (1997).

100. Criminal Justice and Public Order Act, 1994, c. 33, § 25 (U.K.).

101. *Caballero v. United Kingdom*, 2000-II Eur. Ct. H.R. 45, 54; see also ECHR, *supra* note 24, at art. 5(3) ("Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.").

to order his release.¹⁰² The guarantee afforded by the provision is that there will be judicial consideration of the facts of his case “which militate for and against the continuation of pre-trial detention.”¹⁰³

In the later decision of *S.B.C. v. the United Kingdom*, section 25 was again the subject of complaint, and the U.K. government for a second time conceded its nonconformity with article 5(3).¹⁰⁴ In this matter, the court provided a more substantive analysis, adopting full-scale the views of the European Commission:

[J]udicial control of interference by the executive with an individual’s right to liberty [is] an essential feature of the guarantees embodied in Article 5(3), the purpose being to minimise the risk of arbitrariness in the pre-trial detention of accused persons. Certain procedural and substantive guarantees ensure that judicial control: the judge (or other officer) before whom the accused is “brought promptly” must be seen to be independent of the executive and of the parties to the proceedings; that judge, having heard the accused himself, must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused’s liberty, and that judge must have the power to order an accused’s release [A] removal of the judicial control of pre-trial detention required by Article 5(3) of the Convention was found by the Commission to amount to a violation of that Article The Court sees no reason to disagree with the conclusions reached by the Commission¹⁰⁵

Thus, the absolute ban on the grant of release for a particular class of accused violates article 5(3) of the ECHR¹⁰⁶ and, arguably, the corresponding provision in the ICCPR that

102. *Caballero*, 2000-II Eur. Ct. H.R. at 68 (attaching the merits section of the Commission’s opinion in full).

103. *Id.*

104. *S.B.C. v. United Kingdom*, App. No. 39360/98, 34 Eur. H.R. Rep. 619, 623 (2002).

105. *Id.* at 624–25.

106. *See Ilijkov v. Bulgaria*, 2001 Y.B. Eur. Conv. On H.R. 98 (Eur. Court of H.R.). (“Any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention”), as reprinted in 12 HUM. RTS. CASE DIGEST 597 (2001).

equally necessitates judicial supervision of deprivations of liberty.¹⁰⁷ In addition, detention absent a showing of reasonable necessity gives rise to the possibility of arbitrary detention,¹⁰⁸ in violation of article 9(1) of the ICCPR.¹⁰⁹ The relevance of these instruments, which form part of public international law, is particularly cogent at the ICTY, where at least one trial chamber has averred that “no distinction can be drawn between persons facing criminal procedures in their home country or on an international level.”¹¹⁰

2. Relevance of International and Regional Jurisprudence to the Tribunal

Of course, the inaugural members of the ICTY were no more required to incorporate the mandates of international and regional human rights bodies in their proposed rules of procedure and evidence¹¹¹ than they would when applying the provisions of the tribunal’s statute and rules.¹¹² Nevertheless,

107. ICCPR, *supra* note 23, art. 9(3) (“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release . . .”).

108. See HRC, *Communication No. 1128/2002: Views of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights (Marques de Morais v. Angola)*, ¶ 6.1, U.N. Doc. CCPR/C/83/D/1128/2002 (Mar. 29, 2005) (“[T]he notion of ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but *reasonable and necessary in all the circumstances*, for example to prevent flight, interference with evidence or the recurrence of crime.” (emphasis added)). This issue is discussed in greater detail *infra* Part III.D.

109. ICCPR, *supra* note 23, art. 9(1) (“No one shall be subjected to arbitrary arrest or detention . . .”).

110. Prosecutor v. Blagojević, Case No. IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokić, ¶ 15, (Mar. 28, 2002). Conversely, the importance of the ICCPR and relevant regional instruments has been sidelined by others, owing to the fact that the ICTY exclusively deals with serious crimes. See, e.g., Fergal Gaynor, *Provisional Release at the International Criminal Tribunal for the former Yugoslavia*, in *THE LEGAL REGIME OF THE ICC: ESSAYS IN HONOUR OF PROF. I.P. BLISHCHENKO* (Jose Doria et.al. eds., 2009).

111. Excepting, of course, those elements incorporated in the ICTY’s statute, such as the aspects of ICCPR article 14 that appear in articles 21 and 20 of the ICTY and ICTR statutes, respectively.

112. See Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 27 (Aug. 10, 1995) (concluding that the interpretations of other judicial bodies are of “limited relevance” given their separate legal frameworks and the unique context of the tribunal). This

numerous members, according to Judge Wald, saw the importance of ensuring that the rules conformed to the provisions of the ECHR.¹¹³

Although the rationale for this desire was never provided, it can be speculatively attributed to a number of different factors. First, a unique aspect of the ICTY is that it draws upon international human rights law.¹¹⁴ In light of this seminal trait, and the fact that the ICTY renders justice in Europe on matters involving European citizens, it is certainly a reasonable aim to have the practice of the ICTY reflect the human rights standards of the region.¹¹⁵ Moreover, if the practice of the ICTY were seen to be noncompliant with established human rights standards, it would not only call into question the validity of the tribunal's proceedings but could also "set [the progress made in] human rights back decades."¹¹⁶ Finally, it was also incumbent upon the ICTY judiciary, when drafting the rules that would govern its function, to act in accordance with the proclamation of the U.N. Secretary-General that "the International Tribunal must fully respect internationally recognized standards *at all stages* of its proceedings."¹¹⁷ Indeed, the jurisprudence of the ICTY has expressly recognized that "[a]s a Tribunal of the United Nations, the ICTY is committed to the standards of the ICCPR" and that "the inhabitants of member states of the United Nations enjoy the fundamental freedoms [delineated therein] within the framework of a United Nations court."¹¹⁸

position, of course, has altered over time such that the joint Appeals Chamber of the ICTY and ICTR later noted that the international and regional human rights documents and their related jurisprudence hold "persuasive authority" in the decision-making of the tribunals. *Barayagwiza v. Prosecutor*, Case No. ICTR-97-I-AR72, Decision, ¶ 40 (Nov. 3, 1999).

113. See Wald & Martinez, *supra* note 35, at 232–33.

114. See Schabas, *supra* note 99, at 514.

115. The relevance of this is highlighted in the jurisprudence of the tribunal. See, e.g., *Blagojević*, Decision on Request for Provisional Release of Accused Jokić, ¶¶ 14–15 (noting that the ICTY is entrusted to bring justice to a part of Europe, that parts of the former Yugoslavia are now party to the European Convention on Human Rights and that all inhabitants of the states of the former Yugoslavia are entitled to equal treatment regardless of membership in the Council of Europe).

116. Schabas, *supra* note 99, at 516.

117. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), ¶ 106, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) (emphasis added).

118. *Blagojević*, Decision on Request for Provisional Release of Accused Jokić, ¶ 13. Similarly, the idea of turning to the jurisprudence of the U.N. Human Rights Committee

Despite this, the argument remains that the distinctive setup of the ICTY should dictate a practice different from that which is mandated on the domestic level by human rights regimes. In this regard, it is submitted that such a discussion should not revolve around the “institutional shortcomings” of the ICTY,¹¹⁹ but rather whether its framework is one that obviates the need for that which is dictated in the municipal sphere. This is a relevant consideration, particularly when the interpretation at issue relies upon the separation of powers, as the construct of the tribunal does not conform to this standard. Yet, despite the fact that the judges of the ICTY straddle the legislative and judicial branches, the prosecution clearly embodies a separate executive branch in the tribunal’s “primarily adversarial system.”¹²⁰ As follows, it is submitted that this is a pivotal factor in determining the relevance of the rationale provided by the European Court in *S.B.C. v. United Kingdom* as it relates to the practice of the Tribunal.

In *S.B.C. v. United Kingdom*, the court deemed it imperative that systems of justice include the safeguard of judicial review when an act of the executive branch impinges upon the liberty interests of an individual.¹²¹ Judicial review, it noted, reduces the risk of arbitrary detention.¹²² This is effectively accomplished by the examination of all of the evidence, including that put forth by the accused, while maintaining independence from both the executive branch and the parties.

One can readily see a place for this line of argument when assessing the activity of a common law system, such as that of the United Kingdom. In such systems, investigations are initiated and conducted by the prosecutor (an interested party in the proceedings), charges are contained in an indictment, and suspects are generally not permitted to contest evidence prior to

for guidance has trickled over to the ICTR as a result of the tribunals’ shared Appeals Chamber. *See, e.g.,* *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment of the Appeals Chamber, ¶ 1 (May 20, 2005) (Pocar, J., dissenting) (concluding that article 24 of the ICTR Statute must be read in conformity with article 14(5) of the ICCPR).

119. Examples of this include the fact that the ICTY does not have its own police force and that it is located at a distance from the conflict. These matters are considered further in a different context, *infra* Parts III.E, IV.

120. *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Judgment, ¶ 2 (Dec. 17, 2004).

121. *S.B.C. v. United Kingdom*, App. No. 39360/98, 34 Eur. H.R. Rep. 619, 624 (2002).

122. *See id.*

trial.¹²³ This approach lies in stark contrast to comparable continental procedures, which utilize an impartial magistrate (or some other sort of neutral oversight) in the investigatory stage and allow the opportunity for the target of an investigation to be heard prior to the finalization of the charges against him or her.¹²⁴ Simply put, the common law approach is void of the continental orientation in which “state organs bear responsibility during the [pretrial] process for the well-being of the defendant.”¹²⁵ Accordingly, it is submitted that the need for judicial review, as noted by the European Court in *S.B.C.*, is at least more obviously necessary¹²⁶ in a common law system than in a continental system.¹²⁷

This observation is of particular relevance when considering the applicability of the rationale employed by the European Court to the workings of the ICTY. In the latter forum, the sequence of events that leads up to an arrest warrant for an accused is in essence a prosecution-based venture of investigation and indictment as set out in the ICTY Statute.¹²⁸ The authorizing document of the ICTY precludes any type of official oversight of pretrial investigation by the prosecution by making investigation the sole responsibility of the prosecutor.¹²⁹ The system established for the preparation and confirmation of indictments

123. See, e.g., Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny: Due Process Deficit*, 4 INT'L CRIM. L. REV. 243, 250–51 (2004).

124. See *id.* at 248–50.

125. J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 75 (2001).

126. Of course, continental efforts to secure neutrality and protect the rights of the accused throughout the pretrial process are not always successful. See, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 368 (2003).

127. This may lead to the conclusion that this line of European Court of Human Rights jurisprudence represents “an unwelcome common-law incursion” on continental procedure. Mitchel De S.-O.-l'E. Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995, 1071 (2005). As has been observed, case law of the European Court “has been approved on many occasions, without the impartiality and independence of the various judicial figures concerned (an impartiality and independence which permeates their acts) having made the least impression on that line of argument.” *Plant v. Commission*, Case C-480/99P, 2002 E.C.R. I-265, ¶ 36.

128. ICTY Statute, *supra* note 3, art. 18.

129. *Id.* art. 16(2) (“The prosecutor shall act independently as a separate organ of the Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.” (emphasis added)); see also Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 517 (1994) (“Any other source must . . . include the Tribunal and the Security Council.” (emphasis added)).

therefore, resembles the common law approach, with a prosecution-prepared indictment¹³⁰ and subsequent judicial review.¹³¹

Moreover, the ICTY Statute dictates an adversarial construct for the tribunal by “discard[ing] the model based upon an investigating judge responsible for gathering evidence on behalf of both parties” and incorporating “the fundamental features of the adversarial system.”¹³² As a result, the procedural rules created by the judges followed suit, imposing no affirmative duty upon the prosecutor to seek out exculpatory evidence, although requiring disclosure of such evidence if known.¹³³ Thus, as in adversarial systems where defense attorneys assume the main burden to investigate exculpatory evidence,¹³⁴ “[t]he primary responsibility for investigating the charges against an accused, including seeking and gathering information related to those charges, lies with defence counsel.”¹³⁵

This understanding of the pretrial activity of the ICTY and the roles assumed by the parties underscores the fact that judicial oversight of pretrial detention is as essential a criterion in the practice of the tribunal as it is in the domestic (adversarial) sphere. While the requirement of judicial review prior to indictment is a vital component in this process, it cannot be seen to satisfy completely the supervision required to ensure that the detention of an accused is just. At the time of review, the judge has heard only from the prosecution, an interested party in the proceedings under no obligation to seek out exculpatory evidence and free from any sort of oversight in his investigations. It is thus fitting and appropriate to have in place a mechanism that ensures judicial control over the subsequent interference with the liberty interests of an accused. To act otherwise would render illusory the appearance of the independence of the

130. ICTY Statute, *supra* note 3, art. 18(4).

131. *Id.* art. 19(1).

132. CASSESE, *supra* note 126, at 384.

133. See Int'l Criminal Tribunal for the Former Yugo. [ICTY], *Rules of Procedure and Evidence*, R. 68, U.N. Doc. IT/32 (Feb. 11, 1994) [hereinafter *Original ICTY Rules*].

134. See Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791, 818 (2001). A failure on behalf of defense counsel to perform this task would likely result in an appellate finding of ineffective assistance of counsel. *Id.*

135. Prosecutor v. Blagojević, Case No. IT-02-60-PT, Joint Decision on Motions Related to Production of Evidence, ¶ 26 (Dec. 12, 2002).

judiciary and, by only allowing for prosecutorial input on the matter, would subvert the goal of equal treatment of the parties. Moreover, it would send the message that the judiciary stands ready to endorse prosecutorial submissions and is unwilling to review its own decisions. By contrast, the tribunal can be seen as conforming with the statutory requirement that it “satisf[ies] itself that the rights of the accused are respected” by properly assessing the pretrial detention of the accused.¹³⁶ In addition, this approach preserves the double meaning of due process—to ensure the protection of the right to liberty, and also to serve as a “structural protection that is meant to prevent the excessive blurring of the lines between the executive and judicial powers.”¹³⁷

Thus, the decision to include a right to provisional release within the framework of the ICTY was an appropriate rather than generous measure. Regardless of the judicial motivation for its inclusion, the opportunity for release was called for from a human rights perspective generally¹³⁸ and with regard to the tribunal’s composition specifically. This is an important factor as regards the discussion that follows. If it were not incumbent upon the judges of the tribunal to provide a mechanism for pretrial release in the first place, one could hardly be critical of any method subsequently established which makes such release possible. However, as this type of mechanism was a necessary component of the tribunal’s practice, it makes sense to address the rule as originally adopted, and as subsequently modified, to assess whether ICTY precedent in this area is worthy of imitation.

136. ICTY Statute, *supra* note 3, art. 20(3).

137. Jared Perkins, *Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatants*, 19 *BYU J. PUB. L.* 437, 457 (2005) (internal citation omitted); *see also* J. Harvie Wilkinson III, *Our Structural Constitution*, 104 *COLUM. L. REV.* 1687 (2004) (“The guarantees of our rights simultaneously provide guideposts for the exercise of executive authority.”).

138. *See, e.g.*, Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo, ¶ 35 (Aug. 14, 2009) (concluding that internationally-recognized human rights dictate that an accused person “have access to a judicial authority vested with the power to adjudicate upon the lawfulness and justification of his or her detention”).

B. *Drafting History of the ICTY Rules*

As Judge Wald notes, those judges who sought to create a set of rules that were in compliance with the ECHR were not alone in subscribing to the opinion that the opportunity for release ought to be incorporated into the ICTY's Rules of Procedure and Evidence ("ICTY RPE"); nongovernmental international organizations, such as Amnesty International, joined in this perspective as well.¹³⁹

In this respect, Security Council Resolution 827 facilitated the transfer of suggestions for the yet undrafted rules, providing that the same be forwarded to the tribunal's judges by the Secretary-General.¹⁴⁰ The tribunal's judiciary later recognized that the proposals it received were of valuable assistance¹⁴¹ and, among them, was a memorandum tendered by the Lawyers Committee for Human Rights. In accordance with the aforementioned ECHR case law, the memorandum provided in pertinent part that "[t]he Tribunal, or any judge of the Tribunal should have the power to permit release of any [detained] person upon the sufficient posting of bail."¹⁴² This suggestion is consistent with the Australian submission which "considers that the rules of procedure and evidence for the International Tribunal should draw on internationally recognised norms and standards."¹⁴³

Yet no other submission specifically addresses the issue, with the exception of the expansive proposal tendered by the United States, which called for a provision that is noticeably at odds with established international norms. The proposed rule seemingly makes detention the rule and appears to impose tacitly a defense-based burden of proof in relation to release:

Once confined, an accused may not be released except upon order of the Trial Chamber Release may be ordered by

139. Wald & Martinez, *supra* note 35, at 232–33.

140. S.C. Res. 827, ¶ 3, U.N. Doc. S/RES/827 (May 25, 1993).

141. *First Annual Report of the ICTY*, *supra* note 9, ¶ 55.

142. *Memorandum of the Lawyers Committee for Human Rights to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the former Yugoslavia Since 1991*, II(C), UN Doc. IT/INF 4 (Nov. 19, 1993), reprinted in 2 MORRIS & SCHARF, *supra* note 84, at 565, 566.

143. *Australian Comments on the Rules of Procedure and Evidence for the International Tribunal*, U.N. Doc. IT/5 (Nov. 16, 1993), reprinted in 2 MORRIS & SCHARF, *supra* note 84, at 507, 507.

the Trial Chamber only in extraordinary circumstances, or if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.¹⁴⁴

Indeed, much can be seen of this proposal in the rule ultimately adopted by the judges at the first plenary. However, the tribunal's initial offering actually pared down the United States submission and, in so doing, established a system of provisional release that was even more inconsistent with international norms. Rule sixty-five as originally adopted provided in relevant part that "[r]elease may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."¹⁴⁵

1. Rationales for the Initially Adopted Rule on Provisional Release

- a. Formally Recognized Reasons

In scaling back the U.S. proposal, the ICTY's judges strayed from the purported goal of some ECHR conformity and, in so doing, acted in a manner that belied any interest in complying with international standards.¹⁴⁶ In fact, it seems the tribunal's judges were persuaded only by the practical necessity that certain accused might be so ill or infirmed as to "exceptionally" require release.¹⁴⁷ As interpreted, the initial rule turned international human rights law on its head, with trial chambers averring that the provision dictated detention on remand as "the norm" and provisional release "the exception."¹⁴⁸ Judges justified this mode of operations by noting both the gravity of the offences charged

144. *Suggestions Made by the Government of the United States of America*, U.N. Doc. IT/14 (Nov. 17, 1993), reprinted in 2 MORRIS & SCHARF, *supra* note 84, at 509, 532.

145. *Original ICTY Rules*, *supra* note 133, R. 65(B).

146. Cf. Lehmann, *supra* note 91, at 193 ("Internationally accepted standards of human rights require that persons accused of a crime should be released from detention pending their trial . . . whenever possible.").

147. Wald & Martinez, *supra* note 35, at 233.

148. Prosecutor v. Blaškić, Case No. IT-95-14-T, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, ¶ 13 (Apr. 3, 1994).

and the tribunal's institutional shortcomings.¹⁴⁹ This seeming disregard for the right to release has been dubbed "one of the great travesties characterizing international criminal cases to date"¹⁵⁰ and the tribunal's adopted approach has repeatedly been recognized as one that affronts established international human rights standards.

b. Other Factors

Of course, other factors other than those noted above may well have played a role in the decision to presume detention over liberty, despite the tribunal's failure to formally recognize them. For example, Judge Wald cites "the perceived inconsistency in asking UN and national peacekeeping forces to risk their lives to apprehend indicted war criminals only to have them promptly released at arraignment."¹⁵¹ Yet, there are serious problems with including this factor as a reason for reversing the presumption in favor of release, an action that affects *all* cases coming before the tribunal. As is highlighted time and again in relevant human rights jurisprudence and, indeed, that of the tribunal, release determinations are individual and must be made on a case-by-case basis. If an accused proves elusive at the outset and imperils those who apprehend him, this will be a relevant (and, presumably, a decisive) factor in the determination made regarding his pretrial detention status. Yet there is neither a logical nor just basis for painting other accused with the same brush. Rather, imposing such a penalty across the board feeds into the philosophy that the tribunal's priority is not justice in each individual case, but instead the assessment of its activities by outside entities.

149. *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on Motion for Provisional Release filed by the Accused, Zejnil Delalić, ¶ 20 (Sept. 25, 1996) (indicating that the tribunal "is not in possession of any form of mechanism, such as a police force, that could exercise control over the accused, nor does it have any control over the area in which the accused would reside if released."). There are also no penalties in place for failure to appear. *See* Wald & Martinez, *supra* note 35, at 236.

150. David Aronofsky, *International War Crimes and other Criminal Courts: Ten Recommendations for Where We Go From Here and How to Get There—Looking to a Permanent International Criminal Tribunal*, 34 *DENV. J. INT'L L. & POL'Y.* 17, 26 (2006).

151. Wald & Martinez, *supra* note 35, at 235 (internal citation omitted).

i. Public Reaction

The general perception of “the international community” may have played a role in the ICTY’s disfavor toward release.¹⁵² Yet, from a human rights perspective, the ability of the community at large to play a role in release determinations is necessarily constricted. While it is true that the gravity of a charge and public reaction to the same “may give rise to a social disturbance capable of justifying pre-trial detention,”¹⁵³ this approach can only be rightfully employed in a very limited set of situations. Similar to the language initially employed in the tribunals’ respective rules, the European Court notes that such an argument may sustain an act of pretrial detention only in “exceptional circumstances.”¹⁵⁴ The court further provides that such measures may be employed only when “based on facts capable of showing that the release of a specific accused would actually disturb public order” and that the threat to the public order must remain in order for ongoing detention to be legitimate.¹⁵⁵

Thus, an amorphous and universal attempt to satisfy popular opinion could never justify interference with an individual’s liberty interests through the use of pretrial detention. Rather, in order to sustain such detention, there must be an articulable threat. While even this approach remains somewhat problematic, in that it gives rise to the possibility that public opinion may dictate whether an individual has access to personal liberty interests, from a practical standpoint this is a seemingly necessary measure. Similar to other permissible derogations from state obligations when faced with a threat to the life of a nation, one can see the need for a provision that allows for detention in order to avoid social disturbance. Moreover, it is a method that could equally serve to secure the life and safety of the accused.¹⁵⁶

152. See Ntanda Nsereko, *supra* note 129, at 532 (noting that “the desire to avoid a public outcry over allowing accused persons to be at large” may possibly explain the stringency of the tribunal’s original release provision).

153. Letellier v. France, 207 Eur. Ct. H.R. (ser. A) at 21 (1991).

154. Kemmache v. France, 208 Eur. Ct. H.R. (ser. A) at 25 (1991).

155. *Id.*

156. Of course, such cases need to be carefully evaluated, as instances in which it is asserted that detention is for the “protection” of the accused are often the most objectionable. See GERHARD O.W. MUELLER & FRE LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURE* 101 (1969).

For the purposes of this discussion, however, it is of seminal importance that if public reaction in some way affected either the drafting of the original Rule 65 or its subsequent interpretation, it did not do so in a way that conforms to internationally accepted standards. Rather than allowing for case-by-case determinations, which would permit detention in a narrow set of circumstances, detention was presumed for all accused.

ii. Judicial Insecurity

Of course, the view of the international community and the perception of alleged victims are not the only opinions that have possible relevance when it comes to the ultimate position assumed by the judiciary. The assumed political independence of this body from both the U.N. General Assembly and Security Council is likely not a complete reality.¹⁵⁷ Financial dependence and the wish to be re-elected may entice members of the judiciary to act in a manner that they anticipate will be positively perceived by the U.N. organs.¹⁵⁸ The potential effect accordingly plays out on two fields: at plenary meetings where rules are created and amended; and on the bench, where such rules are interpreted and applied.

In short, judges making bail determinations may feel personally compelled or tempted to decide against pretrial release. Members of the judiciary acting in this capacity do so knowing that the determinations they make may subsequently be subject to criticism. Releasing an accused creates the possibility that he or she may commit an offence throughout the pretrial period or may in some way interfere with justice. The decision to detain, on the other hand, is foolproof: “when the system detains persons who could have safely been released, its errors will be invisible.”¹⁵⁹ Therefore, elected and appointed judicial officials who find that they are navigating veritable

157. The range of substantive law has been shaped by political considerations. *See, e.g.*, ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES* 330 (2005) (“The ambit of international criminal law has never been apolitical.”). Accordingly, it follows that the process of trying such crimes is likely similarly affected.

158. Tribunal judges are eligible for re-election by the U.N. General Assembly. ICTY Statute, *supra* note 3, art. 13(4). This is a factor that “could mitigate against the principle of judicial independence.” M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 806 (1996).

159. Tribe, *supra* note 80, at 375.

landmines in determining the pretrial fate of certain accused individuals may succumb to external pressures. In fact, an individual in a nonpermanent position or subject to sanctions may well err on the side of caution and find in favor of pretrial incarceration.¹⁶⁰ Accordingly, one might assert that by making detention the exception, the tribunal's judiciary insulated itself from the negative ramifications of making "wrong" decisions.

2. Subsequent Amendments

Like many provisions in the ICTY RPE, Rule 65 has been amended a number of times. In 1997; the rule was amended for the first time to create an opportunity for interlocutory appeal, albeit with the proviso that leave to appeal would only be granted once "serious cause" was established to the satisfaction of a bench of three judges of the appeals chamber.¹⁶¹ Although the tribunal proffered no explanation for the amendment,¹⁶² the provision made some perceptible headway from a fair trial perspective,¹⁶³ as did the language implemented in the months

160. Flemming marks many bail decisions down to "context," noting that hostile environments and job insecurity of those who set bail results in higher levels of pretrial incarceration—a theory borne out by his study of two dissimilarly situated judicial systems in the United States. FLEMMING, *supra* note 38, at 136–38.

161. ICTY, *Rules of Procedure and Evidence*, R. 65(D), U.N. Doc. IT/32/Rev.11 (July 25, 1997). The term "serious cause" was subsequently interpreted by the appeals chamber as showing

a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or raise[s] issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber

Prosecutor v. Delalić, Case No. IT-96-21, Decision on Application for Leave to Appeal (Provisional Release) by Hazim Delić, ¶ 12(3) (Nov. 22, 1996).

162. The relevant annual report acknowledged that the amendment was substantive, but provided no further information. The President of the ICTY, *Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 56, delivered to the Security Council and the General Assembly, U.N. Doc. A/52/375, S/1997/729 (Sept. 18, 1997).

163. See, e.g., Monroe Leigh, *The Yugoslav Tribunal: The Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235, 235 (1996) (remarking on the "daunting prospect" of a post-judgment appeal); see also Jill Paradise Botler et. al, *The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court*, 47 FORDHAM L. REV. 929, 931 (1979) (concluding that a broad scope of interlocutory review "ensure[s] that substantial justice is available to the

that followed, as the threshold for appeal was lessened from “serious” to “good cause.”¹⁶⁴ However, these efforts to improve upon the rule did little to change the outcome of its application. Those seeking leave to appeal from provisional release determinations, like those seeking provisional release,¹⁶⁵ were routinely rejected,¹⁶⁶ and “the depressive effects of lengthy pretrial detention without regular contact with the court” developed into a problem at the tribunal.¹⁶⁷

The most remarkable amendment to the rule governing provisional release came in late 1999, when the ICTY repealed its “exceptional circumstances” requirement.¹⁶⁸ This amendment

litigants” (citation omitted)). The negative ramifications of an unfair denial of provisional release are, moreover, immediately tangible and incapable of adequate remedy post-trial.

164. ICTY, *Rules of Procedure and Evidence*, R. 65(D), UN Doc. IT/32/Rev.12 (Nov. 12, 1997). Similarly, the tribunal only acknowledged the amendment in passing. The President of the ICTY, *Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 105, delivered to the Security Council and the General Assembly, U.N. Doc. A/53/219, S/1998/737 (Aug. 10, 1998) (concurrently shortening the window of appeal from fifteen to seven days) [hereinafter *Fifth Annual Report of the ICTY*]. According to ICTR appellate jurisprudence, “good cause” requires that “a party seeking leave to appeal under [the] provision satisfies the bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision.” *Ndayambaje v. Prosecutor*, Case No. ICTR-96-8-A, Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002, at 4 (Jan. 10, 2003).

165. See Wald & Martinez, *supra* note 35, at 233 (“[C]ase after case, the various trial chambers adhered unrelentingly to the presumption against release and in favour of detention.”).

166. See, e.g., The President of the ICTY, *Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991*, ¶ 100, delivered to the Security Council and the General Assembly, U.N. Doc. A/55/273, S/2000/777 (Aug. 7, 2000) [hereinafter *Seventh Annual Report of the ICTY*] (reporting that all six applications for leave to appeal from a decision on provisional release that were received during the year were denied); The President of the ICTY, *Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 64, delivered to the Security Council and the General Assembly, U.N. Doc. A/54/187, S/1999/846 (Aug. 25, 1999) (reporting that eight of fifteen such applications were denied); *Fifth Annual Report of the ICTY*, *supra* note 164, ¶ 100–02 (reporting that seven of eight such applications were denied).

167. Wald & Martinez, *supra* note 35, at 233. The deaths of two detained individuals caused the tribunal to implement status conferences every 120 days which the accused could attend and answer questions about the conditions of detention. *Id.*

168. See ICTY, *Rules of Procedure and Evidence*, R.65(B), U.N. Doc. IT/32/Rev.17 (Dec. 7, 1999). Four years passed before the ICTR followed suit. Int’l Criminal Tribunal

was made just before the release of a report rendered by an expert group assigned to evaluate the work of the tribunal and its sister court, the International Criminal Tribunal for Rwanda (“ICTR”).¹⁶⁹ The group found the prior standard proved “difficult” to satisfy in practice,¹⁷⁰ an unsurprising fact given that prolonged pretrial incarceration was routinely rejected as independently establishing an exceptional circumstance at both tribunals. Indeed, this was so even in an egregious case at the ICTR where the detention at issue exceeded six years in duration.¹⁷¹ The expert group’s report accordingly linked the high threshold initially in place at the ICTY with the dismal state of affairs at the tribunal, concluding that this has “naturally given rise to serious concerns regarding the generally recognized right to a speedy trial.”¹⁷²

A perennial interpretational problem with the tribunal’s rules, however, is an inability to discern the “legislative intent” accompanying their creation (and subsequent amendments made to them), as the plenary meetings at which such activities occur are held in private. Despite this, judges are free to discuss plenary activity and often do just that. Regarding the “exceptional circumstances” amendment, Judge Robinson asserts that its purpose “was to bring the Rule in line with modern international human rights law [which dictates] that detention shall not be the general rule.”¹⁷³ However, the tribunal’s comment on the amended version of the rule in its next annual

for Rwanda, *Rules of Procedure and Evidence*, R. 65(B), U.N. Doc. ITR/3/Rev.13 (May 27, 2003).

169. See *Seventh Annual Report of the ICTY*, *supra* note 166, ¶ 320 (requesting that the Secretary-General evaluate the efficiency of the operation and function of the Tribunals). The practice of the two tribunals is nearly identical. See *supra* note 7

170. *Report of the Expert Group to Conduct a Review of the Effective and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, ¶ 51, U.N. Doc. A/54/634 (Nov. 22, 1999) [hereinafter *Report of the Expert Group*].

171. See *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on the Defence Motion for Release, ¶¶ 4, 28, (July 12, 2002) (recognizing, however, that the length of detention is a factor taken into account to determine whether exceptional circumstances exist).

172. *Report of the Expert Group*, *supra* note 170, ¶ 51.

173. *Prosecutor v. Krajišnik & Plavšić*, Case No. IT-00-39 & 40-PT, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, ¶ 16 (Oct. 8, 2001) (Robinson, J., dissenting). Robinson was a member of the tribunal at the time the relevant amendment was made.

report was more circumspect, noting that the revision “reflect[ed] the circumstances in which the tribunal found itself (that is, long delays between trial and arrest, together with the number of detainees in custody).”¹⁷⁴

Despite this statement, which in many respects reads in a manner akin to Stephen’s description of the inception of bail in England,¹⁷⁵ the alterations made to Rule 65 over the course of the tribunal’s history provide enhanced conformity with international standards. In this regard, certain subsequent decisions take the opposite position to pre-amendment jurisprudence, rejecting the assertion that the “Tribunal’s Statute and Rules make detention the rule rather than the exception.”¹⁷⁶ Yet, despite these changes, it is continually noted that that the tribunal’s approach to provisional release is at variance with that which is dictated by international human rights standards.¹⁷⁷ Accordingly, it remains a worthwhile exercise to consider exactly why the tribunal’s original and subsequent methods of dealing with the issue of provisional release are so problematic.

C. *Allocation of the Burden of Proof*

Since the repeal of the exceptional circumstances requirement in 1999, the amended rule has given rise to differing interpretations; “the most contentious in this regard is certainly the burden of proof in applications for provisional release.”¹⁷⁸ Rule 65 itself is silent on the allocation of the burden of proof.¹⁷⁹ For at least one member of the of the Tribunal’s judiciary, the revised rule logically calls for a prosecutorial burden, “supported by a consideration of the purpose of the

174. *Seventh Annual Report of the ICTY*, *supra* note 166, ¶ 293.

175. *See* STEPHEN, *supra* note 40, at 233–39.

176. *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36, Decision on Motion by Momir Talić for Provisional Release, ¶ 17 (Mar. 28, 2001).

177. *See, e.g.*, ZAPPALA, *supra* note 66, at 70 (observing that the elimination of the exceptional circumstances requirement “brought the Rules more into line with human rights standards” but that, nonetheless, it still remains true that liberty is the exception while detention is the rule).

178. *See* Gerhard Kemp, Commentary, *Provisional Release*, in 8 ANNOTATED LEADING CASES OF THE INTERNATIONAL CRIMINAL TRIBUNALS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2001–2002, at 83, 85 (André Klip & Göran Sluiter eds., 2005).

179. ICTY, *Rules of Procedure and Evidence*, R. 65(D), UN Doc. IT/32/Rev.44 (Dec. 10, 2009) [hereinafter *ICTY Rules*].

amendment, which was to bring the rule in line with modern international human rights law that detention shall not be the general rule.”¹⁸⁰ This, however, remains the minority position. With very limited exceptions, those cases that affirmatively address the issue of burden allocation adhere to the dominant view that the accused continues to bear the burden of proof with regard to the establishing the requirements of Rule 65(B).¹⁸¹ In fact, this approach is incorporated in the tribunal’s recently published manual on its practice.¹⁸² Accordingly, the first element under consideration is that of the burden of proof¹⁸³ in provisional release matters.

1. Should a Burden Be Assigned?

The silence of Rule 65 with regard to the allocation of the burden of proof is not unique. Indeed, this approach is common in the domestic realm and characteristic of legal drafting in common law systems, where many legal provisions do not address

180. Prosecutor v. Krajišnik & Plavšić, Case No. IT-00-39 & 40-PT, Decision on Momcilo Krajišnik’s Notice of Motion for Provisional Release, ¶ 16 (Oct. 8, 2001) (Robinson, J., dissenting).

181. See, e.g., Prosecutor v. Milosević, Case No. IT-02-54T, Decision on Assigned Counsel Request for Provisional Release, ¶ 10 (Feb. 23, 2006); Prosecutor v. Šainović & Ojdanić, Case No. IT-99-37-AR65, Decision on Provisional Release, ¶ 2 (Oct. 30, 2002) (Shahabuddeen, J., separate opinion); Prosecutor v. Brđanin & Talić, Case No. IT-99-36, Decision on Motion by Momir Talić for Provisional Release, ¶ 18 (Mar. 28, 2001). This approach, as will be discussed in greater detail, *infra*, does not conform to the prevailing view from an international perspective. See, e.g., Gabrielle McIntyre, *Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY*, in INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 193, 229 (Gideon Boas & William A. Schabas eds., 2003) (referring to the accused-based burden as being “in stark contrast to the approach taken by the human rights regime”).

182. ICTY, *ICTY Manual on Developed Practices* 65 (2009), available at http://www.icty.org/x/file/about/reports%20and%20publications/manual_developed_practices/icty_manual_on_developed_practices.pdf.

183. The phrase “burden of proof” has two possible interpretations; it can mean either the burden of producing evidence or the burden of persuasion. See JOHN HENRY WIGMORE, 9A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2483 (3d ed. 1940). While both of these distinct concepts may play a role in provisional release matters, “burden of proof” in this context refers to the burden of persuasion, or a party’s obligation convince the fact finder of a specific fact at issue.

the issue of burden allocation.¹⁸⁴ Given the reference to the common law, it is perhaps initially necessary to address the question of whether a burden of proof in provisional release matters ought to be allocated at all in the *sui generis* system that is the ICTY. As the Yugoslav Tribunal has for some time been diluting its original adversarial structure and procedures by moving in a direction that is increasingly continental¹⁸⁵ and the tribunal's judges enjoy the ability to order that evidence be produced by a party or to summon witnesses on their own motion,¹⁸⁶ one might conclude that burden allocation is unnecessary. After all, the ICTY judiciary, as in continental systems, has the power to summon information relevant to the question of release.¹⁸⁷

One must, however, bear in mind the manner in which provisional release motions have consistently arisen before the tribunal, as "burden of proof problems in international law are influenced by the character of the proceeding, whether predominantly adversarial or investigatory."¹⁸⁸ The adversarial aspect inherent in the process that accompanies provisional release determinations is pervasive; it has only infrequently been the case that the prosecution has consented to or failed to oppose an accused's request for release.¹⁸⁹ It is, therefore, this aspect of the provisional release process that makes burden allocation both necessary and vital.

Accordingly, the tribunal's jurisprudence has consistently assigned a burden of proof in provisional release matters. By and large, as noted, the rule governing provisional release has been interpreted as one that calls for an accused-based burden of

184. See Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 254 (1987) (remarking that U.S. statutes that create a cause of action generally do not allocate the burden of proof).

185. See generally Darryl A. Mundis, *From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367 (2001) (discussing the evolution of the jurisprudence of the ICTY).

186. See *ICTY Rules*, *supra* 179, R. 98.

187. The continental approach, in which there is a judicial obligation to investigate and present evidence as needed, may be seen to obviate the necessity of assigning the burden of proof. See JULIANE KOKOTT, *THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW* 10 (1998).

188. *Id.* at 144.

189. See, e.g., Prosecutor v. Krnojelac, Case No. IT-97-25-A, Decision on Application for Provisional Release (Dec. 12, 2002) (providing one example of the prosecution's choice not to oppose a short-term release).

proof, both before and after the exceptional circumstances amendment. This assignment of the burden of proof, however, is an unsuitable one from a human rights perspective, given the right to liberty, the presumption of innocence, and the corollary that pretrial detention ought to be an extraordinary measure.

2. Principles Governing Burden Allocation

Setting these concerns temporarily aside, however, it makes sense to consider the possibilities that were available to the ICTY as regards burden allocation, as there is no particular rule of distribution that will work in every situation. Rather, determining the appropriate rule in order to properly assign the burden “is merely a question of policy and fairness based on experience in the different situations.”¹⁹⁰ As a result, any one of a number of rules may be utilized in order to determine the appropriate allocation in a given case.

Interestingly, the tribunal’s decision to place the burden of proof upon the accused with regard to provisional release motions is consistent with the principle of *actori incumbit probatio*, “the broad basic rule with respect to the allocation of the burden of proof in international procedure,”¹⁹¹ wherein the party putting forth the claim is required to establish its requisite elements of law and fact.¹⁹² In this respect, the allocation is akin to that applied in domestic jurisdictions that heed international standards as regards interim release. The variance between the two lies not in the adopted rule of allocation, but in the relevant rule governing release. Whereas it would normally be the responsibility of the prosecution to request remand and, accordingly, establish those facts necessary to sustain such a motion, the approach employed by the tribunals ensures that the obligation to raise the issue of detention versus release lies with the accused.¹⁹³

190. WIGMORE, *supra* note 183, § 2486.

191. MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 116 (1996). Kazazi notes the rule is recognized in virtually all of the world’s legal systems and that, despite some variance in its application, “the essence of the rule remains the same . . .” *Id.* at 116–17.

192. *Id.* at 54–66 (tracing the history of the rule and noting its applicability in Islamic law and common and civil law jurisdictions).

193. For a discussion on the disparity between the approach of the tribunal and that which is dictated by the jurisprudence of the European Court of Human Rights, see

As *actori incumbit probatio* is not the only potential rule governing burden allocation, however, it ought not to be a foregone conclusion that it is the preferable approach. To blindly accept the idea based upon the prominence of the rule would be to overlook the overarching importance of the fairness considerations noted above. The possibility must rather be considered alongside numerous other rules, as “[t]here are no hard and fast standards governing the allocation of the burden of proof in every situation.”¹⁹⁴ Indeed, the ICTY could have availed itself of any one of a number of potential rules, such as apportioning the burden to one asserting an affirmative allegation, or to the party to whose case a fact is essential, or to one who has a peculiar means of knowledge to disprove an assertion.¹⁹⁵

It therefore makes sense to consider whether, in the context of provisional release at the ICTY, any option presents a more suitable alternative to that of “he who asserts must prove.” In this regard, it bears note that an accused is required to prove a negative: that, if released, he or she will not pose a danger to any victim, witness, or other person. In the legal realm, establishing a negative has historically been regarded as a more difficult task than proving an affirmative fact. This deduction has, in turn, had the potential to affect burden allocation.¹⁹⁶ Nevertheless, in recent years, academics have rejected the notion that the burden of proof ought to be allocated to the party making an affirmative allegation and have rightly highlighted the shortcomings of that approach.¹⁹⁷ Accordingly, this piece will now consider whether the fact that an accused is required to prove a negative ought to

GEERT-JAN ALEXANDER KNOOPS, *THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS* 150–54 (2005).

194. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973).

195. *See generally* WIGMORE, *supra* note 183, § 2486 (delineating numerous allocation rules).

196. *See* *Walker v. Carpenter*, 57 S.E. 461, 461 (N.C. 1907) (“The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative.”); *see also* *Repatriation Comm’n v. Perrot* (1984) 1 F.C.R. 507, 514 (Aus.) (noting that it is often difficult to establish negative propositions).

197. *See, e.g.*, MCCORMICK ON EVIDENCE §337 (John William Strong, ed., 5th ed. 1999) (referring to the doctrine as erroneous and one that places an undue emphasis on the manner in which an issue is pleaded).

qualify as a factor for consideration when vetting the tribunal's assignment of the burden of proof in provisional release matters.

At the outset, it makes sense to pay heed to a thought-provoking article by Professor Kevin Saunders which sets out to dispel "the myth" that it is inherently more difficult to prove a negative allegation than it is to establish an affirmative one.¹⁹⁸ In support of this position, Saunders first successfully refutes the notion that it is *always* more difficult to establish a negative proposition by isolating and critiquing a particular category of statements. Specifically at issue are assertions ("unquantified statements of propositional logic") that an individual entity has (or does not have) a particular property; for example: "X has blue eyes."¹⁹⁹ Clearly, there is nothing inherently more difficult in proving that X does not have blue eyes than there is in establishing that X does and, in fact, the type of proof put forward to advance either proposition might well be the same.²⁰⁰

The second category of assertions identified, however, is more complex than the first and focuses on "quantified statements of predicate logic"—statements that involve assertions which relate to the characteristics of some or all entities.²⁰¹ Those that relate to some entities (for example, "at least one person in town is a retired defense attorney") are referred to as existential propositions; those that relate to all entities ("no one in town is a former prosecutor") are referred to as universal propositions.²⁰² These types of assertions have more in common than belonging to the same class of logic; each is the opposite of the other, such that a universal proposition (one that is, by nature, generally more difficult to establish) is necessary to disprove its existential cousin and vice versa.²⁰³ The conclusion drawn by Saunders is that those "situations in which it is more difficult to prove a

198. See Kevin W. Saunders, *The Mythic Difficulty in Proving a Negative*, 15 SETON HALL L. REV. 276 (1984). For Saunders, such a proposition is part of "legal folklore" and is supported by "logical fallacies." *Id.* at 277.

199. *Id.* at 280.

200. See *id.*

201. *Id.*

202. *Id.* at 280–81.

203. See *id.* at 283, n.29. For example, to disprove the existential proposition that at least one person in town is a former defense attorney, one must prove the universal proposition that no one in town is such; to disprove the universal proposition that no one in town is a former prosecutor, one must merely establish the existential statement that one person is. *Id.* at 281.

negation do not have to do with the negation but with the difference in difficulty between proving universal and existential propositions in predicate logic.”²⁰⁴

Thus, in shifting the burden to the party who has to prove the affirmative or lightening the burden of the party who must establish the negative, courts are actually leveling the playing field between those who bear the burden of establishing an existential proposition (which requires a finite amount of information) and those whose onus involves establishing its (likely more taxing) universal cousin. This is an interesting argument, particularly in light of the fact that the case law analyzed by Saunders appears to bear out his proposition.²⁰⁵ The approach also appears to be a “clean” one²⁰⁶ that would not involve the convoluted rules often employed in an attempt to iron out the perceived disparities in burden allocation when negative allegations are at issue.²⁰⁷ Moreover, by adopting the touted approach, those responsible for establishing unquantified statements of propositional logic (allegations no more inherently difficult to prove than their affirmative counterparts) would not be unfairly absolved of their evidentiary responsibilities.

Saunders’ observations, however, are not ones that fit neatly into the context of the “negative” requirement for provisional release at the ICTY. What must be proved falls neither squarely into the category of unquantified statements of propositional logic nor that of quantified statements of predicate logic;

204. Kevin W. Saunders, *What Logic Can and Cannot Tell Us About the Law*, 73 *NOTRE DAME L. REV.* 667, 677 (1998).

205. See Saunders, *supra* note 198, at 283–288.

206. *Id.* at 283 (“A recognition by courts of where the difficulty of proof actually resides would help prevent the granting of legally (and logically) impermissible concessions to parties facing the supposed difficulties of proving a negative.”).

207. Consider, for example, the “rule” governing burden allocation that was delineated by the U. S. Supreme Court in *United States v. Denver & Rio Grande R.R. Co.*:

When a negative is averred in pleading, or plaintiff’s case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.

191 U.S. 84, 92 (1903).

establishing that an accused will not pose a danger to any person while released seems, in this respect, neither Saunders' fish nor his fowl. One reason for this is that what is at issue is an uncertain property. Saunders considers what happens when one is required to prove something that is or was, not a future event that may (or may not) come to pass. At first blush, then, one might conclude that his observations are not inclined to contribute to the burden of proof debate regarding provisional release at the ICTY.

Yet one ought not to subscribe to such a narrow view with regard to analogical reasoning; the necessary element involved is not uniformity but, rather, similarity. Thus, setting aside for the moment the difficulty inherent in accurately predicting future conduct, one must look more carefully at Saunders' argument and consider the logical property that is the hinge upon which it turns. Saunders isolates the encumbrance that dictates the assignment of proof as one that relates not to the affirmative or negative value of a pleading, but rather its "type of quantification,"²⁰⁸ or, whether the pleading itself requires universal rather than finite or unquantified proof.

It is in this regard that one must consider the "negative" provisional release prong. What must an accused prove in order to successfully establish that he will not pose a danger to any victim, witness or other person whilst released? Arguably, the possibilities are endless in number *and* incredibly difficult to establish. The accused bears the "universal" burden of establishing that he will not likely do *anything* that may harm *any* person if released and, in this respect, allocating an accused-based burden fails from a Saunders-defined fairness perspective.

In contrast to the accused's "universal" burden of establishing that he will not likely do anything that may harm anyone is the alternative: a prosecutorial burden in which all that is required is the demonstration that an accused will likely do *something* that will endanger *someone*. This "something" need only be one thing—a finite piece of evidence indicating that an accused has the propensity to act as a danger to a victim, witness or other person if released.²⁰⁹ Thus, Saunders' dissolution of "the mythic difficulty in proving a negative" does nothing to alter the

208. Saunders, *supra* note 198, at 281–82.

209. It is submitted that only specific accusations should suffice. See Tribe, *supra* note 80, at 394–95.

misplacement of the burden for establishing the “negative” element in cases of provisional release.

Moreover, in the face of establishing a universal and future proposition, it is fair to ask how those seeking release are meant to rise to the challenge. Presumably, an accused can put forth general evidence of a good character and peaceful nature, but it is fair to question how much weight will be given to such assertions made by an accused war criminal and those close to him. For Tribe, such a burden is Kafka-esque, more for its amorphous nature than owing to the fact that what is at issue is future conduct; as he observes, an accused “will be able to offer nothing more than general assurances of his own good intentions.”²¹⁰ Moreover, despite the difficulty inherent in substantiating the universal proposition required, it is likely that those accused are wary of proffering every bit of evidence that might support a motion for release. Given the pressure upon the tribunals to expedite their proceedings²¹¹ it would seem a poor trial strategy for an accused to invoke the ire of the three-member panel that will later adjudicate guilt and, if a conviction is rendered, determine the appropriate sentence. In light of all of this, it is not surprising that, in bearing this “negative” burden, “there is little that [an accused before the tribunals] can do but give the appropriate undertaking and point to such things as the absence on his part of any significant political support through which such interference could be directed.”²¹²

Of course, this does little to advance the tribunal in what is presumed and hoped to be its goal of rendering “more informed decision[s]” through access to the best, most pertinent evidence.²¹³ For much of the reasons illustrated to this point,

210. *Id.* at 393 (drawing a parallel to Franz Kafka’s *The Trial* (1925)).

211. See William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia and the Creation of the State Court in Bosnia and Herzegovina*, 46 COLUM. J. TRANSN’L L. 279, 282 (2008) (remarking upon the ICTY’s Completion Strategy, devised “in response to pressure from donor states to wrap up the work of the Tribunal”); see also, *A Critical Look at Ad Hoc Tribunals’ Completion Strategy: Open Questions and Prospects for the Future*, 6 J.INT’L. CRIM. JUST. 681, 682–83 (2008) (including a dialogue in which ICTY Judge O-Gon Kwon remarks upon how the pressures of time have impacted “the [tribunal’s] legacy of procedural and evidentiary rules and the conception of due process”).

212. Prosecutor v. Šainović & Ojdanić, Case No. IT-99-37-AR65, Decision on Provisional Release, ¶ 72 (Oct. 30, 2002) (Hunt, J., dissenting).

213. Jeffrey L. Bleich, *Complementarity*, 25 DENV. J. INT’L L. & POL’Y 281, 291 (1997).

Judge Hunt grapples with—and struggles to keep intact—the tribunal’s (mis)assignment of the burden of proof with regard to this element of Rule 65(B). While maintaining that the onus of establishing the future conduct of the accused with regard to victims and witnesses is one borne by the accused, he is unable to ignore the inadequacies of this approach: the limited evidence that an accused can proffer and the unfairness inherent in unsupported, prosecutorial assertions alluding to a possibility of victim or witness tampering put forth in a manner too vague for an accused to refute.²¹⁴

3. Arbitrary Detention and the Burden of Proof

Additional difficulties arise when one considers the merit of an accused-based burden alongside the relationship between the right to release and arbitrary detention. As noted in the above discussion regarding international standards in the area of provisional release, a domestic accused may bring a claim before the U.N. Human Rights Committee on the authority of ICCPR article 9(3). Yet, as illustrated in the 2005 case of *Morais v. Angola*,²¹⁵ applicants are not so limited in bringing claims relating to their detention. In *Morais*, the Human Rights Committee considered the forty-day detention of an accused who was ultimately charged with defamation.²¹⁶ Of relevance to this inquiry is the complainant’s successful 9(1) claim, a subarticle that prohibits arbitrary arrest or detention and which applies to all forms of detention (not just those of a criminal nature).²¹⁷ In asserting a 9(1) violation, the author of the communication maintained that, even if his arrest was lawful, “his continued detention for a period of 40 days was neither reasonable nor

214. *Šainović & Ojdanić*, Decision on Provisional Release, ¶ 72 (Oct. 30, 2002) (Hunt, J., dissenting).

215. HRC, *Communication No. 1128/2002: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (*Morais v. Angola*), U.N. Doc. CCPR/C/83/D/1128/2002 (Apr. 18, 2005) [hereinafter *Morais*].

216. *Id.* ¶¶ 2.1–2.9.

217. ICCPR, *supra* note 23, at art. 9(1) (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention . . .”). Given his relatively limited period of detention, the author of the communication did not assert a violation of article 9(3) based upon a failure to be tried within a reasonable time, although he did avail (successfully) of the provision insofar as he was not brought promptly before a judicial official. *Morais*, *supra* note 215, ¶ 6.3.

necessary in the circumstances of his case.”²¹⁸ Consistent with its prior decisions, the committee held that its interpretation of arbitrary expands beyond that which is merely unlawful²¹⁹ and, importantly, detention is not arbitrary only when it is reasonable and necessary in the circumstances.²²⁰ In illuminating those factors that may comprise that which is reasonable and necessary, the committee’s decision then specifically notes the issues of risk of flight, evidence tampering, and prevention of crime.²²¹ These three enumerated factors are, of course, most frequently associated with release matters brought pursuant to subarticle 9(3).²²²

At first blush, the decision appears an interesting one, as the time that the accused spent in detention is unquestionably shorter than that which normally gives rise to a successful article 9(3) application.²²³ One might think, then, that the value of the decision lies in the fact that it opens the door for a greater number of successful claims as regards rights violations related to pretrial detention. This appears to be so, and the decision may

218. *Morais*, *supra* note 215, ¶ 3.1.

219. *Id.* ¶ 6.1. This is consistent with the viewpoint of *some* of the drafters. As the Report of the Third Committee reveals, some states considered the term arbitrary to mean “contrary to law” while others viewed the term in a broader sense, so as to encompass acts that violated justice or reason or had other like negative attributes. Draft International Covenants on Human Rights, 1 U.N. GAOR, 13th. Sess., Annex, Agenda Item 49, U.N. Doc. A/4045 (1958); Report of the Third Committee, §49, *in BOSSUYT*, *supra* note 32, at 201.

220. *Morais*, *supra* note 215, ¶ 6.1. This is consistent with the committee’s prior decisions. *See, e.g.*, HRC, *Communication No. 305/1988: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Van Alphen v. Netherlands), ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Mar. 29, 1989) (interpreting “not arbitrary” as requiring that detention be reasonable and necessary “in all the circumstances,” and noting that necessity may be established in cases where the accused may abscond, tamper with evidence or engage in recidivist criminal activity). This approach is also in accord with Nowak’s contention that “the prohibition of arbitrariness is to be interpreted broadly.” NOWAK, *supra* note 27, at 225.

221. *Morais*, ¶ 6.1.

222. *See, e.g.*, HRC, *Communication No. 432/1990: Decision on Admissibility* (W.B.E. v. Netherlands), ¶ 6.3, U.N. Doc. CCPR/C/46/D/432/1990 (Oct. 23, 1992).

223. *See, e.g.*, HRC, *Communication No. 908/2000: Views Under Article 5, Paragraph 4, of the Optional Protocol* (Evans v. Trinidad & Tobago), ¶ 6.2, U.N. Doc. CCPR/C/77/D/908/2000 (May 5, 2003) (finding a violation from 27 months of detention); HRC, *Communication No. 704/1996: Views Under Article 5, Paragraph 4, of the Optional Protocol* (Shaw v. Jamaica), ¶ 7.4, U.N. Doc. CCPR/C/623/D/704/1996 (June 4, 1998) (reaching the same conclusion in an application citing 27 months of pretrial detention).

well have a positive effect in the resolution of subsequent pretrial detention cases brought before the Human Rights Committee. However, the import of the decision extends beyond this issue when considered in conjunction with the allocation of the burden of proof in applications for release.

In *Morais*, the Human Rights Committee establishes that, if a state fails to invoke an element that illustrates the reasonableness and necessity of detention, detention is arbitrary. In interpreting this jurisprudence, one must assume that the committee did not intend that its decision, and the action it calls for, to be without value. Accordingly, it would make no sense if a state could satisfy its responsibility to demonstrate the factor (or factors) that justifies detention by mere lip service. Such a “requirement” would render the committee’s ruling, and “state compliance,” meaningless. Rather, it follows that it must be “the government’s burden to prove that detention is necessary, not the individual’s burden to prove that release is justified” in order to ensure that it is not arbitrary.²²⁴ This protection of the right to liberty, often embodied in constitutional form, ensures the value of the safeguard of judicial review in cases of detention.²²⁵

The question therefore becomes: how can these facts rest comfortably alongside an accused-based burden of proof in matters of provisional release? It is submitted that they simply cannot. Rather, the procedural protection of judicial review is undermined by the tribunal’s method of operation that effectively shifts the burden to the accused to establish that his detention is arbitrary. The ICTY RPE should not be set up in such a manner so as to facilitate the prosecution (the executive) in impinging upon the rights of the accused without ensuring meaningful judicial review. As a result, the tribunal’s approach affords insufficient respect for the right to liberty and sets a poor example to the world at large. It is, quite simply, not representative of the enlightened manner in which the U.N. ought to administer justice.²²⁶

224. *Reno v. Flores*, 507 U.S. 292, 341–43 (1993) (Stevens, J., dissenting).

225. *See Zamir v. United Kingdom*, App. No. 9174/80, 8 Eur. H.R. Rep. 108, 113 (1986) (“If it were otherwise, there can be no doubt that the protection afforded to detained persons by the requirement of judicial control of the legality of the detention would be substantially weakened.”).

226. That such a practice is essentially in accord with that available to those detained at Guantanamo Bay should create some perspective for the unacceptability of

One may be inclined to contest this conclusion by citing to domestic jurisdictions that allow for a reverse onus in pretrial release matters. Canada, for instance, employs an outright accused-based burden in certain types of cases,²²⁷ and the American Bail Reform Act²²⁸ provides for what some have deemed the functional equivalent of an accused-based burden in select matters.²²⁹ Yet, as is illustrated by the example of *Mauritius*,²³⁰ domestic practice does not enjoy a per se imprimatur of “best practice”; in fact, its compliance with that which is dictated by international standards and obligations can by no means be assumed.²³¹ Indeed, “no country appears to handle the problem of pre-trial detention with as much restraint as might be expected in view of the constitutional and statutory law on the subject and the gravity of the measure.”²³²

Such is the case in each of the selected examples in which the shift in the burden of proof represents an abandonment of

this approach. *See, e.g.*, Perkins, *supra* note 137, at 457–58 (noting a relevant petitioner must “prove the legality of his liberty[,] . . . eviscerating the fundamental premise of the writ of habeas corpus: that he who detains is charged with proving the legality of the detention”).

227. Canada Criminal Code, R.S.C., ch. C46, § 515(6) (1985) (imposing an accused-based burden when the accused is charged with an indictable offense while on release for an earlier indictable charge). The code goes on to mandate that “the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified.” *Id.*

228. 18 U.S.C. § 3142(e) (2006) (establishing two separate rebuttable presumptions against release, depending upon such factors as the criminal history of the accused, the type of crime charged and whether the current offense is alleged to have been committed while the accused was on pretrial release).

229. *See, e.g.*, Robert S. Natalini, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984*, 134 U. PA. L. REV. 225, 250 (1985). Interestingly, former President George W. Bush’s interpretation of the Act (contrary to its plain language) is not even this generous. Despite the fact that the Act provides for a hearing in each case, Bush asserted, “Today, people charged with certain crimes, including some drug offenses, are *not eligible* for bail” Remarks at the Federal Bureau of Investigation Academy in Quantico, Virginia, 39 WEEKLY COMP. PRES. DOC. 1190, 1194 (Sept. 10, 2003). One must hope that President Bush’s interpretation reflects a misapprehension of the law and is not representative of its practical application.

230. *Supra* notes 215–25.

231. *See, e.g.*, David M. Paciocco, *Pragmatism, Legal Culture, and the Protection of Rights and Freedoms*, 8 CAN. CRIM. L.R. 5, 8–10 (2003) (lamenting various aspects of the present day legal culture in Canada).

232. MUELLER & LE POOLE-GRIFFITHS, *supra* note 156, at 101. Although this observation is nearly forty years old, it is submitted that its potency remains intact, particularly in light of the domestic trend noted in the following paragraph.

the government's responsibility to establish the reasonableness and necessity of detention as dictated by the Human Rights Committee's interpretation of ICCPR article 9(1) in *Morais*. Moreover, the Canadian and U.S. examples illustrate the inescapable erosion of civil liberties in contemporary domestic systems of justice when the decision is made to sideline the rights of accused individuals in order to curry political favor with the voting public.²³³ International obligations appear to have taken a backseat as societies become increasingly receptive to historically unjustified restraints on liberty in the name of collective security,²³⁴ a trap that the tribunal ought to have avoided.

Rather, it ought to be incumbent upon the tribunal's prosecutor to provide evidence that indicates the reasonableness and necessity of detention, such as risk of flight or that an accused would frustrate justice by engaging in evidence tampering or witness intimidation if released. This is a necessary factor, not only insofar as the issue of arbitrary detention is concerned; it also establishes that detention is not punitive, but an administrative necessity.²³⁵ Furthermore, as Tribe avers, due

233. Similarly, those who sought to shield the Republic of South Africa's reverse-onus provision in bail proceedings from constitutional challenge prevailed in the drafting of that country's constitution. See Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human Rights Perspective*, 47 AM. J. COMP. L. 67, 78 (1999) (noting that the attempt could be attributed to "anticriminal public sentiment" and that the reverse onus provisions undermine the presumption of innocence and the right to liberty and are discriminatory toward unrepresented defendants). An extensive discussion as to whether a state can meet its obligation of establishing the reasonableness and necessity of detention in a given case through certain statutory restrictions is beyond the scope of this inquiry. It is submitted, however, that limiting the burden shift in release matters to certain types of cases insufficiently addresses the concerns raised with regard to meaningful judicial review of such matters.

234. See Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pre-Trial Detention*, 79 MINN. L. REV. 325, 327 (1994). Police Commissioner Ken Moroney of New South Wales illustrates this disturbing issue well when he defended a plan that would have the state police monitoring magistrate's bail decisions because the police and community were tired of having their efforts to clean up the streets undone by the release of accused individuals: "I have an obligation to the people of New South Wales, not only to prevent and detect crime, but equally as important, to reduce the fear of crime, and I think there is an element of fear within the community when people are continually allowed bail and continue to re-offend." Hamish Fitzsimmons, *Police to Monitor the Granting of Bail in NSW*, ABC Radio (Jan. 6, 2003), transcript available at <http://www.abc.net.au/am/stories/s758229.htm> (second emphasis added).

235. Daniel J. Rearick, *Innocent Until Alleged Guilty: Provisional Release at the ICTR*, 44 HARV. INT'L L.J. 577, 577 (2003) ("To presume that an accused is innocent means, among other things, that punishment cannot begin until the accused is convicted. Thus, detention must serve some other distinguishable goal.").

process necessitates that this showing be particularized,²³⁶ a position that is also aligned with Saunders' analysis of burden allocation; unquantified statements of propositional logic involve the establishment of specific attributes of particular properties, not vague assertions or generalizations.²³⁷ Moreover, especially with regard to the second prong of Rule 65(B), this is a preferable approach from the standpoint of judicial economy. Contrary to the assumption that it will save time to assume the necessity of detention, requiring an accused to satisfy the court of the universal proposition that he will not be a danger to any person is an exercise that is neither efficient nor just.

4. Relevance of Institutional Shortcomings

This is not to say, however, that the limitations of the Yugoslav Tribunal, specifically, the lack of a police force and consequent inability to monitor the activities of an accused while released (and to effectuate his arrest as necessary), do not have a role to play in provisional release determinations. Here, a domestic analogy is useful. In municipal systems, pretrial supervision is an essential element of pretrial release; it not only enables a judicial official to rest comfortably in the fact that the conditions set out for bail are meaningful and enforceable, but also fosters public confidence in the system of release.²³⁸

Of course, it is not easy to always fall within this idyllic paradigm: domestic systems routinely suffer from inadequate resources with which to monitor compliance with bail conditions.²³⁹ Perhaps as a result, the United States has incorporated a mechanism of third party monitoring in its system of provisional release²⁴⁰ that, in practice, requires an accused to

236. Tribe, *supra* note 80, at 396.

237. See *supra* notes 198–207.

238. See James R. Marsh, *Performing Pre-trial Services: A Challenge in the Federal Criminal Justice System*, 58 *FED. PROBATION* 3 (1994).

239. See, e.g., Esmond Harmsworth, *Bail and Detention: an Assessment and Critique of the Federal and Massachusetts Systems*, N. ENG. J. CRIM. & CIV. CONFINEMENT 213, 250 (1996); THE COMPTROLLER AND AUDITOR GENERAL, *FACING JUSTICE: TACKLING DEFENDANTS' NON-ATTENDANCE AT COURT*, 2003-4, H.C. 1162, ¶ 2.15 (U.K.), available at <http://www.nao.org.uk/idoc.ashx?docId=a65320da-80fe-4576-acb0-03e1316c5bb5&version=-1>.

240. See 18 U.S.C. §3142(c)(1)(B)(i) (2006) (permitting the court to require as a condition of release that a defendant “remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the

find and designate such a person to be responsible for him.²⁴¹ Interestingly, this procedure is seemingly akin to ancient bail practices that permitted an accused “to either pay a money bail or have friends and relatives swear surety that the accused would appear for trial.”²⁴² Similarly, ICTY practice provides a parallel in what is its de facto requirement of a state guarantee²⁴³ and, it is submitted, the obligation of an accused to secure the same adequately addresses the difficulties that arise from the tribunal’s institutional limitations.²⁴⁴

5. Practical Allocation of the Burden of Proof

Having established the shortcomings of asserting an accused-based burden of proof, it makes sense to now look beyond the rule as written and assess its practical application. As Judge Wald notes, early ICTY jurisprudence regarding the two prongs of Rule 65(B) is “technically gratuitous or dicta,” as trial chambers did not need to discuss the application of the rule after

Court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community”).

241. *See, e.g.*, United States v. Dobson, No. 87-1222-01-P, 1987 WL 11147, at *6 (D. Mass. Mar. 13, 1987) (involving an accused who “proposed” his sister as a third party custodian and called her to the stand to provide the court with the personal information in order to qualify her for the position).

242. Metzmeier, *supra* note 8, at 401 (emphasis added); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) (“Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused.”).

243. These are guarantees from a state (or, sometimes, an entity) which indicate the state’s willingness to accept and monitor the accused while released and to secure his return to the tribunal. This issue is considered in greater detail *infra* at Part III.E.2.

244. The International Criminal Court (“ICC”) may be charting a different, more accused-friendly, approach in this regard. The intent to do so is evidenced in the now overturned *Bemba* release decision, which aimed to facilitate the process of finding a state willing to accept the accused. *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo, ¶¶ 89–90 (Aug. 14, 2009). The subsequent appeal judgment is less straightforward on the matter. While it notes that conditional release may not be granted without first identifying a state willing to accept the accused, it does not specify the party responsible for acquiring the state’s consent and notes that the ICC is dependent upon the state’s cooperation as to accepting the individual. *Bemba*, Case No. ICC-01/05-01/08 OA2, Judgment on the Appeal of the Prosecutor, ¶¶ 104–09 (Dec. 2, 2009).

finding the absence of exceptional circumstances.²⁴⁵ From the pre-amendment cases, however, Judge Wald perceived the indication to be that, if put to prove that he or she would appear for trial and would not cause a danger to any person while released, an accused person's burden would be essentially unqualified.²⁴⁶ In support of this conclusion, she notes the *Blaškić* court's position (in light of the tribunal's discovery process): "the knowledge which, as an accused person, he has of the evidence produced by the Prosecutor would place him in a situation permitting him to exert pressure on victims and witnesses and that the investigation of the case might be seriously flawed."²⁴⁷

The early days of post-amendment jurisprudence did not seem much brighter for those accused insofar as the issue of burden of proof in provisional release matters was concerned. Just one month after the exceptional circumstances requirement was removed, a number of motions for release were denied for those involved in the *Kupreškić* case. The decisions denying release were short and absent of elaboration. In one instance, the trial chamber acknowledged the voluntary surrender of the accused, the fact that written assurances of arrest and deliverance had been tendered from the authorities of Bosnia and Herzegovina, a long-term detention of more than two years, and compliance with a prior short-term release for bereavement.²⁴⁸ Despite these factors, in the final paragraph of the three paragraph decision, the trial chamber concluded that it was "not satisfied that the accused would not try to interfere with the

245. Wald & Martinez, *supra* note 35, at 241; *see also* Prosecutor v. Drljača & Kovačević, Case No. IT-97-24, Decision on Defence Motion for Provisional Release, ¶¶ 26–27 (Jan. 20, 1998) (finding the defendant's submission that, if released, he would not pose a danger to others insufficient, although providing no indication that any evidence had been put forth indicating the contrary).

246. Wald & Martinez, *supra* note 35, at 241.

247. Prosecutor v. Blaškić, Case No. IT-95-14, Decision Rejecting a Request for Provisional Release, ¶ 21 (Apr. 25, 1996). These words have subsequently been oft-quoted by the Prosecution in its opposition to provisional release motions, despite never again being popularly endorsed by the Tribunal. *See, e.g.*, Prosecutor v. Brđanin & Talić, Case No. IT-99-36, Decision on Motion by Radoslav Brđanin for Provisional Release, ¶ 19 (July 25, 2000) (rejecting the conclusion as "strange logic").

248. *See* Prosecutor v. Kupreškić, Case No. IT-95-16, Decision on the Motion for Provisional Release by the Accused Drago Josipović of 21 December 1999, ¶ 2 (Dec. 22, 1999).

witnesses and victims, and that he would appear for the delivery of judgment.”²⁴⁹

This is a troubling decision from a burden of proof perspective and one that seems to bear out all of the concerns raised above. The prosecution, it seems, offered no evidence that the accused would pose a danger to victims and witnesses and the accused raised a number of presumably pertinent, positive factors to no avail. One might then be inclined to wonder how an accused could *ever* meet his burden. Yet, a relevant but unmentioned factor, and one which undoubtedly affected the tribunal’s decision, was the fact that the *Kupreškić* trial had then been ongoing for more than a year. Moreover, as time would later reveal, ICTY accused would not always be put to the test of proving the amorphous negative of non-dangerousness in pretrial matters.

a. Dangerousness Prong

i. Tacit Prosecutorial Burden

In this respect, it can be noted that, in disposing of a number of more recent requests for provisional release, each ICTY trial chamber has at one point or another implicitly assigned a prosecutorial burden of proof as regards the dangerousness prong of the provisional release rule. Despite giving token approval to an accused-based burden in *Ljubičić*,²⁵⁰ Trial Chamber I went on to find that the dangerousness of the accused had not been established, as there was no evidence indicative of the accused having interfered with justice. Of particular importance, the chamber blatantly rejected the *Blaskić* conclusion above, noting that unsupported suggestions by the prosecution predicting possible danger to victims or witnesses upon the release of the accused are insufficient.²⁵¹ Likewise, the panel has concluded more than once that, in order to find

249. *Id.* ¶ 3.

250. Prosecutor v. Ljubičić, Case No. IT-00-41-PT, Decision on Second Application for Provisional Release, ¶ 17 (July 26, 2005) (reaffirming that the burden of proof is upon the accused to satisfy that he will not pose a danger to persons while on release).

251. *Id.* ¶ 29.

against an application for release pursuant to victim or witness concerns, “concrete” danger must be shown.²⁵²

Responding to prosecutorial objections, the Appeals Chamber has rejected the argument that the practical effect of the foregoing is a shift in the allocation of the burden of proof, citing the lower court’s consideration of such other evidence as the conduct of the accused while knowingly under investigation and the prospect of available supervision upon release.²⁵³ Interestingly, in considering the matter, the higher court alleges that the accused had met his persuasive burden regarding the negative prong of Rule 65(B) and that the prosecution then failed to rebut the evidence accepted by the trial chamber in this regard.²⁵⁴ This position, however, appears somewhat disingenuous, as the language from the initial decision that is cited by the ICTY Appeals Chamber to buttress its claim points, in fact, to an opposite conclusion.²⁵⁵

Yet, even if one accepts the appeals chamber’s assessment as true, the approach is a problematic one from the perspective of both fairness and judicial economy. This is not a situation that involves a legal presumption²⁵⁶ and, accordingly, it will be a guessing game for the prosecution as to whether it is required in

252. *See, e.g.*, Prosecutor v. Prlić, Case No. IT-04-74-PT, Order on Provisional Release of Berislav Pušić, ¶ 29 (July 30, 2004). The related decisions of Pusić’s co-accused reflect a similar conclusion. *See Prlić*, Order on Provisional Release of Bruno Stović, ¶ 27 (July 30, 2004); *Prlić*, Order on Provisional Release of Jadranko Prlić, ¶¶ 22, 28 (July 30, 2004); *Prlić*, Order on Provisional Release of Milivoj Petković, ¶ 27 (July 30, 2004); *Prlić*, Order on Provisional Release of Slobodan Praljak, ¶ 28 (July 30, 2004); *Prlić*, Order on Provisional Release of Valentin Ćorić, ¶ 28 (July 30, 2004).

253. *See Prlić*, Decision on Motions for Reconsideration, Clarification, Request for Release, and Applications for Leave to Appeal, ¶ 26 (Sept. 8, 2004) (describing the trial chamber’s examination as “detailed” and also including an assessment of the area in which the accused would reside).

254. *See id.* ¶ 28.

255. *See Prlić*, Order on Provisional Release of Berislav Pušić, ¶ 29 (July 30, 2004) (“Considering that no suggestion has been made that the Accused has interfered with the administration of justice since the Indictment was confirmed against him, the Prosecution’s suggestion that, if released, the Accused may pose a danger to witnesses and victims is insufficiently supported by the evidence. No concrete danger has been identified. The assessment under Rule 65 cannot be done in abstracto.”).

256. Presumptions of law are judge-made (or statutory) rules, which require, once certain factual foundations have been laid, that particular conclusions are to be drawn. COLIN TAPPER, *CROSS & TAPPER ON EVIDENCE* 148 (11th ed. 2007). The application of a presumption makes it incumbent upon the party against whom it operates to make an evidentiary showing lest it suffer an adverse ruling. *See, e.g.*, Note, *A Survey of Procedural Presumptions in the District of Columbia Part I*, 45. *GEO. L.J.* 410, 422 (1957).

a given case to put on evidence with regard to the asserted accused-based burden. Moreover, the approach is not universally employed, offending the principle that like cases ought to be treated alike. In addition, in the interest of fairness, the approach necessitates that a relevant accused then be afforded the opportunity to respond to the prosecutor's accusations, in turn contributing to the overall length of the proceedings.²⁵⁷

Similar to the approach noted above, Trial Chamber III seems to impose a "shared burden," taking into account the institutional shortcomings of the tribunals by requiring the combined personal undertaking of the accused and state guarantees that will ensure compliance with the conditions set by the Tribunal. The concurrent requirement is implicitly that of the prosecution, as the chamber remarked on the "absence of any suggestion that the Accused has interfered with the administration of justice in any way since the date when the indictment was confirmed against him."²⁵⁸ Similarly, in a later matter, the same trial chamber concluded that, as to the "dangerousness" prong, in the absence of any positive evidence adduced by the prosecution, "it is difficult to see that a Trial Chamber could do other than conclude that the Accused will not pose such a danger."²⁵⁹

257. Although outside the scope of this discussion, it is fair to question the value, in some cases, of being given the chance to respond. Consider, for example, a matter recently considered by Trial Chamber II in which the accused had to counter the assertions of intimidation made by two anonymous witnesses and a third allegation of interference contained in a sealed U.N. Interim Administration Mission in Kosovo ("UNMIK") file to which he was denied access as well as its executive summary. *Prosecutor v. Haradinaj*, Case No. IT-04-84-PT, Further Decision on Lahi Brahimaj's Motion for Provisional Release (May 3, 2006).

258. *Prosecutor v. Milutinović*, Case No. IT-99-37-PT, Decision on Second Application for Provisional Release, ¶ 24 (Apr. 14, 2005). Trial Chamber III made identical, contemporaneous findings with regard to Multinović's co-accused and had earlier availed itself of a similar argument in granting the release of Simatovic. *Prosecutor v. Simatović*, Case No. IT-03-69-PT, Decision on Provisional Release, ¶ 32 (July 28, 2004).

259. *Milutinović*, Decision on Nebojša Pavković's Application for Provisional Release, ¶ 12 (Apr. 14, 2005) (advocating for a prosecutorial onus regarding both the absconding and dangerousness prongs). Notably, this aspect of Tribunal case-law has recently been endorsed by the ICC. *See Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo, ¶ 72 (Aug. 14, 2009). (citing ICTY release decisions in the cases of *Haradinaj* and *Prlić* in support of its decision to reject the prosecution's "general allegation" and "general concern" regarding victim safety upon the release of the accused).

It seems, then, that these approaches take into consideration some of the concerns noted above, in particular, that it is unfair to require that an accused prove a universal proposition and that due process requires a particularized showing as regards detention, rather than vague suppositions or generalizations. Whether the implicit prosecutorial burden makes any real inroads on the unfairness associated with an accused-based burden remains to be seen. For example, consider the issue of the standard of proof: if “any evidence” will enable the prosecution to meet its burden as to the potential danger posed by an accused, this calls into question whether a real benefit derives from the tacit burden allocation.²⁶⁰ Moreover, one must bear in mind that these approaches fail to address every problem associated with an accused-based burden and, additionally, are not uniformly employed at the tribunal.

ii. Conflicting Jurisprudence

Those cases that implicitly assign a prosecutorial burden as an aspect of Rule 65(B) must be considered alongside post-amendment jurisprudence in which it is asserted that the prosecution bears no evidentiary burden to demonstrate that provisional release is inappropriate.²⁶¹ Relevant in this respect is a 2005 case in which, despite the fact that prosecutorial assertions that the accused had intimidated or threatened witnesses had not been verified, a trial chamber decided that:

[I]n the absence of any other significant factor indicating that he will not pose a danger to any victim, witness or other person, if released, the Accused has not discharged his burden of proof to satisfy the Trial Chamber that the second requirement of Rule 65(B) of the Rules has been met.²⁶²

Similarly, even in cases in which it seems clear that the prosecution is required to make some contribution towards establishing the negative requirement of Rule 65(B), some trial chambers are not above finding that the negative prong of Rule

260. This issue is addressed in greater detail *infra* at Part III.D.

261. *See, e.g.*, Prosecutor v. Limaj, Case No. IT-03-66-AR65, Decision on Haradin Bala’s Request for Provisional Release, ¶ 40 (Oct. 31, 2003).

262. Prosecutor v. Haradinaj, Case No. IT-04-84-PT, Decision on Lahi Brahimaj’s Motion for Provisional Release, at 6 (Nov. 3, 2005).

65 has not been met in the wake of little more than prosecutorial conjecture.²⁶³

While cases such as those noted in the preceding paragraph appear to be the exception and not the rule,²⁶⁴ this does not address the problem of disparate treatment of like cases. Moreover, simply because the majority of ICTY practice limits the inherent unfairness of the rule as drafted does render the respective provisions harmless.²⁶⁵ First, in fairness to both the prosecution and defense, the rules ought to faithfully reflect tribunal activity. Parties should be clearly and honestly informed as to their proof obligations. In addition, the approach is for another reason unfair and inefficient: by being compelled to refute the possibility of harm to victims or witnesses before any evidence has been advanced regarding the same, time, energy, and resources will be directed towards establishing an element which the accused may not actually bear the burden of proving and, consequently, diverted from meeting his or her legitimate obligations.

Allocating the burden of proof regarding this aspect of rule 65 to the prosecution, on the other hand, would dovetail with Saunders' universal/finite allocation assessment²⁶⁶ and

263. See, e.g., Prosecutor v. Šešelj, Case No. IT-03-67-PT, Decision on Defence Motion for Provisional Release (July 23, 2004); Prosecutor v. Mrda, Case No. IT-02-59-PT, Decision on Darko Mrda's Request for Provisional Release (Apr. 15, 2003). Although the latter matter was likely decided on the fact that the accused failed to proffer a state guarantee, the trial chamber chose to make an *in abstracto* finding as to the negative prong of Rule 65 rather than, it seems, the absence of a guarantee. *Mrda*, Decision on Darko Mrda's Request for Provisional Release, ¶ 39.

264. Trial Chamber II has also imposed a tacit obligation on the prosecution as regards the "dangerousness" prong. See, e.g., Prosecutor v. Popović, Case No. IT-05-88-PT, Decision on Drago Nikolić's Request for Provisional Release, ¶ 27 (Nov. 9, 2005) (concluding that "[n]ot having received any information from the Prosecution that would substantiate an opposite conclusion, the Trial Chamber does not see any reason to doubt that the Accused has never posed a danger to any victim, witness or any other person who may appear before the Tribunal, or that he would not do so if he were to be provisionally released"); see also Gaynor, *supra* note 110, at 196 (offering the opinion that the accused-based burden in rule 65(B) remains the formal position, but that "the onus in practice shifts to the prosecution").

265. This is also part of a recurring issue that, in part, relates back to the observation that the limitations of the *ad hoc* instruments create a burden upon the judiciary to ensure the fair trial that is not necessarily assured by the rules. It is particularly troubling when considered in light of the precedential effect of *ad hoc* activity. The RPE standing alone should assure a fair proceeding; it is not enough that this objective may be met by judicial correction.

266. See *supra* note 204 and accompanying text.

Wigmore's observation that burden allocation ought to correspond with fairness considerations.²⁶⁷ It would bring the tribunal in line with a burden of proof that is dictated by recent jurisprudence of the U.N. Human Rights Committee.²⁶⁸ Moreover, a prosecutorial burden would create a framework more worthy of serving as precedent by limiting the spectrum of evidence placed before the overburdened court, placing the prosecution on clear notice that it is required to adduce evidence, and resulting in a scenario wherein an accused is clearly informed of the allegations that he must address.

b. External Effect of Tribunal Jurisprudence and Practice

In light of the issues raised in relation to burden allocation at the tribunal, one must consider the carry-on effect of ICTY practice in this area. It is not difficult to imagine that an accused-based burden in release matters, despite all of the problems noted with the same, may be adopted on the domestic, quasi-international, or international level. In fact, such is already the case with regard to the Special Court for Sierra Leone, which has adopted, *mutatis mutandis*, the RPE of the ICTR²⁶⁹ (whose rules are virtually identical to those of the ICTY).²⁷⁰ While the ICC has opted not to follow the ICTY insofar as the latter makes detention the rule and allocates an accused-based burden of proof for release,²⁷¹ the potential precedential effect of the ICTY's accused based burden of proof in matters of release at other institutions remains. Indeed, at the Extraordinary Chambers of the Courts of Cambodia ("ECCC"), the co-prosecutors in the *Samphan* case appear to question whether the relevant section in the Cambodian Procedure Code, which dictates that "as a rule, the Charged Person is to remain at liberty," necessarily applies to release determinations at the

267. See *supra* note 190 and accompanying text.

268. See *supra* note 224 and accompanying text.

269. Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 145, art. 14(1).

270. See *supra* note 5.

271. See, e.g., Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Decision on the Powers of the Pre-Trial Chamber to Review *Proprio Motu* the Pretrial Detention of Germain Katanga (Mar. 18, 2008) (distinguishing the ICC approach to release from that of the ICTY by interpreting provisions of the ICC Statute to dictate that detention is an exceptional measure for which the prosecution bears the burden of proof).

ECCC.²⁷² In support of the conclusion that it does not, the co-prosecutors cite ICTY precedent in which pretrial detention is the rule.²⁷³

Further problems are likely to arise still, as the tribunal has not candidly (or consistently) addressed its modification of the rule in practice, so as to expressly create a prosecutorial burden with regard to the dangerousness prong. Thus, despite the fact that later courts are “not generally bound by the jurisprudence of other International Tribunals”²⁷⁴ they may well refer to tribunal cases and, in the field of provisional release, are at risk of taking the tribunal at face value, accepting the (it is submitted, disingenuous) assertion that the accused bears the entirety of the burden in provisional release matters.²⁷⁵

272. Public Redacted Version of the “Co-Prosecutor’s Response to Khieu Samphan’s Appeal Brief Against the Order Refusing Request for Release Dated 28 October 2008,” Filed on 22 January 2009, ¶¶ 7–8, Co-Prosecutors v. Samphan, Case No. 002/19-09-2007-ECCC/OCD (PTC 14) (Jan. 28, 2009). The relevance of existing Cambodian procedure is beyond dispute. See Guido Acquaviva, *New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers*, 6 J. INT’L CRIM. JUST. 129, 132 (2008) (“Since the [Extraordinary Chambers in the Courts of Cambodia (“ECCC”)] are intended to form part of the domestic judiciary of Cambodia, existing Cambodian procedural law should in principle apply.”). As we have seen, the norm applied may in essence dictate burden allocation.

273. Public Redacted Version of the “Co-Prosecutor’s Response to Khieu Samphan’s Appeal Brief Against the Order Refusing Request for Release Dated 28 October 2008,” Filed on 22 January 2009, ¶ 8, *Samphan* (availing of case law from the Special Court for Sierra Leone, which attributes the approach to the serious nature of the crimes charged, to justify this deviation from international standards). Note, however, that using ICTY precedent to “trump” the existing Cambodian procedural provision runs afoul of ECCC law. See Acquaviva, *supra* note 272, at 132 (“Articles 20, 23 and 33 of the ECCC Law only allow for recourse to procedural rules established at the international level in case ‘existing procedure in force’ does not deal with certain matters. Article 12 of the Agreement adds that guidance may be sought in procedural rules established at the international level where (i) Cambodian Law does not deal with a particular matter, (ii) there is uncertainty regarding interpretation or application of Cambodian law or (iii) there is a question on the consistency of Cambodian law with international standards.”).

274. Prosecutor v. Sesay, Case No. SCSL-04-15-PT, Decision on the Motion by Morris Kallon for Bail, ¶ 32 (Feb. 23, 2004).

275. While this represents an example of how the absence of candor in the Tribunal’s provisional release jurisprudence can work to the detriment of an accused, as the *Bemba* decision illustrates, this absence of candor in Tribunal decisions can also inure to the benefit of an accused. See *infra* note 298 and accompanying text.

D. *Standard of Proof*

Having thus considered the issues raised by the allocation of the burden of proof in provisional release determinations, it makes sense to turn to the matter of the standard of proof: to what degree must the requirements of rule 65 be met? The answer is not apparent from the rule itself, which requires only that a trial chamber be “satisfied” that an accused will appear for trial and will not pose a danger to others before ordering release.²⁷⁶ In addition, the recently created ICTY Manual on Developed Practices offers no more enlightenment than the relevant rule.²⁷⁷

The prosecution has repeatedly sought the application of a standard of proof greater than the balance of probabilities (*i.e.*, preponderance of the evidence). In so doing it has advanced a number of arguments, such as that the trial chamber must be satisfied “that there is no real risk that the accused will fail to appear for trial,”²⁷⁸ that Rule 65(B) places a “substantial burden on the Accused to show that, if he is released, he will appear for trial and will not pose a danger to any witness, victim or other person,”²⁷⁹ and that the accused “must do more than simply tip the balance in his favour.”²⁸⁰ According to the prosecution, “the special circumstances in which [the] Tribunal operates warrant the application of a more onerous standard by a Trial Chamber

276. See *ICTY Rules*, *supra* 179, R. 65(B); see also U.N. Comm’n on Int’l Trade Law, *Report of the Working Group on Arbitration on the Work of Its Thirty-ninth Session* (Vienna, 10–14 November 2003), ¶ 28, U.N. Doc. A/CN.9/545 (Dec. 8, 2003) (observing that satisfaction is “a neutral formulation of the standard of proof”); see also McIntyre, *supra* note 181, at 234, (identifying a clarity issue that extends beyond the relevant standard of proof: “[t]he exact nature of the burden which is placed upon an accused is unclear . . . [p]resumably . . . Rule 65(B) places a persuasive burden upon the accused in the sense that the accused not only has the obligation to adduce evidence to meet the requirements of the rule, but must also discharge a persuasive burden . . .”).

277. See *ICTY Manual on Developed Practices*, *supra* note 182, at 65 (confirming only burden allocation by noting that the criteria for release must be “satisfied” by the accused).

278. Prosecution’s Appeal Against the Trial Chamber’s Decision to Grant Provisional Release, ¶ 14, Prosecutor v. Šainović & Ojdanić, Case No. IT-99-37-AR65 (July 26, 2002).

279. Confidential Reply of Haradin Bala to Prosecution’s Response to Motion for Provisional Release, ¶ 4, Prosecutor v. Limaj, Case No. IT-03-66T (July 25, 2003) (unpublished), *quoted in Limaj*, Decision on Provisional Release of Haradin Bala, at 4 (Sept. 16, 2003).

280. Prosecution’s Reponse to Applications for Provisional Release, ¶ 27, *Sainović & Ojdanić* (June 19, 2002).

when considering a motion for provisional release.”²⁸¹ In effect, the prosecution has frequently asked for the institutional shortcomings of the tribunal to not only create an accused based burden of proof, but to render that burden more substantial.

One of the decisions that appears to support the call for a heightened standard was delivered in the *Brđanin* case, in which Trial Chamber II avers that the ICTY’s institutional shortcomings “place a substantial burden upon any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released.”²⁸² This decision was subsequently invoked by the prosecution in *Šainović* and *Ojdanić*, in support of its contention that the burden placed upon the accused in release determinations is a “very substantial” one.²⁸³ This interpretation of the *Brđanin* language is no doubt a plausible one; however, it was subsequently dispelled by Judge Hunt, who authored the cited words. According to Hunt, the “substantial burden” noted in *Brđanin* bears no legal import; it is “a reference only to the substantial difficulty [an accused] will have, by reason of the context within which the Tribunal is forced to operate, in satisfying a Trial Chamber that *more probably than not* he will appear.”²⁸⁴

Somewhat startling, then, is Judge Shahabuddeen’s response, in a separate opinion in the same case: “It could be argued that the reference to . . . ‘a substantial burden of proof’, visualised only a test based on the balance of the probabilities, the gravity of the condition to appear for trial being taken into account in the workings of that test. But I am not persuaded.”²⁸⁵ Rejecting Judge Hunt’s explanation and maintaining that the cited *Brđanin* language “went to the kind of standard of proof by which that ‘substantial burden of proof’ had to be discharged,”

281. Prosecution’s Appeal Against the Trial Chamber’s Decision to Grant Provisional Release, ¶ 9, *Sainović & Ojdanić* (July 26, 2002).

282. Prosecutor v. Brđanin & Talić, Case No. IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, ¶ 18 (July 25, 2000).

283. *Šainović & Ojdanić*, Decision on Provisional Release, ¶ 28 (Oct. 30, 2002) (Hunt, J., dissenting).

284. *Id.* ¶ 30 (emphasis added). According to Hunt, “[t]he more serious the matter asserted, or the more serious the consequences flowing from a particular finding, the greater the difficulty there will be in satisfying the relevant tribunal that what is asserted is more probably true than not.” *Id.* ¶ 29.

285. *Šainović & Ojdanić*, Decision on Provisional Release, ¶ 40 (Shahabuddeen, J., separate opinion).

Shahabuddeen sanctions the prosecution's position and endorses the use of an intermediate standard.²⁸⁶

This divide leaves the water rather muddled as regards the applicable standard of proof in release determinations. It appears that the majority of subsequent decisions that affirmatively address the issue of the standard of proof endorse Judge Hunt's approach, averring that the applicable standard of proof is that of the balance of probabilities.²⁸⁷ Yet many release determinations fail to elaborate upon the standard imposed and others avail themselves of the now ambiguous assertion that the accused's burden is a "substantial" one.²⁸⁸ Moreover, several decisions evidence outright approval of a heightened standard of proof in provisional release matters, as well as of Judge Shahabuddeen's interpretation of the language in *Brdanin*.²⁸⁹ Accordingly, this noted disparity as to what the standard is—or ought to be—provides yet another example of how parties to a provisional release motion at the ICTY face both unpredictable and potentially disparate treatment.

Finally, one must also consider the standard of proof associated with the tacit prosecutorial burden addressed earlier.²⁹⁰ Despite the fact that it is often difficult to discern the standard employed in any given case (unless a court expressly addresses the issue), the substance of at least one tribunal decision raises concerns regarding the standard of proof required in matters in which the prosecution has an implied burden regarding the dangerousness prong. While seeming to

286. *Id.* ¶¶ 40–41.

287. *See, e.g.*, Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-PT, Decision on Provisional Release, ¶ 37 (May 26, 2008); Prosecutor v. Milošević, Case No. IT-02-54T, Decision on Assigned Counsel Request for Provisional Release, ¶ 10 (Feb. 23, 2006); Prosecutor v. Perešić, Case No. IT-04-81-PT, Decision on Momčilo Perešić's Motion for Provisional Release, ¶ 5(h) (June 9, 2005); Prosecutor v. Delić, Case No. IT-04-83-PT, Decision on Defence Request for Provisional Release, ¶ 4 (May 6, 2005); Prosecutor v. Lazarević, Case No. IT-03-70-PT, Decision on Defence Request for Provisional Release, ¶ 5(h) (Apr. 14, 2005).

288. *See, e.g.*, Prosecutor v. Prlić, Case No. IT-04-74-PT, Order on Provisional Release of Milivoj Petković, ¶ 13 (July 30, 2004).

289. Prosecutor v. Tolimir, Case No. IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, ¶ 8 (July 19, 2005); *Tolimir*, Decision Concerning Motion for Provisional Release of Radivoje Miletić, ¶ 8 (July 19, 2005); Prosecutor v. Bošković & Tarčulovski, Case No. IT-04-82-PT, Decision Concerning Renewed Motion for Provisional Release of Johan Tarčulovski, ¶ 9 (Jan. 17, 2007).

290. *See supra* note 262 and accompanying text.

maintain the position that dangerousness cannot be established *in abstracto*, in deciding the pretrial fate of Lahi Brahimaj, Trial Chamber II accepted as sufficient virtually unchallengeable (and, consequently, unverifiable) evidence proffered by the prosecution.²⁹¹ In so doing, the trial chamber asserted that the threshold upon the prosecution as regards the dangerousness prong “must not be set too high; else, it would never be met.”²⁹²

This is a troubling conclusion in light of the fact that, as noted above, to associate an insignificant standard of proof with this prosecutorial onus is substandard: if the prosecution is deemed to meet its burden as to the potential dangerousness of an accused by proffering a negligible amount of “evidence,” this has the capacity to undermine the utility of the allocation from the standpoint of procedural fairness. If a trial chamber deems vague and unsubstantiated prosecutorial assertions as sufficient, the accused essentially remains in the same untenable position of establishing the universal proposition of nondangerousness (and, even more troublingly, may be required to establish the same in accord with Judge Shahabuddeen’s higher standard).

E. *Relevant Factors in Assessing Requests for Release*

1. General Considerations

Having thus covered the matters of burden allocation and standards of proof, it makes sense to highlight those issues that may play a role in a chamber’s determination as to whether these requirements are satisfied. As Rule 65 is silent regarding the factors that may be considered in granting or denying release, one must look to the jurisprudence of the tribunal to isolate some of the factors that may be relevant to a provisional release determination. In this regard, a non-exhaustive list composed by the Appeals Chamber in *Šainović & Ojdanić* in 2002 is quite useful.²⁹³ Among the factors noted therein are: the seriousness of

291. The evidence at issue involved assertions of intimidation by two anonymous witnesses and a third allegation of interference contained in a sealed UNMIK file to which the accused was denied access. See Prosecutor v. Haradinaj, Case No. IT-04-84-PT, Further Decision on Brahimaj’s Motion (May 3, 2006).

292. *Id.* ¶ 39 (concluding that “[t]his is particularly true in an environment which is hostile to witnesses who are willing to give evidence in criminal proceedings.”).

293. Prosecutor v. Šainović & Ojdanić, Case No. IT-99-37-AR65, Decision on Provisional Release (Oct. 30, 2002).

the criminal offense, the likelihood of a long prison term if convicted, the circumstances of surrender, the degree of cooperation given by the authorities of the state to which the accused seeks to be released, guarantees offered by the authorities of that state in relation to ensuring the presence of the accused for trial and the observance of the conditions set by a trial chamber, the senior position of the accused, the existence of national legislation facilitating cooperation with the tribunal, the degree to which the accused has cooperated with the prosecution, and any suggestion that the accused has interfered with justice since the confirmation of the indictment against him.²⁹⁴

Despite the fact that the opinion seemingly limits its observations to the case then at issue,²⁹⁵ subsequent appellate jurisprudence appears to indicate otherwise²⁹⁶ and some subsequent decisions reflect this sentiment as well.²⁹⁷ As such, one cannot underestimate its precedential value for subsequent release determinations at the ICTY. Importantly, however, the list is not comprehensive and, of course, some of the items mentioned are more noteworthy than others. For example, while it is reasonable for the severity of the crimes charged and the consequent potential penalties to play a role in pretrial release decision making, given the limited subject matter jurisdiction of the tribunal, such inquiries will often yield similar results and therefore likely admit of an answer before the question is even posed. Among those factors that remain, however, an undeniably potent issue is that of state guarantees.

294. *Id.* ¶ 6.

295. *Id.* (noting that a reasonable trial chamber would have been expected to consider the above enumerated factors “[i]n relation to the *present* application for provisional release.” (emphasis added)).

296. *See, e.g., Sainović & Ojdanić*, Decision Refusing Ojdanić Leave to Appeal, at 4 (June 27, 2003) (noting that “in its Decision on Provisional Release, the Appeals Chamber has laid down a non-exhaustive list of factors which a Trial Chamber must take into account before granting provisional release.”).

297. *See, e.g., Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-PT, Decision on Johan Tarčulovski’s Motion for Provisional Release, ¶ 13 (July 18, 2005); *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Momčilo Perišić’s Motion for Provisional Release, at 2–3 (June 9, 2005).

2. State/Entity Guarantees

Notwithstanding tribunal claims to the contrary,²⁹⁸ it has thus far been established that certain aspects of pretrial release at the ICTY, in particular, that detention is the rule and the accused bears the burden of proof as regards release, do not legitimately correspond with the tribunal's so-called institutional shortcomings. By contrast, the relevance of state guarantees to release determinations genuinely addresses the ICTY's lack of a police force, as the use of state guarantees create to the ability to monitor the accused while on release and to arrest him, if necessary.²⁹⁹ It follows, then, that an accused request that the state in which he intends to reside during his release provide assurances as to his return to the tribunal.³⁰⁰

Although Rule 65 does not explicitly reference state guarantees, such assurances are extremely valuable. In fact, although tribunal case law has consistently maintained that a state guarantee is not a mandatory precondition for obtaining release,³⁰¹ this contention does not seem to stand up to scrutiny.

298. See *supra* note 148 and accompanying text.

299. Indeed, ICTY former President Meron acknowledges that release “has been granted increasingly often as better government cooperation has made it possible to trust states’ guarantees to rearrest the accused.” Thodor Meron, *Anatomy of an International Criminal Tribunal: Hudson Lecture*, 100 AM. SOC’Y OF INT’L L. PROC. 279, 284 (2006) (implying that it is the inability of ICTR indictees to obtain guarantees that has stalled provisional release motions at the ICTR).

300. Here, the ICTY arguably finds itself in a different position from that of the ICC, as states parties to the ICC are obliged to “cooperate fully with the Court.” Rome Statute of the International Criminal Court art. 86, July 17, 1998, 2187 U.N.T.S. 90; see also *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo, ¶¶ 85–87 (Aug. 14, 2009) (implying that the ICC may call upon unwilling states to implement its interim release decisions pursuant to their treaty obligations). *But see Bemba*, Case No. ICC-01/05-01/08 OA2, Judgment on the Appeal of the Prosecutor, ¶¶ 107 (Dec. 2, 2009) (maintaining that the ICC “is dependent on State cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the Court are enforced. Without such cooperation, any decision of the Court granting conditional release would be ineffective”).

301. See *Sainović & Ojdanić*, Decision on Provisional Release, ¶ 57 (Oct. 30, 2002) (Hunt, J., dissenting) (“The Appeals Chamber has made it clear that, although the production of a guarantee from the relevant governmental body is advisable, it is not a prerequisite for provisional release.” (citing *Blagojević*, Decision on Application by Dragan Jokić for Provisional Release, at 2–3 (Mar. 28, 2002)); see also *Prosecutor v. Tolimir*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber’s Decisions Granting Provisional Release, ¶ 9 (Oct. 19, 2005) (averring that Rule 65 “places no obligation upon an accused applying for provisional release to

As per appellate jurisprudence, the absence of a state guarantee “weighs heavily” against an accused seeking release.³⁰² Moreover, as yet, not one accused has obtained release in the absence of such a guarantee.³⁰³ This aligns with the U.N. Secretary-General’s October 2000 report to the General Assembly which states “in those cases in which no guarantee is given by the relevant state, a release will not be granted.”³⁰⁴ In this respect, the jurisprudence of the ICTR appears more honest than its Yugoslav counterpart, in that it acknowledges that “[t]he Defence *must* provide at least prima facie evidence that the country in question agrees or would agree to accept the Accused on its territory, and that the country will guarantee the Accused’s return to the Tribunal at such times as the Chamber may order.”³⁰⁵

The jurisprudence of the Yugoslav Tribunal makes clear that each provisional release application must be assessed individually and on its own facts.³⁰⁶ As a result, a state’s general level of

provide guarantees from a State as a prerequisite to obtaining provisional release” (citations omitted)).

302. *Bošković & Tavčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Bošković’s Interlocutory Appeal on Provisional Release, ¶ 23 (Sept. 28, 2005) (maintaining, however, that “a lack of governmental guarantees does not alone bar provisional release”).

303. *See, e.g., McIntyre*, *supra* note 181, at 225 (noting that, as of 2003, the ICTY required every released accused to secure a state guarantee despite the fact that “it is not a prerequisite to the grant of provisional release.”); *see also*, Clemens A. Muller, *The Law of Interim Release in the Jurisprudence of the International Criminal Tribunals*, 8 INT’L CRIM. L. REV. 589, 605 (2008) (observing that “[g]uarantees given by governments or authorities are essential in determining if the accused will appear for trial”). It is nothing short of ironic, then, that the tribunal’s hollow mantra—that a guarantee is not a prerequisite for release—is cited in the recent ICC *Bemba* decision in support of the single judge’s conclusion that release should be granted despite the absence of such a guarantee. *Bemba*, ¶ 88.

304. Summary of Follow-up Action Taken to Implement Relevant Recommendations of the Internal and External Oversight Bodies and the Advisory Committee on Administrative and Budgetary Questions, The Secretary-General, *Report of the Secretary General on the Financing of the ICTY*, Annex VII, at 82, U.N. Doc. A/55/517 (Oct. 24, 2000).

305. *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, Decision on Defence Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request His Provisional Release, ¶ 22 (Aug. 18, 2003). This requirement is likely the key factor the ICTR’s failure to have ever granted a request for provisional release.

306. *See, e.g., Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić (Sept. 20, 2002) (noting that Rule 65 “cannot be applied *in abstracto*, but must be applied with regard to the factual basis of the particular case”).

cooperation with the tribunal should not be referenced as a separate finding in an application;³⁰⁷ rather, the relevant issue is the merit of the guarantee vis-à-vis the relevant accused.³⁰⁸ Undoubtedly, this is an approach that works to the advantage of an accused in possession of a guarantee from a state or entity that does not have a strong record with the tribunal. Of course, an accused in possession of a guarantee from an unpopular state or entity may well still face an uphill battle.

Guarantees rendered by nonstate entities equally merit consideration in provisional release determinations. The Tribunal has accepted guarantees from the U.N. Interim Administration Mission in Kosovo³⁰⁹ and, more controversially, from the nonstate entity of Republika Srpska. Acceptance of guarantees from the latter was the result of a tug of war between Trial Chamber II and the appeals chamber, the former refusing to factor in a guarantee rendered by Republika Srpska in a release determination³¹⁰ despite appellate jurisprudence dictating otherwise. Later, in direct contravention of a decision directing the lower court to consider the proffered guarantee, the trial chamber refused to relent.³¹¹ Consequently, when faced with the issue for a second time, the appeals chamber decided the matter on its own.³¹²

307. See Prosecutor v. Blagojević, Case Nos. IT-02-60-AR65 & IT-02-60-AR65.2, Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, ¶ 12 (Oct. 3, 2002) (Hunt, J., separate opinion).

308. See Blagojević, Case No. IT-02-60-AR65.4, Decision on Provisional Release Application of Blagojević, ¶ 16 (Feb. 17, 2003); Prosecutor v. Mrkšić, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, ¶ 11 (Oct. 8, 2002).

309. See Gaynor, *supra* note 110, at 187.

310. Blagojević, Case No. IT-02-60-PT, Decision on Dragan Obrenović's Application for Provisional Release, ¶ 2 (Nov. 19, 2002) (noting that the original decision to deny release "was independent of the guarantees provided by the authorities which gave them").

311. Blagojević, Case Nos. IT-02-60-AR65 & IT-02-60-AR65.2, Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, (Oct. 3, 2002) (Shahabuddeen, J., declaration).

312. Blagojević, Decision on Provisional Release Application of Blagojević, ¶ 14. Although the relevant accused persons were unsuccessful, the same appellate panel granted the short-term release of another accused who proffered guarantees provided by Republika Srpska. See Prosecutor v. Krnojelac, Case No. IT-97-25-A, Decision on Application for Provisional Release (Dec. 12, 2002). Notably, however, the motion by the accused was not opposed by the prosecution. *Id.*

F. *Return of the Dangerousness Prong: Problems in Addition to Burden Allocation*

As already noted, Rule 65(B) requires that a trial chamber be satisfied that the accused will not pose a danger to any victim, witness, or other person upon release. Up to this point, the “dangerousness prong” has been established to be problematic with regard to both burden allocation and the standard of proof. However, these areas do not represent the whole of the difficulties associated with the provision. As will be shown, the dangerousness prong also unacceptably permits detention on the basis of an untried indictment³¹³ and the broadness of the dangerousness provision compounds the proof problems of the accused beyond that of establishing a universal proposition. As Tribe observes, it is possible to live one’s life in a manner likely to assure never to be found guilty of a crime beyond a reasonable doubt, yet the same cannot be said for the lesser standard of proof required to secure an indictment, nor the ability to ensure that one will never be deemed to pose a danger to any person.³¹⁴

Equally, when considering the dangerousness prong, it makes sense to recall the presumption of innocence. As noted earlier, in order for pretrial detention to comply with the presumption, the reason for detention must relate to the integrity of the trial process.³¹⁵ Bearing this factor in mind, difficulties with the dangerousness prong immediately come to light. The provision is overly broad and by no means constrained so as to ensure solely the reliability of the judicial process,³¹⁶ a fact that is indicated by the absence of any relevant language of limitation and established beyond a doubt by its inclusion of the language “or other person.”

313. *Cf.* *United States v. Salerno*, 481 U.S. 739, 768 (1987) (Stevens, J., dissenting) (“It is clear to me that a pending indictment may not be given any weight in evaluating an individual’s risk to the community or the need for immediate detention.”).

314. Tribe, *supra* note 80, at 405–06.

315. *See supra* Part I.B.2.

316. *ICTY Rules, supra* 179, R.65(B). As is illustrated *infra* Part III.G.2, this problem extends beyond the dangerousness prong in Rule 65(B), as certain trial chambers have asserted that their discretionary authority enables them to detain an accused if required by the public interest.

In addition, the sheer punitive aspect of this type of detention³¹⁷ affronts the presumption of innocence³¹⁸ and, by enabling the detention of an individual based upon his potential to pose a danger to others, the provision is as arbitrary as it is unfair. While individuals who stand accused may be more likely, on the whole to commit a future crime, “there are persons not charged with any crime who give every indication of being at least as dangerous as anyone awaiting trial on a pending charge.”³¹⁹

Furthermore, when viewed in the light of a subsequent acquittal, the dangerousness prong again proves both in violation of the presumption of innocence and inconsistent in its application.³²⁰ Once cleared of the underlying charges, a “dangerous” accused will be released into the community,³²¹

317. United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 716 (S.D.N.Y. 1981) *aff'd sub nom.* Martin v. Strasburg, 689 F. 2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 467 U.S. 253 (1984).

If incarceration . . . were based exclusively on a founded suspicion that [an individual] had committed crimes, no one would doubt that this constituted punishment. To hold that it is not ‘punishment’ when based on a vague suspicion the [individual] may commit further crimes would render the due process clause in inverse proportion to the arbitrariness of governmental decision-making.

Id.

318. See, e.g., Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 373 (1990) (concluding that, under such circumstances, a court’s finding that an accused will commit crimes in the future “is equivalent to guilt after trial—that the individual possesses the requisite mens rea to justify being jailed”).

319. Tribe, *supra* note 80, at 405.

320. This is again an area where domestic practice by no means represents best practice. As is reflected by the *Salerno* dissents noted *supra*, the United States Bail Reform Act also allows for the detention of a “dangerous” accused. See, e.g., United States v. Salerno, 481 U.S. 739, 768 (1987) (Stevens, J., dissenting). Similarly, the amendment of the Irish Constitution, *supra* note 16, paved the way for that country to refuse bail when it is “reasonably considered necessary to prevent the commission of a serious offence by” an accused. See Bail Act, 1997, §2(1) (Act. No. 16/1997) (Ir.) available at <http://www.irishstatutebook.ie/1997/en/act/pub/0016/sec0002.html#zza16y1997s2>. The relevant amendment to the constitution required a public referendum in which it garnered the approval of 74.83% of voters, see Ireland Index, History and News, available at http://www.oefre.unibe.ch/law/icl/ei__indx.html (last visited Apr. 30, 2010), a result that provides credence to the theory that the present trend is for members of voting communities to endorse the erosion of civil liberties in favor of provisions that enhance their “security.” See Ireland Index, History and News, http://www.oefre.unibe.ch/law/icl/ei__indx.html (last visited Apr. 30, 2010).

321. Justice Marshall concludes that this is the case in the United States, where the detention provision requires the government to establish dangerousness by clear and convincing evidence, as this fails to meet the reasonable doubt threshold required to imprison an individual for a crime. *Salerno*, 481 U.S. at 756 n. 1, 763–64 (1987)

despite the fact that his dangerousness may have had nothing to do with the integrity of the criminal process in the case at hand and, therefore, he may be as likely to endanger others at the moment as before acquittal. Indeed, only those bases used to establish the necessity of pretrial detention that relate to the integrity of the pending case cease to exist upon acquittal.³²² Moreover, the release of the accused highlights the fact that, impermissibly, it was the underlying charge(s), to which the presumption of innocence never ceased to apply, which enabled the pretrial detention. Stated succinctly, “[t]he conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that, left to his own devices, he will soon be guilty of something else.”³²³

G. *Rule 65: Breadth and Vagueness Problems*

The breadth problems associated with rule 65(B) are, unfortunately, not limited to the dangerousness prong, but also arise in conjunction with the trial chamber’s discretionary power in provisional release matters. ICTY jurisprudence provides that a chamber has the power to deny a motion for provisional release despite the fact that an accused has proved that he will reappear for trial and will not pose a danger to any person if released.³²⁴ A plain reading of Rule 65(B) reveals that this discretionary power may not equally be used to grant release when a trial chamber is not satisfied that the accused will appear for trial and/or that he will not pose a danger to any person if released—and this is

(Marshall, J., dissenting). This argument is even stronger at the tribunal where, as discussed *supra*, the accused ostensibly bears the burden of disproving his dangerousness and, even in cases where the prosecution seems to carry the affirmative burden, the standard of proof may be minimal.

322. Tribe, *supra* note 80, at 406.

323. *Salerno*, 481 U.S. at 764 (Marshall, J., dissenting).

324. Trial Chamber II quibbles with this assertion. It maintains that “if a Trial Chamber is satisfied regarding [the] two preconditions, the Chamber must then determine *whether it should* exercise its discretion to order release.” Prosecutor v. Tolimir, Case No. IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, ¶ 8 (July 19, 2005) (emphasis added). A contrary view, and an argument for a shared or shifting burden, has been advanced by Judge Hunt. Prosecutor v. Šainović & Ojdanić, Case No. IT-99-37-AR65, Decision on Provisional Release, ¶ 80 (Oct. 30, 2002) (Hunt, J., dissenting) (averring that, once an accused has established that he will appear for trial and will not be a danger to others while on release, release ought to be granted, unless the prosecution persuades the chamber against it).

confirmed in ICTY case law.³²⁵ Yet there is no statutory guidance as to the application of the discretionary power in denying release when the express requirements have been met.³²⁶ Thus, the state of affairs is such that the deciding trial chamber is not perceptively restrained in rejecting a motion for release.³²⁷ In short, an accused may carry his burden, yet remain in detention due to factors that are both unarticulated and limitless. As such, it is submitted that, insofar as it confers this discretionary power upon the trial chamber, Rule 65 is impermissibly vague.

1. Dangerousness Prong

Admittedly, if one were to apply the “void for vagueness” doctrine familiar in U.S. jurisprudence, one might anticipate certain difficulties, as historically the doctrine in the United States has turned on whether a law provides adequate notice as to the type of conduct it prohibits (akin to *nulla poena sine lege*).³²⁸

325. Prosecutor v. Ademi, Case No. IT-01-46-PT, Order on Motion for Provisional Release, ¶ 21 (Feb. 20, 2002) (“If the Trial Chamber is not convinced that the accused will both appear for trial and not pose a risk to any victim, witness or other person, a request for provisional release *must* be denied.” (emphasis added)).

326. Trial Chamber I has attempted to shed some light on this issue, noting that: [T]he express requirements within Rule 65(B) should not be construed as intending to exhaustively list the reasons why release should be refused in a given case. There may be evidence of obstructive behaviour other than absconding or interfering with witnesses, which a Trial Chamber finds necessary to take into account. For example: the destruction of documentary evidence; the effacement of traces of alleged crimes; and potential conspiracy with co-accused who are at large. In addition, factors such as the proximity of a prospective judgement date or start of the trial may weigh against a decision to release. The public interest may also require the detention of the accused under certain circumstances, if there are serious reasons to believe that he or she would commit further serious offences.

Id. ¶ 22. Of course, the last issue noted rejects the broad and positive application of the presumption of innocence called for herein and arguably sanctions preventative detention. *See supra* Part I.B.2.

327. In this regard, it is worthwhile to recall Nowak’s admonition, noted at the outset of this Article: in order to guard against arbitrary and unjust detention, relevant legislation must “define *precisely* the cases in which deprivation of liberty is permissible.” NOWAK, *supra* note 27, at 211–12 (emphasis added).

328. *See* David W. Gartenstein & Joseph F. Weingartz, *RICO’s “Pattern” Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489, 504–05 (1990). A domestic analogy is necessary here, as “an international void for vagueness doctrine has never been fully articulated.” Matthew C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT’L ECON. L. 79, 99 (2006). This absence in international law is perhaps best attributed to the nascent aspect of international criminal proceedings. The vagueness doctrine, while not limited to criminal prohibitions and sanctions, “has shown greater

In fact, in addressing a challenge to the “dangerousness” component in the U.S. Bail Reform Act based upon this ground, the district court in the *Payden* case rejected the claim, averring that the bail statute does not prohibit conduct, and asserted that “rather it establishes a framework for a judge to detain an individual based on a prediction of possible future conduct.”³²⁹ Yet, with regard to the dangerousness claim, there is merit to the argument that both the U.S. act and the ICTY RPE “fail[] to give notice of the conduct which will lead to pre-trial detention.”³³⁰ Moreover, one must again consider the burden of proof problems earlier associated with universal propositions in light of the fact that “[t]he core of procedural due process is the adequacy of the hearing provided before a deprivation of liberty . . . occurs.”³³¹

Further still, it appears that the *Payden* court fatally overlooked the evolution of the vagueness doctrine. Over time, the notice requirement has inherited a twin element, as the prevention of arbitrary and discriminatory enforcement of law has become “an independent wing” of the doctrine.³³² In fact, it is this latter component that has been dubbed the “most persuasive justification for vagueness review generally.”³³³ Thus, as is illustrated in Canadian jurisprudence, a vagueness attack may be structured in one of these two ways.³³⁴

2. Tribunal’s Discretionary Power

In fact, the Canadian Supreme Court somewhat recently entertained a legality challenge to a bail provision in the country’s criminal code on the basis that its language facilitated

solicitude for the protection of the individual who faces criminal penalties.” Gartenstein & Weingartz, *supra*, at 509.

329. *United States v. Payden*, 598 F. Supp. 1388, 1396 (S.D.N.Y. 1984).

330. *Id.* at 1395 (citing the defendant’s claim).

331. *Aime v. Commonwealth*, 611 N.E. 2d 204, 214 (Mass. 1993).

332. Gartenstein & Weingartz, *supra* note 328, at 513–16 (noting that this component has come to be known as the “primary goal” of the doctrine).

333. John Calvin Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 218 (1985).

334. A claim of vagueness may be waged pursuant to the Canadian Charter under either section 1 (*nulla poena sine lege*) or section 7 (the dictate of fundamental justice that laws may not be too vague). *See, e.g., Canada v. Nova Scotia Pharm. Soc’y*, [1992] 2 S.C.R. 606 (Can.).

arbitrary detention. The wording at issue in *R. v. Hall*³³⁵ enabled judicial officials to deny bail “on any just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary to maintain confidence in the administration of justice”³³⁶ While upholding the “administration of justice” language, the majority decision rejected the preceding phrase of “any just cause” declaring that “it is a fundamental principle of justice that an individual cannot be detained by virtue of a vague legal provision.”³³⁷ As noted by the dissenting members of the court, in finding the provision offensive in its entirety, “sweeping discretion to abrogate the liberty of the accused” is unjustifiable.³³⁸ In addition, the dissent convincingly highlights the need for applying the vagueness doctrine to the judiciary, noting: “A standardless sweep does not become more acceptable simply because it results from the whims of judges and justices of the peace rather than the whims of law enforcement officials. Cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice.”³³⁹

Considering these conclusions alongside the unfettered discretion that the ICTY judiciary has granted itself in matters of provisional release thus creates a worrisome picture indeed. In this respect, the judges have truly made themselves the unrestrained masters of an accused person’s destiny by “failing to give direction as to how to exercise [their] discretion, so that this exercise may be controlled.”³⁴⁰ Furthermore, in the absence of an articulated and intelligible standard, the tribunal’s “adversary system . . . [may] suffer[] because its vitality depends on effective challenge.”³⁴¹

One final matter merits mention before concluding this discussion of the discretionary release powers of the tribunal.

335. [2002] 3 S.C.R. 309, 2002 SCC 64, [96] (Can.).

336. Canada Criminal Code, R.S.C., 1985, ch. C 46, §515 (10)(c) (1985) (amended 2003). The two preceding subsections provide for detention when necessary to secure presence at trial and where necessary for the protection or safety of the public, respectively. *Id.* § 515 (10)(a)–(b).

337. *Hall*, 2002 SCC 64, [12].

338. *Id.* [51].

339. *Id.* [73] (Iacobucci, J., dissenting) (citing *R. v. Morales*, [1992] 3 S.C.R. 711, 729 (Can.)).

340. *R. v. Nova Scotia Pharm. Soc’y*, [1992] 2 S.C.R. 606, 641.

341. *Hall*, 2002 SCC 64, [59] (quoting H.L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 214–15 (1968)).

Similar to the express requirements in Rule 65(B), the Canadian Criminal Code provides, in addition to the litigated section, that an accused may be detained where necessary to secure his presence at trial and, alternatively, for the protection or safety of the public.³⁴² Accordingly, the dissent in *R. v. Hall* fairly questions whether any acceptable, additional purpose could be served by reserving a catch-all discretionary power.³⁴³ In assessing the matter, the dissent rightly concludes that providing for detention in matters in which there is no risk of flight and in which there is no safety threat would actually serve to undermine confidence in the administration of justice.³⁴⁴ As a consequence, the power is ripe for misuse and is likely intended to detain an accused solely in satisfaction of the will of the public.³⁴⁵

To be fair, the Canadian provision is slightly more descriptive than Rule 65(B), in that its protection of the public clause relates to those acts by an accused that may constitute an interference with the administration of justice.³⁴⁶ In this regard, the tribunal's rule is lacking. Accordingly, the concerns raised by the *Hall* minority with regard to discretionary power ring equally true at the ICTY. As such, the retention of the unbridled discretionary power at the tribunal creates the possibility that impermissible considerations make affect release determinations.

CONCLUSION

The concept of provisional release involves a complex array of interrelated issues. Involved in the mix are liberty interests, which give rise to the exceptional nature of detention, the prohibition of arbitrary detention, and the right to be presumed innocent. As the latter concept has evolved, it has expanded beyond a rule of evidence that dictates the burden of proof in criminal trials, and is now predominantly viewed as a necessary element at each stage of the criminal process. Thus, the presumption has garnered a role at center stage, as the *raison d'être* of pretrial release³⁴⁷ and, in conjunction with the right to

342. Canada Criminal Code § 515 (10) (a)–(b).

343. *Hall*, 2002 SCC 64, [96] (Iacobucci, J., dissenting).

344. *Id.* [101].

345. *See id.* [106].

346. *See* Canada Criminal Code § 515 (10) (b).

347. *See supra* note 64 and accompanying text.

liberty, dictates that instances of pretrial detention ought to be limited to those factors relevant to the pretrial process.

Accordingly, the right to liberty is indeed subject to limitation. However, in such instances, the necessary safeguard to which an accused is entitled is the opportunity for effective judicial review of detention. This element ensures the integrity of the criminal process and appropriate respect for the liberty interests of the accused. As a result, despite the severity of the crimes under the ICTY's jurisdiction, an absolute ban on the right to release for those who stand accused before it would not have complied with its responsibility to either the accused or the world at large. This is a pivotal issue: had it not been incumbent upon the tribunal to ensure effective judicial supervision of the deprivations of liberty it authorized, it would not be possible to be critical of the release system that was ultimately adopted other than by considering its limitations as effective precedent. While the tribunal continues to take small steps toward bringing its provisional release scheme closer in line with international human rights norms, its progress is inconsistent and suffers from a lack of candor, severely hampering the value of tribunal precedent.

The tribunal's allocation of the burden of proof is one of its primary shortcomings. Inefficiency concerns aside, it is the fundamental right of every human being to be free from arbitrary detention, and a system that requires an accused to prove that his detention is arbitrary, rather than require the detaining authority to establish the reasonableness and necessity of limiting the right to liberty is a backwards one indeed. Moreover, the very basis of the rules governing burden allocation, that assignment be fair in a given situation, is offended by the tribunal's requirement that an accused establish the universal (and future) proposition of non-dangerousness.

Importantly, the tribunal's approach in this or in others areas that represent incompatibility with international human rights norms is not elevated by the fact that it is reflected in the practice of some states. As a U.N. entity, the ICTY ought to be stemming the tide of the erosion of civil liberties, not creating precedent unworthy of imitation by descending into a netherworld where such rights may be sidelined in order to curry favor with external entities. Indeed, the fact that tribunal's

approach has given rise to the argument at the ECCC that a Cambodian procedural rule—which comports with internationally accepted standards with regard to its view of detention—should possibly give way to ICTY practice, creates a very troubling picture.

Additional problems are bound to arise with regard to precedent and burden allocation. While, positively, the tribunal appears to have recognized the unfairness of an accused-based burden as to future dangerousness, its refusal to affirmatively acknowledge this fact encourages disparate treatment of its accused and is wholly unhelpful in terms of guidance to future courts. What is the value of reams of case-law maintaining an entirely accused-based burden of proof when, in fact, tribunal practice reveals a sometimes tacit prosecutorial burden in release matters?

In addition, the tribunal's rationale for its assignment of the burden of proof is at best misguided and at worst disingenuous. In fact, the only aspect of the tribunal's provisional release practice that actually addresses its institutional shortcomings is its requirement of state/entity guarantees. To assert otherwise is simply illogical, leaving one to wonder whether the assignment of the burden actually turns on the fact that an accused-based allocation of proof makes life easier for the prosecution or, alternatively, makes release that much more difficult for an accused to obtain.

Equally problematic are the overly broad dangerousness prong and the unfettered discretion retained by the tribunal to reject release applications. In a certain respect, each undermines the ability of an accused to determine his fate and to avoid the punishment of detention. Further problems abound, such as arbitrary and unfair determinations to detain and a lack of respect for the presumption of innocence. Moreover, the tribunal's discretionary power ought to be void for vagueness; it leaves the judiciary able to act without direction and fails to focus the release inquiry by providing an intelligible standard to which both the accused and the prosecution may respond. Finally, it again leaves members of a trial chamber free to entertain notions that ought not to be part of the judicial inquiry.

Ultimately, tribunal practice and its precedential value would be enhanced by requiring a level of certainty in its

procedure such that parties could adequately prepare for and argue motions. Similarly, there is a need to establish uniformity as to issues in dispute, in order to ensure that like cases are indeed treated alike and that there is meaning and substance to the language that appears in tribunal decisions. Finally, and of distinct significance, as accused persons bear the brunt of the tribunal's lack of resources insofar as provisional release determinations are concerned, the judiciary ought to ensure that any steps departing from international norms are directly, genuinely, and clearly attributable to the context in which the tribunal operates.