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Review of the International Criminal Court's Case-Law 2013

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Abstract: Presented article evaluates ICC's case-law rendered in 2013, or more precisely, analyzes and evaluates some challenges the ICC faced in 2013. Scrutiny of the latest decisions has its obvious advantage, since it opens the door for better understanding of previous case-law. Vice versa, it is obvious that current ICC's practice cannot be comprehended without the knowledge of legal background it emanates from. To put it differently, an analysis of the case-law from 2013 presupposes to reveal its roots which are embedded in previous years. This holds true with respect to all considered and selected issues covered in this article – cooperation with the Court, complementarity, witness proofing, or presence at trial.

Keywords: International Criminal Court, cooperation, complementarity, witness proofing, presence at trial

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The International Criminal Court comes of age. It is notoriously known that the International Criminal Court (hereinafter called "ICC" or "Court") was established in 2002, as its founding treaty, the Rome Statute of the International Criminal Court (hereinafter called "ICC Statute" or "Rome Statute" or "Statute") came into force. In 2005, the first judicial decisions concerning the situation in the Democratic Republic of Congo (hereinafter called "DRC") were issued in a pre-trial stage. From that time, the ICC reveals still growing activity. Currently, the ICC has 122 State Parties. In total, 21 cases and 8 situations (i.e. Uganda, the DRC, Central African Republic, Sudan (Darfur), Kenya, Libya, Ivory Coast, and Mali) have already been brought before the Court. Despite considerable criticism presented by certain scholars who point to the fact that the ICC should have already been much more productive - even though there are reasons which might be put forward for explanation of rather slow motion on the side of the ICC (e.g. lack of cooperation from States, complexity of cases)[1], there are already numerous outcomes which can be assessed.

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The aim of presented article is to evaluate ICC's case-law rendered in 2013, or more precisely, to analyze and evaluate some challenges the ICC faced in 2013. Scrutiny of the latest decisions has its obvious advantage, since it opens the door for better understanding of previous case-law.[2] Vice versa, it is obvious that current ICC's practice cannot be comprehended without the knowledge of legal background it emanates from. To put it differently, an analysis of the case-law from 2013 presupposes to reveal its roots which are embedded in previous years. This holds true with respect to all considered and selected issues – cooperation with the Court, complementarity, witness proofing, or presence at trial.

1. Cooperation with the Court

Famous metaphor describes international criminal tribunals as giants without arms and legs,[3] which are entirely dependent on the cooperation provided by the States or international organizations. The ICC is not an exception.[4] With respect to cooperation with the ICC, especially two aspects attracted present author's attention. Firstly, it is the continuous effort to arrest current president of Sudan, Omar Al-Bashir (1.1) and secondly, the ongoing detention of witnesses from the DRC who applied for asylum in the Netherlands (1.2) and got struck in a "legal limbo".[5]

1.1 Al-Bashir and the ICC - Tag Game, Hide-and-Seek…or Rather Blind Man's Bluff?

Despite considerable effort to arrest current president of Sudan, Omar Al-Bashir, the simple fact remains that he is still at large. During 2013, the ICC

1 Compare e.g. CASSESE, Antonio. The International Criminal Court five years on: Andante or Moderato? In: STAHN, Carsten, SLUITER, Göran. *The Emerging Practice of the International Criminal Court*. Leiden: Martinus Nijhoff, 2009, p. 30. SCHABAS, William. The International Criminal Court at Ten. *Criminal Law Forum*. 2011, vol. 22, issue 4, p. 507.

2 Secondary aim of presented article is to contribute to domestic scholarly discourse about the ICC and its activity. This topic is still rather neglected in the Czech Republic.

3 Address of Antonio Cassese, President of the ICTY to the General Assembly of the UN, 7 November 1995. This general truth is often confirmed by the ICC itself. Compare e.g. ICC, *The Prosecutor v. Omar Al-Bashir*. ICC-02/05-01/09-169, Decision Regarding Omar Al-Bashir's Potential Travel to the State of Kuwait, PTCH II, 18 November 2013, § 9. The ICC stipulated that: "Court has no enforcement mechanism and thus relies on the States' cooperation, without which it cannot fulfil its mandate and contribute to ending impunity." In following text PTCH means Pre-Trial Chamber, TCH means Trial Chamber, ACH means Appeals Chamber.

4 ICC Statute, Part IX (Art. 86-102)

5 ICC, *The Prosecutor v. Germane Katanga*. ICC-01/04-01/07-3405-tENG, Decision on the application for the interim release of detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, TCH II, 1 October 2013. IRVING, Emma. *The Legal Limbo Continues: Update on the Detained Witnesses at the ICC*. In: *Shares Project* [online]. [cit. 2013-12-12]. Available at: http://www.sharesproject.nl/the-legal-limbo-continues-update-on-the-detained-witnesses-at-the-icc/

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issued eight (judicial) decisions concerning arrest and surrender of Al-Bashir which were addressed both to State Parties (Chad, Nigeria) and non-State Parties (Libya, Ethiopia, Saudi Arabia, the United States of America, Kuwait) to the ICC Statute.[6] The crucial issue here at stake is, whether the ICC may demand arrest and surrender of serving head of state, which is not a State Party to the Rome Statute. This issue incorporates two aspects: (*a*) personal immunity of a head of State; (b) execution of an order to arrest and surrender a head of State. Before the latest case-law shall be analyzed, it is necessary to set default axioms concerning both examined issues.

These questions attracted considerable attention among scholars, especially after issuance of two arrest warrants and two decisions pursuant to Article 87(7) of the ICC Statute on the refusal of Chad and Malawi to comply with the cooperation requests issued by the Court.[7] It is not surprising that doctrinal opinions here are substantially divided. According to P. Gaeta, Al-Bashir cannot rely on the Head of States immunity before the ICC, because under customary international law personal immunities are not bar to prosecution before international criminal courts.[8] It is possible to refer to famous *Arrest Warrant* case, where the International Court of Justice (hereafter "ICJ) stated that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[9] Neverthe-

6 Compare decisions ICC-02/05-01/09-145, ICC-02/05-01/09-147, ICC-02/05-01/09-151, ICC-02/05-01/09-157, ICC-02/05-01/09-159, ICC-02/05-01/09-162, ICC-02/05-01/09-164, ICC-02/05-01/09-169.

7 ICC, *The Prosecutor v. Omar Al-Bashir*. ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, PTCH I, 12 December 2011. ICC, *The Prosecutor v. Omar Al-Bashir*. ICC-02/05-01/09-140, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December, 2011. Hereinafter called "Chad and Malawi decisions". For scholarly literature dealing with topic compare KREß, Claus. The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute. In: BERGSMO, Morten, LING, Yan. *State Sovereignty and International Criminal Law*. FICHL Publication Series No. 15. Beijing: Torkel Opsahl Academic EPublisher, 2012, p. 224. Compare further OXFORD SCHOLARLY AUTHORITIES ON INTERNATIONAL LAW. *Debate Map: High-profile prosecutions at the International Criminal Court: heads of state, immunities, and arrests* [online]. 2013, 2013-12-04 [cit. 2013-12-12]. Available at: http://opil.ouplaw.com/page/215/debate-map-highprofile-prosecutions-at-the-international-criminal-court-heads-of-state-

8 GAETA, Paola. Does President Al Bashir Enjoy Immunity from Arrest? *Journal of International Criminal Justice*. 2011, vol. 7, issue 2, p. 325.

9 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 25, § 61*. The ICJ referred to *ad hoc* international criminal tribunals and the ICC. Even if the ICJ speaks about Minister of Foreign Affairs, *a minori ad maius*, this ruling is applicable likewise towards Head of States.

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less, the ICJ's decision is of limited use here, because it failed to consider different legal basis of the International Criminal Tribunal for the Former Yugoslavia (hereafter "ICTY") and the International Criminal Tribunal for Rwanda (hereafter the "ICTR") (resolution of the UN Security Council) and the ICC (international treaty). Despite the fact that the ICC has legal personality, it is very doubtful that it can assert it even against third States (i.e. non-State Parties to the ICC Statute).[10]

Self-confident proclamation of the ICC that "the current position of Omar Al-Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case"[11] seems to be at least controversial – inapplicability of personal immunities before international criminal courts is far from being settled in customary international law.[12] To employ comparison of W. Schabas: if there is no immunity for current Head of States before international tribunals, would it be possible for the Czech Republic and Slovakia to establish international tribunal which would assert jurisdiction over the President of Germany?[13] Definitively not! To conclude, it seems to be more persuasive that current customary international law does not provide exception from Head of States personal immunities before international criminal courts. Waiver of personal immunities contained in Article 27(2) of the ICC Statute is applicable only towards State Parties to the Statute.[14]

The second line of reasoning likewise stripping Al-Bashir of his personal immunities before the ICC is presented by D. Akande. He maintains that Security Council resolution 1593 (2005) referring Sudan situation to the ICC "puts Sudan in an analogous position to a party to the Statute. The only difference is that Sudan's obligations to accept the provisions of the Statute are derived not from the Statute directly, but from a UN Security Council resolution and the Charter."[15] If Sudan is in a position of State Party to the ICC Statute, with refer-

10 Objective legal personality is definitively not applicable in relation to the ICC. Compare *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 185.*

11 ICC, *The Prosecutor v. Omar Al-Bashir*. ICC-02/05-0l/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTCH I, 4 March 2009, § 41. Hereinafter called "Arrest Warrant decision".

12 It is not necessary to analyze here all relevant practice. Enough is to refer to relevant literature. Compare KIYANI, Asad. Al-Bashir & the ICC: The Problem of Head of State Immunity. *Chinese Journal of International Law*. 2013, vol. 12, no. 3, p. 486-501. The author concludes that practice of States does not support exception from personal immunities before international criminal courts.

13 SCHABAS, William. *Obama, Medvedev and Hu Jintao may be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes*. [online]. [cit. 2013-12-15]. Available at: http://humanrightsdoctorate.blogspot.cz/2011/12/obama-medvedev-and-hu-jintao-may-be.html

14 Vienna Convention on the Law of Treaties Article 34

15 AKANDE, Dapo. The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities. *Journal of International Criminal Justice*. 2009, vol. 7, issue 2, p.

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ence to its Article 27, it is deprived of possibility to rely on personal immunities of incumbent Head of State. Akande concludes that Article 27 of the ICC Statute is therefore applicable to Sudan in the same manner as to State Parties to the ICC Statute.

Author of this article does not agree with this legal fiction, because it goes simply too far. A Security Council resolution cannot substitute expression of the consent of a State to be bound be a treaty (Article 11 Vienna Convention on the Law of Treaties); it would be a revolution in public international law. Sudan resolution did nothing else than it referred Darfur situation to the ICC. The ICC itself concluded that "by referring the Darfur situation to the Court […] the Security Council of the United Nations has also accepted that […] any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole."[16] It was already explained that Article 27 (statutory framework provided for in the Statute) relates and is applicable only to State Parties – this rule cannot be altered by the Security Council.[17] Put it differently, the Security Council resolution cannot extend jurisdiction of the ICC.[18]

According to present author's opinion, prosecution of Al-Bashir before the ICC has legal support neither in the ICC Statute, nor in customary international law or Security Council resolution 1593 (2005) referring the situation in Sudan to the ICC. Lack of jurisdiction of the ICC over President Al-Bashir therefore precludes initiation of any legal steps against him (including request to arrest and surrender). Nevertheless, it is suitable to briefly comment even on the cooperation issue.

If one accepts that the ICC has jurisdiction in *Al-Bashir* case, the crucial issue would be whether the ICC can demand his arrest and surrender. Article 98 of the ICC Statute enters the stage here. Contrary to the UN Charter (Article 103), the ICC Statute does not provide for its precedence over other international obligations. A State Party to the ICC Statute thus cannot be forced to arrest and surren-

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16 Arrest Warrant decision, § 45.

17 One commentator argues that Security Council resolution cannot trump law of immunities, because it is regulated by customary international law. He concludes that resolutions (Article 25 of the UN Charter) prevail by virtue of Article 103 of the UN Charter only over obligations under any international agreement - that is not over customary international law. This argument is far from obvious - compare BERNHARDT, Rudolf. *Article 103*. In: SIMMA, Bruno (ed.) *The Charter of the United Nations: A Commentary*. 2nd edition. Oxford: Oxford University Press, 1298-99. Moreover, according to the ICC, there is no normative conflict between the resolution 1593 (2005) and the ICC Statute, as the resolution submits itself to statutory framework provided for in the ICC Statute. Compare Kiyani, A.: sub 12, p. 478-80.

18 CONDORELLI, Luigi, VILLALPANDO, Santiago. Can the Security Council Extend the ICC's Jurisdiction? In: CASSESE, Antonio (ed.) *The Rome Statute of the International Criminal Court: A Commentary*. Oxford: Oxford University Press, 2002, p. 573.

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der non-State Party's Head of State or any other state organ entitled to personal immunity – Article 98 envisages that the Court must first obtain the cooperation of that third State for the waiver of the immunity. The logic is very simple: if the third State refuses to waive its immunities, State Parties are entitled to refuse cooperation request.[19] As the Statute is binding only on the State Parties, it cannot be used as a legal basis for imposition of obligations towards third States.[20]

There is an agreement among scholars that obligation of cooperation can emanate from source of law other than the ICC Statute - a Security Council resolution.[21] Nevertheless, the resolution referring situation in Darfur to the ICC does not provide for this duty – it merely urges all States to cooperate fully. If drafters of the resolution have had a duty of cooperation in mind, they would have definitively used obligatory language (shall cooperate). Therefore, States (to be a State Party or a non-State Party to the ICC Statute – with exception of Sudan) cannot be forced to arrest and surrender Al-Bashir, because such obligation is provided for neither in the ICC Statute, nor in the 1593 Security Council resolution. With these conclusions in mind, it is now possible to comment on decisions rendered in 2013.

The first decision deals with Al-Bashir's travel to Chad and Libya.[22] With respect to Chad, the Pre-Trial Chamber ruled that Chad as a State Party is under obligation to execute pending Court's decision concerning arrest and surrender (§10). With respect to Libya which is a non-State Party, the ICC indicated that obligations of cooperation are not so straightforward, nevertheless it stressed that Libya is still urged by the 1593 Security Council resolution to cooperate fully with the Court (§ 13). Obligations of Chad were reiterated in the second decision (§ 12), where the ICC demanded explanation of failure to arrest and surrender of Al-Bashir during his visit in Chad.[23] In the next decision, the ICC made use of Article 87(7) of the ICC Statute and reported Chad to the Assembly of States Parties and the Security Council.[24]

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19 Unfortunately, this obvious position was not reflected in Chad and Malawi decisions at all.

20 Compare Article 87(5) of the ICC Statute.

21 It was already mentioned above that the Security Council resolution cannot extend jurisdiction of the ICC. Nevertheless, the Security Council can impose obligations of cooperation which go beyond those required by the ICC Statute (the Security Council resolution would prevail here due to Article 103 of the UN Charter). This position is supported even by practice – compare S/RES/1593 (2005), § 2 (here with respect to Sudan as non-State Party to the ICC Statute). SCHABAS, William. *The International Criminal Court: A Commentary on the Rome Statute*. Oxford: Oxford University Press, 2010, p. 1041; Gaeta, P.: sub 8, p. 330; Akande, D.: sub 15, p. 307.

22 ICC-02/05-01/09-145. For brevity reasons only numbers of decisions shall be mentioned.

23 ICC-02/05-01/09-147.

24 ICC-02/05-01/09-151. Observations presented by Chad were transmitted to the ICC after lapse of the deadline and were disregarded by the ICC (§ 19). Interestingly, in its observations Chad referred to common positions adopted by the African Union, which criticized ICC's approach for its contradiction with Article 98 of the ICC Statute. Compare ICC-

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It seems that obligation of cooperation would be met where a State Party at least reply for the ICC's request – that was a case with Nigeria which argued that "Al-Bashir was not invited to undertake a visit to Nigeria, rather he appeared in Nigeria ostensibly to attend the special Summit of the African Union."[25] Due to sudden departure of Al-Bashir the necessary steps, corresponding with Nigeria's international obligations, could not have been taken. The ICC satisfied itself with this reasoning.

Last three decisions dealt with potential travel to territories of non-State Parties (Libya, Saudi Arabia, the United States and Kuwait). In all three decisions, the ICC stressed that only State Parties to the Statute are under obligation to cooperate with the Court. Non-State Parties, which are Members of the UN, can be undertaken to cooperation by the Security Council resolution. Nevertheless, all three decisions reveal that the ICC is aware of rather vague formulation concerning obligation to cooperation addressed to non-State Parties of the ICC Statute, which is included in the 1593 resolution.[26]

To conclude, according to this author's opinion, it is very improbable that Al-Bashir will be surrendered to the Court while holding his office. Firstly, there is a strong disagreement with extending the ICC's jurisdiction over incumbent Heads of States holding their offices in non-State Parties to the ICC Statute. Arrest and surrender of Al-Bashir is currently precluded by Article 98 of the ICC Statute, or rather it is made dependent on previous waiver of immunity by Sudan. Support for arrest and surrender cannot be found even in the 1593 resolution, due to its ambiguous language. Finally, one cannot forget immunities enjoyed by Sudanese President as a representative of State at international fora (e.g. Article 105 of the UN Charter, Article IV of the Convention on the Privileges and Immunities of the United Nations). The situation might alter once Al-Bashir will leave his office, what might occur after the next presidential elections in Sudan which will take place in 2015. Until that time it seems that the ICC will play blind man's bluff with scarf over its eyes.

02/05-01/09-150-Anx1.

25 ICC-02/05-01/09-159, § 11.

26 Compare e.g. ICC-02/05-01/09-164, § 7. The Court ruled that: "The Chamber highlights that only States Parties to the Statute are under an obligation to cooperate with the Court. Given that the Statute is an international treaty governed by the rules set out under the Vienna Convention on the Law of Treaties, it is only with the State's consent that the Statute can impose obligations on a non-State Party. Thus, non-States Parties may decide to cooperate with the Court on an ad hoc basis, as foreseen in article 87(5)(a) of the Statute. This principle may be altered by the SC which may, by means of a resolution adopted under Chapter VII of the UN Charter, create an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. In such a case, the obligation to cooperate stems directly from the UN Charter."

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1.2 Detention of witnesses

In 2011 four witnesses, prosecuted and held in custody in the DRC, were transferred to the ICC to testify on behalf of defense in *Lubanga* and *Katanga* cases. The conditions of transfer and return to their home State were specified in a special cooperation agreement concluded between the ICC and the DRC pursuant to Article 93(7) of the ICC Statute. After completion of testimony the witnesses should have been returned to the DRC, however, they all applied for asylum in the Netherlands, claiming imperilment by the DRC authorities on account of their testimony.[27] This complex situation triggered dispute between the DRC, the ICC and the Netherlands, which was considered by domestic (Dutch) courts, the ICC and the European Court of Human Rights (hereafter "ECHR").[28] No definitive result has been achieved yet – three witnesses from *Katanga* case still find themselves in a situation which was accurately described as "legal limbo".[29] This situation may pose threat to effective cooperation between the Court and State Parties – despite the terms of bilateral cooperation agreement and assurances of return, the witnesses are still (after almost three years) in the Court's custody, it is therefore suitable to briefly discuss it here.

Detention of witnesses claiming the asylum in the Netherlands creates an unprecedented situation before the Court.[30] Drafters of the Statute did not foresee this scenario – clearly, there is a lacuna both in primary and secondary sources of law applicable before the ICC. As the ICC rightly stressed: "[T]he

27 ICC, *The Prosecutor v. Germane Katanga*. ICC-01/04-01/07-3405-tENG, Decision on the application for the interim release of detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, TCH II, 1 October 2013, § 2. In this section referred to as "Decision". In their testimonies witnesses gave the Court information about involvement of current political leaders of the DRC, including President Kabila, in the Ituri massacres. Compare CUPIDO, Marjolein, VAN WIJK, Joris. Testifying behind bars: Detained ICC witnesses and human rights protection. *Social Science Research Network* [online]. [cit. 2014-01-04]. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374678

28 ECHR, *Djokaba Lambi Longa v. the Netherlands*. Appl. No. 33917/12, Chamber, Judgment, 9 October 2012. The case concerns (one) witness from *Lubanga* case who complained that his continuous detention by the ICC violates his right under Article 5 (right to liberty and security) of the European Convention on Human Rights and Fundamental Freedoms. The ECHR found the application inadmissible for lack of jurisdiction *ratione personae*. It ruled (§ 73) that „the fact that the applicant is deprived of his liberty on Netherlands soil does not of itself suffice to bring questions touching on the lawfulness of his detention within the "jurisdiction" of the Netherlands." After his asylum request was withdrawn and after completion of case before the ECHR, he was returned to the DRC. Compare *Witnesses before the International Criminal Court*. In: *IBA ICC Programme Reports* [online]. July 2013. [cit. 2013-09-10], p. 52. Available at: http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx
Next commentary deals only with three witnesses from *Katanga* case.

29 Compare *supra* footnote 6. For overview of the topic compare SLUITER, Göran. Shared Responsibility in International Criminal Justice. The ICC and Asylum. *Journal of International Criminal Justice*. 2012, vol. 10, issue 3, p. 661-76.

30 Decision, § 10.

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positions adopted to date by both States have left the Court with very little room for manoeuvre, and it has, in effect, had no choice other than to continue to hold the three Detained Witnesses' custody."[31] Accordingly, the Netherlands holds the position that witnesses should remain in the Court's custody during asylum proceedings, it does not consider itself obliged to receive these witnesses. On the other hand, the DRC insists on their immediate return as all witnesses face criminal prosecution in the DRC which had to be temporarily discontinued.[32] Despite manifest unease the witnesses have faced from 2011, and with all regard to it, relevant decisions rendered by the ICC in this situation brought a benefit - they provide interpretation of Article 68(1) and Article 93(7) and explain their linkage to Article 21(3). The last mentioned article provides that the application and interpretation of law applicable before the ICC must be consistent with internationally recognized human rights.

With respect to Article 68(1), dealing with the duty to protect victims and witnesses, the Trial Chamber in *Katanga* case concluded that "it is not duty bound to protect witnesses against risks which they might face not only as a result of their testimony but also as a result of human rights violations by the DRC."[33] Accordingly, the Chamber excluded application of *non-refoulement* principle, because as an international organization the ICC does not possess territory and therefore, it is unable to implement this principle within its ordinary meaning (§ 64) – only a State which possesses territory is able to apply the *non-refoulement*. The Chamber went on to say that even if the ICC decided to return witnesses immediately, which would be clear violation of right to apply for asylum and right to effective remedy, the only entity responsible for violation of *non-refoulement* principle would be the Netherlands (§ 73).

With respect to Article 93(7), the same Chamber ruled that this provision encompasses a twin obligation: obligation of immediate return and obligation of continuous detention.[34] The ICC came to conclusion that obligation of immediate return has to be suspended in present situation, on the foundation of Article 21(3) of the Statute – otherwise right to apply for asylum, right to effective remedy and *non-refoulement* principle would be breached. The Chamber went on to stress that *non-refoulement* principle is a peremptory norm of international law.[35] With respect to obligation of continuous detention, the decision provided that

31 Ibid, § 22.

32 Ibid, §§, 7, 8, 17. The Netherlands accepted only obligation to receive sentenced persons if no other State would be found for enforcement of sentence – Article 103(4) of the ICC Statute.

33 ICC, *The Prosecutor v. Katanga and Chui*. ICC-01/04-01/07-3003-tENG, Decision on an *Amicus Curiae* application and on the "*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile*" (articles 68 and 93(7) of the Statute), TCH II, 9 June 2011, § 62.

34 Decision, § 19.

35 Ibid, § 30.

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the ICC is not entitled to review witnesses' detention, because it was ordered by the DRC. The Chamber concluded that "there is no impediment to application of Article 93(7) in accordance with internationally recognized human rights."[36] Continued detention did not violate human rights, because, as the Court reasoned, the right to liberty is subject to numerous restrictions and cannot be considered a peremptory norm of international law.

To summarize these decisions, the Court ruled it cannot return witnesses to the DRC, because that would be a violation of human rights, but at the same time it stressed that continuous detention, lasting almost three years, is in conformity with human rights standards. At the very begin, there is a discrepancy in the Court's reasoning. In 2011 decision the ICC mentioned that *non-refoulement*, one of the leading principles in area of human rights, is inapplicable with respect to Article 68(1), but it admitted its application in relation to Article 93(7). This conclusion is debatable as every single part of the Statute is subjected to Article 21(3) and must conform to international human rights. Further, author of this article does not agree with the Court's conclusion reached in 2013 decision according to which continuous detention of witnesses from the DRC conforms to international human rights law. Firstly, it seems that the Court limited referential framework of Article 21(3) to *jus cogens* which is clearly contrary to what this provision expressly provides for.[37] Then, it is at least controversial to assert that *non-refoulement* is a norm of peremptory character.[38] Finally, with respect to continued detention, it is disputable that international human rights law does not establish any legal impediment here. Enough is to refer to case-law of the Human Rights Committee, according to which "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed."[39] The detention of three witnesses from the DRC has never been meritoriously reviewed – decisions rendered by the ICC only declared lack of competence and found any request for review inadmissible. To conclude, as the ICC suspended the obligation to return, it should have suspended also obligation of detention and should have decided about release of the witnesses to the Netherlands as the Host State.[40]

Possible outcome of this unprecedented situation is threefold. If the Dutch authorities refused to grant asylum to witnesses and at the same time decided

36 Ibid, § 33.

37 ICC, *The Prosecutor v. Katanga*. ICC-01/04-01/07-3405-Anx. Dissenting opinion of Judge Christine van Wyngaert, § 6. Hereinafter called "Dissenting opinion".

38 DUFFY, Aoife. Expulsion to Face Torture? Non-refoulement in International Law. *International Journal of Refugee Law*. 2008, vol. 20, issue 3, p. 373-90.

39 HRC, *A. v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993, 30 April 1997, § 9.4. The Human Right Committee came to conclusion that detention for a period of over four years was arbitrary within the meaning of Article 9(1) of the International Covenant on Civil and Political Rights. Similar line of reasoning was used in dissenting opinion of Judge van Wyngaert.

40 Similarly Dissenting opinion, § 24.

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that their lives and freedoms would not be threatened in the DRC, the ICC would be bound according to Article 93(7) to return these witnesses immediately to the DRC. Second, if the Dutch authorities granted asylum or decided that witnesses' return would violate *non-refoulement* principle, the Court would transfer them to the Dutch authorities.[41] Nevertheless, due to considerable length of asylum procedure in the Netherlands, the third option is at stake. As the Court cannot detain witnesses indefinitely, it should consider releasing of the detainees to the territory of the Netherlands even before completion of the asylum proceedings. As described above, such an approach would be in conformity with international human right obligations the Court accepted to respect and is therefore preferable.

The gap in the law applicable before the ICC has inflicted serious problems and might have adverse repercussions even for future practice of the Court. The situation around the witnesses from the DRC can negatively influence a willingness of the State Parties to transfer witnesses to The Hague and undermine obligation of cooperation with the ICC. Despite enormous effort on the side of the DRC to bring witnesses back, the option that they will never return is still open. The Netherlands as the Host State might be afraid of increase in asylum requests – it will be only seen whether Congolese case was sporadic and isolated situation, or whether other precedents will follow. There is no doubt that agreement concerning this topic concluded at least between the ICC and the Netherlands would be of much help here.

2. Complementarity

One of the most important decision rendered by the ICC in 2013 concerns admissibility of the case against Abdullah Al-Senussi, chief of Libyan intelligence during Gadaffi era.[42] The ICC ruled in favor of Libya and decided that the case against Al-Senussi were inadmissible. This decision crowns long-lasting effort of Libyan authorities to prosecute and punish Al-Senussi before domestic courts which was revealed soon after issuance of arrest warrant by the ICC against him in 2011.[43]

41 Decision, § 21. This option is the most probable. In October 2013 the Amsterdam District Court ruled on appeal against a decision not to grant asylum to the witnesses – they all were excluded on the basis of Article 1 F of the 1951 Convention Relating to the Status of Refugees. At the same time, the District Court found that witnesses suffered a flagrant denial of justice in the DRC. Their return would be contrary to Article 6 of the European Convention on Human Rights and Fundamental Freedoms – the District Court referred to ECHR's case *Othman v. the United Kingdom*. Compare Irving, E.: sub 5. Currently, the witnesses appealed this judgment before the Dutch Supreme Court.

42 ICC, *The Prosecutor v. Saif Al-Islam Gadaffi and Abdullah Al-Senussi*. ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi, PTCH I, 11 October 2013. In this section referred to as "Decision".

43 Compare e.g. following decision: ICC, *The Prosecutor v. Saif Al-Islam Gadaffi and Abdullah Al-Senussi*. ICC-01/11-01/11-354, Decision on Libya's postponement of the execution

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Admissibility of a case before the ICC is the cornerstone of the Statute. It becomes relevant once the jurisdiction of the Court is established.[44] The Court endowed with jurisdiction may decide about inadmissibility of the case if condition of complementarity, double jeopardy or insufficient gravity is fulfilled.[45] Admissibility decision in *Al-Sennussi* case provides so far the most topical interpretation of Article 17(1)(a) concerning the complementarity. According to consistent jurisprudence of the ICC, confirmed even by the Appeals Chamber, decision on complementarity contemplates a two-step test: (*a*) whether the proceedings at national level covers the same case as before the ICC; (*b*) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution.[46]

The "same case" demand is subdivided into two items: the same person and substantially the same conduct.[47] The Chamber confirmed previous ICC's case-law and stressed that legal qualification of conduct is not relevant, therefore domestic investigation and prosecution for ordinary crimes (i.e. not international crimes) is considered to be sufficient as long as it covers the same conduct.[48] Domestic investigation and prosecution must neither encompass all events and incidents described in the arrest warrant decision, nevertheless, it is important that "particularly violent or […] significantly representative"[49] events are covered at national level. After evaluation of investigation steps taken by competent Libyan authorities, the ICC found the first part of complementarity principle to be satisfied.

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of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Rome Statute and related Defence request to refer Libya to the UN Security Council, PTCH I, 14 June 2013. In this decision the ICC ruled that Libya, pursuant to Article 95 of the Statute, had a right to postpone the execution of the surrender request pending determination of the admissibility challenge. This decision is of the utmost importance for ruling on the admissibility of the case – the Chamber concluded that admissibility challenge was properly made, and especially, the requirement of its presentation "at the earliest opportunity" provided for in Article 19(5) was met (§ 33). Nevertheless, the Chamber neglected the fact that the admissibility challenge was presented only seven months after extradition of Al-Senussi from Mauretania to Libya and failed to explain, why seven months period still satisfies the requirement of the earliest opportunity. Compare HELLER, Kevin Jon. The PTC's Erroneous Decision Regarding the Surrender of Al-Senussi. In: *Opinio Juris* [online]. 2013-06-15 [cit. 2013-01-12]. Available at: http://opiniojuris.org/2013/06/15/the-ptcs-terrible-decision-regarding-the-surrender-of-al-senussi/

44 Schabas, W.: sub 21, p. 340.

45 Article 17 of the ICC Statute - complementarity Article 17(1)(a)(b), double jeopardy Article 17(1)(c), gravity Article 17(1)(d).

46 Decision, § 26.

47 Ibid, § 66.

48 For the issue of substantially the same conduct compare HELLER, Kevin Jon. A Sentence-Based Theory of Complementarity. *Harvard Journal of International Law*. 2012, vol. 53, no. 1, p. 86-133.

49 Decision, § 165.

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With respect to the second limb, the Chamber asserted that willingness and ability to carry out domestic proceedings against an accused (Al-Senussi) must be assessed in light of the relevant law and procedures applicable to domestic proceedings in Libya.[50] The Pre-Trial Chamber next considered argument of defense which called attention to irregularities in due process (unjustified delay, lack of legal representation, lack of independence and impartiality). The Chamber emphasized that alleged violations of the accused's procedural rights are not *per se* grounds for a finding of unwillingness or inability under Article 17 of the Statute. According to the Chamber, potential irregularities in the process would be relevant, only if they were motivated by intent to shield person from criminal responsibility, or by intent not to bring this person to justice (Article 17(2) of the ICC Statute).[51] Considering steps taken by Libyan authorities, the Court was unable to make any such conclusion, quite contrary, it concluded that Libya is both willing and able to investigate and prosecute Al-Senussi, and therefore found the second part of the complementarity principle to be fulfilled. In light of these findings, the ICC decided that the case against Al-Senussi is inadmissible before the Court.[52]

The admissibility decision in *Al-Senussi* case should be praised for adoption of material rather than formal approach in relation to the requirement of the same conduct. It does not insist on specific legal qualification of the criminal conduct (i.e. qualification as international crimes), which correctly reflects a margin of appreciation States have with respect to prosecution of international crimes before domestic courts. On the other hand, the ICC totally disregarded discrepancies in domestic proceedings, especially lack of Al-Senussi's legal representation before Libyan authorities. There is some support for usage of case-law of human rights treaty bodies and courts in the assessment of complementarity, which case-law undoubtedly provides for the requirement of legal representation in criminal proceedings, nevertheless, the ICC limited referential framework of its review only to domestic (Libyan) law.[53] At the same time, it should be admitted that according to Article 17 of the ICC Statute, not every procedural

50 Ibid, § 203.

51 Ibid, § 221.

52 The admissibility decision was appealed by the defense. In the next course of the proceedings, the ICC refused to grant suspensive effect to this appeal. The defense requested suspension of domestic proceedings until deliverance of the final judgment on the appeal before the ICC – it argued *inter alia* by danger of imposition of death penalty in Libya, which would cause irreparable harm to the accused. Nevertheless, the ICC found that there is no obstacle for continuation of proceedings before domestic courts. Compare ICC, *The Prosecutor v. Saif Al-Islam Gadaffi and Abdullah Al-Senussi.* ICC-01/11-01/11-480, Decision on the request for suspensive effect and the request to file a consolidated reply, ACH, 22 November 2013, § 16.

53 Schabas, W.: sub 21, p. 345. VAN DER WILT, Harmen, LYNGDORF, Sandra. Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of "Unwillingness" and "Inability" in the Context of the Complementarity Principle. *International Criminal Law Review*. 2009, vol. 9, issue 1, p. 39-75.

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irregularity is relevant for the assessment of complementarity. The Statute takes into account only those violations of procedural rights which cast doubt upon genuine will or intent of a State to bring an accused to justice. Here, the Chamber's opinion is correct one.

Still, the Chamber failed to consider (in)consistency of this ruling with its own previous decision on admissibility of the case against Saif Gadaffi, rendered in May 2013.[54] In *Gadaffi* case, the same Chamber, composed of the same judges, decided that the case against Gadaffi is admissible before the ICC. Here, the Chamber justified its ruling *inter alia* by lack of legal representation: "this important difficulty [in securing a lawyer] appears to be an impediment to the progress of proceedings against Mr Gaddafi. If this impediment is not removed, a trial cannot be conducted."[55] One simply cannot understand, why is missing legal representation, described as an impediment for trial in one (Gadaffi) case, almost irrelevant aspect in the second (Al-Senussi) case decided only few months later. Last but not least, the ICC did not explain sufficiently, why it disregarded the fact that the admissibility request was presented as late as seven months after transfer of Al-Senussi to Libya. The ICC turned blind eyes to Article 19(5) of the ICC Statute.

3. Procedural Issues

Following part deals with challenges the ICC faced in area of international criminal procedure. Present article focuses on issue of witness proofing (3.1) and presence of accused at trial (3.2). Chosen procedural aspects are illustrative examples of extensive interpretation of the ICC Statute, or even examples of judicial creativity.

3.1 Witness proofing

Witness proofing (or witness preparation) is defined as "a meeting between a witness and the party calling that witness, taking place shortly before the witness's testimony, for the purpose of discussing matters relating to the witness's testimony."[56] Application and interpretation of this legal institute provides an example of extensive interpretation of the ICC Statute. It also sheds some light on mutual relation between different first-instance chambers (i.e. Trial and Pre-

54 ICC, *The Prosecutor v. Saif Al-Islam Gadaffi and Abdullah Al-Senussi*. ICC-01/11-01/11-344-Red, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, PTCH I, 31 May 2013. Compare HELLER, Kevin Jon. PTC I's Inconsistent Approach to Complementarity and the Right to Counsel. In: *Opinio Juris* [online]. 2013-12-10 [cit. 2014-01-12]. Available at: http://opiniojuris.org/2013/10/12/ptc-inconsistent-approach-right-counsel/

55 Ibid, § 214.

56 ICC, *The Prosecutor v. Ruto and Sang*. ICC-01/09-01/11-524, Decision on Witness Preparation, TCH V, 2 January 2013, § 4.

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Trial Chambers), and relevance of case-law of older international criminal tribunals (especially the ICTY, the ICTR and the Special Court for Sierra Leone).[57]

Issue of witness preparation was for the first time employed by the Pre-Trial Chamber (2006) and the Trial Chamber (2007) in *Lubanga* case, then by the Trial Chambers in *Katanga* case (2009) and *Bemba* case (2010).[58] Witness proofing was not admitted in any of these cases, primarily by reason of missing regulation in the ICC Statute. Argumentation of the Prosecutor, referring to settled practice of *ad hoc* international criminal tribunals, was repeatedly rejected. The Trial Chamber in *Lubanga* case e.g. ruled that practice of *ad hoc* tribunals does not have precedential value and therefore is not binding on the ICC.[59] The Trial Chamber decided that "the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis."[60] The Chamber consequently reasoned why it would not take the practice of other international criminal tribunals into account: the ICC established procedural framework which differs significantly from frameworks of its predecessors – one can mention principle of objectivity, according to which prosecution should investigate both incriminatory and exculpatory evidence (Article 54(1)(a) of the ICC Statute), or accentuated position of victims in the proceedings (Article 75 of the ICC Statute).

Position of witness proofing was revised in 2013 – or more precisely, recent case-law offered alterative interpretation of relevant provisions in the ICC Statute. The Trial Chamber in *Ruto* case determined that witness proofing implicitly follows from Article 64 of the ICC Statute. The Trial Chamber pointed "that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt".[61] Consequently, the decision referred to practice of *ad hoc* tribunals which approved the witness preparation, although their statutes and procedural rules are equally silent on this issue. The Trial Chamber concluded that although the jurisprudence of *ad hoc* tribunals is

57 NERLICH, Volker. The status of ICTY and ICTR precedent in proceedings before the ICC. In: STAHN, Carsten, SLUITER, Göran. *The Emerging Practice of the International Criminal Court*. Leiden: Martinus Nijhoff, 2009, p. 305-25.

58 For more complex overview compare IBA Report *Witnesses before the International Criminal Court*, sub 28.

59 ICC, *The Prosecutor v. Lubanga Dyilo*. ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial TCH I, 30 November 2007, § 44.

60 Ibid.

61 ICC, *The Prosecutor v. Ruto and Sang*. ICC-01/09-01/11-524, Decision on Witness Preparation, TCH V, 2 January 2013, § 27. Article 64(3)(a) of the ICC Statute provides: "Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings."

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non-binding on the ICC, it is "meaningful when evaluating the silence in this Court's analogous statutory provisions."[62]

Pro-active approach taken in this decision should be welcomed. Not only the Trial Chamber adopted flexible extensive interpretation of the ICC Statute, at the same time it took into consideration rich storeroom of case-law developed by the *ad hoc* international criminal tribunals, with full awareness of position it occupies within the system of applicable law before the ICC. Finally, the decision confirms that Trial Chambers and Pre-Trial Chambers are not bound by previous holdings of other first-instance chambers. Unfortunately, recent decision of the Trial Chamber V need not be followed in other cases – the witness proofing need not be allowed here at all.

3.2 Presence at trial

During 2013, the ICC was kept busy in connection with presence at trial of accused Kenyan President Uhuru Kenyatta and Deputy President William Samoei Ruto, both being prosecuted for their alleged participation in the Kenyan post-election violence 2007-2008. Both accused pointed out to their public duties at the highest national level and asked the Court for exemption from their continuous presence during the trial. This might have been considered at first sight a trivial issue, but it turned to be quite complicated legal problem at the end.

The first relevant decision was rendered in June 2013.[63] The key issue here was interpretation of Article 63(1) of the ICC Statute according to which "[t]he accused shall be present during the trial."[64] Unsurprisingly, defense of the accused argued that Article 63 does not require obligatory presence, because it is a right of an accused. On the other hand, the Prosecutor relied on grammatical interpretation of Article 63 (shall be present) and argued in favor of duty of accused person to be present during trial. The Trial Chamber took somewhat middle approach. It came to the conclusion that aforesaid article imposes duty of presence only upon accused, but not upon the Chamber (§§ 42-43). In exceptional situations, the Chamber may therefore exercise its discretion to excuse an accused person, on a case-by-case basis, from his/her continuous presence at the trial (§ 49). Supportively, the Chamber argued by recognition of democracy (§ 79) – here with reference to Article 31(3)(c) of the Vienna Convention on the Law of Treaties. According to the Chamber, President and Deputy President of Kenya were elected in democratic elections and should be allowed to exercise their mandates - duty of their continuous presence at the trial would be clearly incompatible with will of Kenyan people expressed in elections. After all, the

62 Ibid, § 29.

63 ICC, *The Prosecutor v. Ruto and Sang*. ICC-01/09-01/11-777, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, TCH V(a), 18 June 2013.

64 Ibid, § 34.

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Chamber, within its discretion, enumerated specified hearings where physical presence of accused is obligatory (§ 104). Identical line of reasoning and conclusion was adopted by the Trial Chamber in *Kenyatta* case.[65]

In October 2013, decision in *Ruto* case was reversed by the ICC's Appeals Chamber.[66] The Appeals Chamber agreed that Article 63(1) of the ICC Statute did not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused. Nevertheless, it ruled that the first instance had not exercised its discretion properly. The Appeals Chamber reformulated, in more general manner, conditions for excusal of the presence.[67] In the light of appellate decision, the Trial Chamber in *Kenyatta* case reconsidered its previous holding and adjusted conditions for excuse of presence to those formulated by the Appeals Chamber.[68]

Two separate articles of the ICC Statute deal with the presence of an accused at trial. While Article 67 speaks about the right of an accused to be present, Article 63 was interpreted by the *Ruto* Trial Chamber as provision prescribing duty of accused to be present.[69] Crucial question is, whether presence of accused at trial can be both a duty and a right of an accused? According to the opinion of present author, the ICC failed to explain mutual relation of these two provisions. One may wonder, why an accused as a holder of right to be present at trial would be obliged to submit request to the Trial Chamber to be excused from it. Does it mean that accused has the right, but is deprived of any disposition with it? Interestingly, what is missing in all four decisions is any reference to Article 21(3) of the ICC Statute, which subjects application and interpretation of the ICC Statute to internationally recognized human rights, despite the fact that international human rights jurisprudence describes presence at trial as a right, which might be waived.[70] Conformity of Article 63 with Article 67 and Article 21(3) is here

65 ICC, *The Prosecutor v. Uhuru Kenyatta*. ICC-01/09-02/11-830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, TCH V(b), 18 October 2013, §§ 66-67.

66 ICC, *The Prosecutor v. Ruto and Sang*. ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", ACH, 25 October 2013.

67 Ibid, § 62.

68 ICC, *The Prosecutor v. Uhuru Kenyatta*. ICC-01/09-02/11-863, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, TCH V(B), 26 November 2013.

69 Although Judge Eboe-Osuji in his dissenting opinion to the Trial Chamber V(B) decision argues that Appeals Chamber analyzed presence at trial under article 63(1) under the theory of right. This conclusion is nevertheless far from being evident. Compare ICC-01/09-02/11-863-Anx, § 36.

70 KMEC, Jiří et al. *Evropská úmluva o lidských právech. Komentář*. Praha: C. H. Beck, 2012, p. 752-53. Authors refer to the ECHR case *Hermi v. Italy*, where the ECHR stipulated that: "Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of

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at stake. Moreover, all decisions follow the line of judicial creativity. For example, W. Schabas critically commented on conditions of excusal established by the Appeals Chamber.[71] Similar objection was raised by the Prosecutor.[72] Finally, according to the opinion of present author, the Appeals Chamber might have expressly ruled that its findings were binding even on other Trial and Pre-Trial Chambers, i.e. those considering different case than that which is under appeal.[73] It had suitable opportunity to do so. It would be appropriate approach with regard to judicial economy, of course subject to due justification as binding force of appellate decisions is not provided for in the ICC Statute – at the present state of ICC' case-law, the first instance has to choose between granting leave to appeal and reconsideration of its previous decision.

Rulings on presence of Kenyan President and Deputy President at trial before the ICC were impatiently awaited. The ICC was confronted with considerable political pressure from Kenya, and more generally from the African Union (hereafter "AU"). In October 2013, the AU convened extraordinary session, which *inter alia* inquired into the relationship between Africa and the ICC. As one commentator aptly expressed, the worst scenario that many feared and talked about, i.e. withdrawal of African States from the ICC Statute, did not occurred, but once again strong political disagreement with the ICC resonated through the summit.[74] In November 2013, Kenya initiated adoption of draft resolution

a fair trial […] However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner." ECHR, *Hermi v. Italy*. Appl. no. 18114/02, Grand Chamber, Judgment, 18 October 2006, § 73.

71 "Where these [conditions] come from is a mystery." SCHABAS, William. *Appeals Chamber Rules on Presence of Kenyan Leaders During Trial* [online]. [cit. 2013-12-12]. Available at: http://humanrightsdoctorate.blogspot.cz/2013/10/appeals-chamber-rules-on-presence-of.html

72 According to the Prosecutor: "Whatever "discretion" a Trial Chamber may have, *it does not permit it to discard controlling statutory requirements, or to substitute its own policy preferences for those of the States Parties. The Majority […] is bound to apply the law as it stands*. The Decision fails to do this, and is incorrect as a result." ICC, *The Prosecutor v. Uhuru Kenyatta*. ICC-01/09-02/11-863, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, TCH V(B), 26 November 2013, § 81.

73 Such approach would be in line with practice of *ad hoc* tribunals, which ruled in favor of precedential character of appellate decisions. Compare ICTY, *The Prosecutor v. Aleksovski*. IT-95-14/1-A, ACH, Judgment, 24 March 2000, §§ 92-115.

74 Ext/Assembly/AU/Dec.1, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, 12 October 2013. Decision provides that "no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government" or more specifically that "the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office." Despite legal irrelevance, these statements have explosive political significance. For relation between the ICC and the AU, compare footnote sub 24. Compare AYELLE DERSO, Solomon. *The AU's Extraordinary Summit decisions on Africa-ICC Relationship*. In: *EJIL: Talk!* [online].

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of the UN Security Council requesting that the ICC defer the investigation and prosecution against President Kenyatta and Deputy President Ruto for a period of 12 months, in accordance with Article 16 of the Rome Statute.[75] This draft was not adopted after all, there were only seven votes in favor (e.g. China a Russia) and eight abstentions (e.g. the United Kingdom, France, and the United States).[76] In atmosphere of these events, the Assembly of States Parties adopted (by consensus) amendments to the Rules of Procedure and Evidence (hereafter "RPE") dealing especially with question of presence of an accused at trial.[77]

These amendments have obvious political importance (in its preamble part, the amendments recall the need to conduct a structured dialogue between State Parties and the Court). In the light of growing aversion from the AU and unsuccessful Kenyan initiative to defer both cases by the UN Security Council decision, the Assembly of States Parties, and broadly speaking the ICC itself, showed at least a good will in relation to Kenya. Basically, the amendments explicitly say that accused may be excused from his/her presence at the trial. This is an extremely important conclusion with respect to fulfilment of public duties by Kenyan President and Deputy President.[78] At the same time, the amendment to the RPE is a source of law, furthermore primary source of law applicable within the system envisaged by Article 21 of the ICC Statute.[79]

The rules concerning the presence of an accused at trial encompass the presence through the use of video technology (Rule 134*bis*), excusal from presence at trial (Rule 134*ter*), and excusal from presence at trial due to extraordinary public duties (Rule 134*quater*). Excusal from presence at trial follows the scenario envisaged in the judgment of the Appeals Chamber from November 2013. Excusal is defined as exceptional *ultima ratio* measure adopted by the Trial Chamber on basis of explicit request of accused, under the condition that rights of an accused are fully ensured during his or her absence. Requests are considered on case-by-case basis. Amendments to the RPE entered into force in compliance with Article 51(2) of the ICC Statute. Even if the RPE are now part of the ICC's primary law, it is not clear, whether they comply with the requirement that all RPE amendment must be consistent with the ICC Statute.

2013-10-28. [cit. 2013-12-12]. Available at: http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/

75 S/PV.7060, *Peace and Security in Africa*, 15 November 2013. For text of draft resolution compare S/2013/660.

76 S/PV.7060, p. 2.

77 Res. ICC-ASP/12/Res.7, 12th plenary meeting, 27 November 2013. It is remarkable that the amendment was adopted only one day after issuance of the decision on presence of Mr. Kenyatta at the trial.

78 RPE Rule 134*quater*

79 BITTI, Gilbert. Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC. In: STAHN, Carsten, SLUITER, Göran. *The Emerging Practice of the International Criminal Court*. Leiden: Martinus Nijhoff, 2009, p. 285-304.

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Conclusion

Analyzed decisions of the ICC rendered in 2013 are far from being clear and unproblematic. The author of present article presented disagreement with the Court's approach towards prosecution of current Sudanese President Al-Bashir. Author concluded that the ICC lacks jurisdiction in this case and is therefore precluded to request Al-Bashir arrest and surrender both in relation to State Parties and non-State Parties to the ICC Statute. Next, the ICC was criticized for maintaining the legal limbo concerning detention of the witnesses from the DRC. The other objection pointed to inconsistency of decisions rendered by the same chamber (composed of the same judges) in the same question (relevance of lack of legal representation of an accused in the assessment of the complementarity under Article 17 of the ICC Statute). The ICC (or at least its particular chambers) should put emphasis on consistency of its decision making practice - principles of legal certainty and legitimate expectations require that the same questions should be decided identically and accordingly, any departure should be persuasively reasoned. Finally, with respect to procedural aspect (presence of an accused at trial), the question was implicated, how far should the judicial creativity and expansive interpretation of the ICC Statute be extended.

All analyzed questions (possibly with exception of witness proofing) have posed considerable challenge for the ICC and the Court may be rightfully criticized for approach it has taken in its decisions. Nevertheless, as these questions represent only fragment of current ICC's case-law - this articles naturally did not endeavor to assess ICC's activity in a broader perspective, any possible opinions condemning the ICC as such would be definitively wrong, precipitated and premature. Accordingly, the ICC still has a right to protection, even if it has already come of age.

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