EXTENDING ROME STATUTE ARTICLE 59(2) TO NATIONAL ARRESTS AND DETENTIONS

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Abstract

The International Criminal Court currently does not extend the protections of Rome Statute article 59(2) to domestic arrests and detentions. This leaves a legal vacuum in which human rights violations are acknowledged but not acted upon. To remedy this, the Court should change its interpretation of article 59(2) to extend its scope to domestic arrests and detentions. This interpretation is supported by the text of the article and also aligns with the object and purpose of the Rome Statute, which is to guarantee respect for and enforcement of international justice. Extending this article would also bring the Court into compliance with article 21(3), mandating respect of human rights, and article 55, which protects detainees during investigation. While it is uncertain when the next 59(2) issue will come before the ICC, it is critical that when it does the Court changes its jurisprudence. Extending article 59(2) to domestic arrests and detentions will add legitimacy to the Court, bolster State compliance with international law, and most importantly fully protect the rights of detainees.

> The immutable rights of the individual . . . belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color, or beliefs.[1]

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1. In re Yamashita, 327 U.S. 1, 26 (1946) (Murphy, R., dissenting).

I. INTRODUCTION

Twelve years ago in February 2005, Thomas Lubanga and Floribert Njabu were arrested by Congolese authorities and charged with genocide, war crimes, and crimes against humanity.[2] Floribert Njabu was President of the Front des Nationalistes Intégrationnistes (FNI), a militia group that traffics in arms and has committed numerous human rights abuses.[3] Although the International Criminal Court (the Court, the ICC) tried and convicted Lubanga of enlisting and conscripting children as soldiers in 2012,[4] the ICC has not issued a warrant for Njabu's arrest, and he remains under national arrest at a house in the Democratic Republic of Congo (DRC).[5]

After having been detained for over twelve years as a result of a weak national justice system,[6] Njabu's detention is a violation of the right to be tried without undue delay guaranteed by the African Charter on Human and Peoples' Rights (ACHPR) Article 7 and the International Covenant on Civil and Political Rights (ICCPR) Article 14(3)(c).[7] As Njabu is one of the leaders of the FNI, it is possible that the ICC will issue a formal warrant for his arrest, and he would have a chance to remedy this human rights violation.[8] In previous cases, the Court has looked to Article 59(2) of the Rome Statute and determined that arrests and detentions done without a warrant from the ICC are outside the scope of its review.[9] The Court is likely to follow its precedent and

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2. *DR Congo: ICC Arrest First Step to Justice*, HUM. RTS. WATCH (Mar. 17, 2006, 7:00 PM), https://www.hrw.org/news/2006/03/17/dr-congo-icc-arrest-first-step-justice.

3. The Democratic Republic of Congo Sanctions Committee, *Narrative Summaries of Reasons for Listing Floribert Ngabu Njabu*, U. N. SCOR (Oct. 29, 2014), [hereinafter DRC Sanctions Committee] https://www.un.org/sc/suborg/en/sanctions/1533/materials/summaries/individual/floribert-ngabu-njabu.

4. Prosecutor v. Dyilo, ICC-01/04-01/06, Judgment, ¶1358 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

5. DRC Sanctions Committee, *supra* note 3.

6. *See The Democratic Republic of Congo Background: Ongoing Carnage*, INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/our-work/regions-and-countries/democratic-republic-congo-drc (last visited Apr. 17, 2018).

7. African Charter of Human and Peoples' Rights art. 7, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 rev. 5 [hereinafter ACHPR]; International Covenant on Civil and Political Rights art. 14(3)(c), Dec. 19, 1966, 999 U.N.T.S. 171.

8. *ICC/DRC: Second War Crimes Suspect to Face Justice in The Hague*, HUM. RTS. WATCH (Oct. 18, 2007), https://www.hrw.org/news/2007/10/18/icc/drc-second-war-crimes-suspect-face-justice-hague.

9. "A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that: (a) The warrant applies to that person; (b) The person has been arrested in accordance with the proper

decline to examine Njabu's national arrest or detention. However, it could reverse course and review Njabu's national arrest and detention because it is not bound by precedent.[10]

This Note will examine whether the protections of Article 59(2) should be extended to domestic arrests and detentions. First, I will outline the parameters of Article 59(2) and the Court's current interpretation of it. Second, I will analyze the text of the Article by examining the plain meaning of the text, the object and purpose of the Rome Statute, and the Statute's *travaux preparatoire*. Third, I will consider how the Court's current interpretation of Article 59(2) fails to comply with Article 21(3) of the Rome Statute, mandating that the Court follow human rights law. Finally, I will consider how the Court's current interpretation ignores the reality of State cooperation with the Court Prosecutor prior to formal arrest, governed by Article 55, creating a legal vacuum. Throughout, I will examine the policy choices inherent in the Court's decision either to continue its current trajectory or start afresh. Ultimately, I conclude that, while there would be some difficulties in changing its interpretation of Article 59(2), the Court should nonetheless change it in order to ensure that the human rights of detainees are respected at all stages of the judicial process.

II. The Court's Interpretation of Article 59(2)

Article 59(2) dictates how the custodial state is to conduct arrest proceedings and judicial review.[11] If the Pre-Trial Chamber believes there are "reasonable grounds" to believe that a person committed a crime within the Court's jurisdiction and arrest is necessary, it issues a warrant to the custodial state.[12] After arrest, the State is obliged under Article 59(2) to bring the detainee before a state judge to determine that the warrant applies, he has been arrested with "proper process," and his rights were respected, all in accordance with domestic law.[13]

process; and (c) The person's rights have been respected." Rome Statute of the International Criminal Court, art. 59(2), July 17, 1998, 37 I.L.M. 999, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute]. *See Prosecutor v. Dyilo*, ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006 (Dec. 14, 2006) [hereinafter *Judgment on the Appeal of Lubanga Dyilo*]; Prosecutor v. Katanga, ICC-01/04-01/07, Public redacted version of the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" of 20 November 2009, ¶ 66 (Dec. 3, 2009).

10. Christoph Safferling, International Criminal Procedure 114 (2012).

11. Rome Statute, *supra* note 9, art. 59(2).

12. *Id.* art. 58(1).

13. *Id.* art. 59; Angelica Schlunck, Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 767 (Otto Triffterer ed., 2d ed. 2008).

While this seems to grant domestic courts unreviewable discretion, the Court maintains some power to review domestic court decisions. The Court has said in prior case law that it "retain[s] a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which . . . are referred directly back to that national law by the Statute."[14] Because Article 59(2) of the Statute refers to arrest warrants, proper process, and human rights, the Court may review a domestic court's findings on those issues. The Court has exercised this power of review several times but has limited its scope to arrest and detention after issuance of an official arrest warrant rather than fully extending it to State arrests and detentions.[15]

The case of Laurent Gbagbo is paradigmatic of the Court's understanding. Laurent Gbagbo was arrested by rebel forces on April 11, 2011, and placed under house arrest.[16] He was kept in isolation in a three-by-three-meter room that he was never allowed to leave, ultimately losing his ability to walk without assistance.[17] He remained there until November 29, 2011.[18] During these eight months, Ivorian officials never issued an arrest warrant against him, and he was never brought before a judge.[19] He was denied counsel for the first six weeks of detention and met his counsel only four times during the rest of his detention.[20]

The Pre-Trial Chamber issued an arrest warrant on November 23, 2011, and national officials put Gbagbo in ICC custody on November 30.[21]

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14. Prosecutor v. Dyilo, ICC-01/04-01/06, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, 6 (Oct. 3, 2006) [hereinafter *Decision on the Defence Challenge*].

15. *See* Prosecutor v. Gbagbo, ICC-02/11-01/11, Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo," ¶¶ 101-02 (Aug. 15, 2012) [hereinafter *Decision on the Corrigendum*]; KAREL DE MEESTER, THE INVESTIGATION PHASE IN INTERNATIONAL CRIMINAL PROCEDURE 720 (2015); CHRISTOPHE PAULUSSEN, MALE CAPTUS BENE DETENTUS: SURRENDERING SUSPECTS TO THE INTERNATIONAL CRIMINAL COURT 928 (2010).

16. Prosecutor v. Gbagbo, ICC-02/11-01/11, Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo, ¶¶ 8, 12 (May 29, 2012) [hereinafter *Corrigendum of the challenge*].

17. *Id.* ¶ 21.

18. *Id.* ¶ 10.

19. *Id.* ¶ 14.

20. Decision on the Corrigendum, *supra* note 15, ¶ 71.

21. *Id.* ¶ 6.

Defense counsel filed a challenge to jurisdiction on the grounds that Gbagbo's national arrest and detention violated Ivorian law[22] and several human rights laws, most notably the ICCPR[23] and the Rome Statute.[24] The Chamber determined that Article 59(2) does not apply before issuance of a formal arrest warrant and therefore only looked at the seven days the State held Gbagbo on behalf of the Court before transferring him to the Hague.[25] Within this narrow time frame, the Chamber found that Gbagbo was not deprived of the rights ensured to him by domestic law, so Article 59(2) had not been violated.[26]

The Court's current interpretation preserves state sovereignty and makes the trial process faster because the time frame under consideration for an Article 59(2) claim is generally short. This interpretation, however, has also muddied the Court's reputation for respecting human rights.[27] As shown throughout history, an international criminal court's reputation must be zealously guarded to maintain legitimacy and avoid claims of victor's justice. In addition to reputational concerns, the Court also should change its interpretation of Article 59(2) to better align with the Article's plain meaning.

III. The Text of Article 59(2)

The Court currently reads Article 59(2) narrowly to limit the Court's power of review to arrest and detentions after an official arrest warrant, but the text does not mandate this reading. Article 59(1) requires States to arrest a suspect "immediately" after receiving an arrest warrant from the Court.[28] The Court currently uses Article 59(1)'s description of arrest to define arrest in Article 59(2).[29] Because Article 59(1) defines arrest to mean arrest upon request of the ICC,[30] arrest in Article 59(2) should mean the same thing. Therefore, the detainee

22. *See* Corrigendum of the challenge, *supra* note 16, ¶¶ 142-57; *id.* ¶¶ 164-77.

23. *See* ICCPR, *supra* note 6, art. 9 (guaranteeing the right to liberty and security of the person).

24. *See* Rome Statute, *supra* note 9, art. 67 (guaranteeing adequate time and space for preparing the defense and communicating with counsel); *See* Corrigendum of the challenge, *supra* note 16, ¶¶ 228-34.

25. Corrigendum of the Challenge, *supra* note 16, ¶¶ 101-02.

26. *Id.* ¶ 106.

27. *See* Patrick Costello, *International Criminal Court 'Crumbling' as Defections Put Legitimacy, Viability in Doubt*, Wash. Times (Dec. 27, 2016), https://www.washingtontimes.com/news/2016/dec/27/international-criminal-court-crumbling-as-defectio/.

28. Rome Statute, *supra* note 9, art. 59(1).

29. *See* Decision on the Corrigendum, *supra* note 15, ¶ 101.

30. Rome Statute, *supra* note 9, art. 59(1).

only needs to be brought before the Court after being arrested on behalf of the ICC.

The problem with this interpretation is that it ignores the plain meaning of the text. The text does not narrow the scope of Article 59 (2) to persons arrested after issuance of a warrant by the Chamber.[31] Article 59(2) says only that "a person arrested" will be brought before a judicial authority to determine whether their rights have been violated.[32] It does not specify that the arrest must be the result of a Pre-Trial Chamber warrant.[33] Merriam-Webster's dictionary defines arrest as "to take or keep in custody by authority of law"[34] and does not specify that the "law" must be the same law under which the Court will adjudicate. Instead, the definition focuses on the action of detention. The plain meaning of the text therefore dictates that all persons detained by law, whether by national or international arrest warrant, must appear before a judge who will determine whether their rights have been abridged.

The Court's current interpretation also violates the Vienna Convention on the Law of Treaties ("VCLT"). Article 31 of the VCLT is considered customary international law and is therefore applicable to all countries regardless of whether they are parties to the VCLT.[35] Per Article 31, treaty terms must be interpreted in good faith in accordance with their ordinary meaning, bearing in mind the context of the treaty and its object and purpose.[36] The Court's current importation of the 59(1) definition of arrest into Article 59(2) does not accord with the Rome Statute's object and purpose. The object and purpose of the Rome Statute is "to guarantee lasting respect for and the enforcement of international justice."[37] The Court's current interpretation does not fulfill the Statute's object and purpose because it allows states to violate international law with impunity, which decreases respect for the international justice system.

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31. Rome Statute, *supra* note 9, art. 59(2).

32. Id.

33. Id.

34. *Arrest*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/arrest (last visited Jan. 12, 2018).

35. *See* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. 82, ¶ 48 ("Articles 31 and 32 of the Vienna Convention on the Law of Treaties . . . may in many respects be considered as a codification of existing customary international law. . . .").

36. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

37. Rome Statute, *supra* note 9, pmbl.

In contrast, extending Article 59(2)'s scope would fulfill the statute's object and purpose by guaranteeing respect for and enforcement of international law. First, it would add to the legitimacy of the Court. When the Court holds States responsible for breaches in international law, the Court sends out a signal that it cares more about integrity of the judicial system and enforcement of international human rights than it does about victor's justice, silencing one of the harshest and most immutable critiques against it.[38] Second, expanding the scope of Article 59(2) will increase enforcement of international law. The ICC will be fully complying with international law for the first time since the Court's inception. States will be more likely to follow the Court's example and uphold international law after watching the Court hold states accountable to the highest standards of international law regardless of the culpability of those being tried before the Court. Extending Article 59(2) to domestic arrests and detentions will therefore fulfill the object and purpose of the ICC, increasing respect and enforcement of international law.

Conversely, to interpret "arrest" narrowly is antithetical to the purpose of the Court and will cause the international justice system to lose legitimacy and hinder the enforcement of justice. The Court's current understanding of Article 59(2) allows and even encourages states to get away with breaking national and international laws. Based on the Court's precedent, national authorities know that they will not be held responsible for their treatment of detainees prior to issuance of an official arrest warrant, so they can commit breaches of human rights with impunity.[39] This clouds the Court's reputation and leads to criticisms of victor's justice.[40] It also hinders the enforcement of justice at individual and systemic levels. First, the individual detainee is deprived of his rights with no recourse for that deprivation even though he is at the ICC, a Court established to be a vanguard of human rights.[41] Systemically, national courts will feel less compelled to follow international law and will perhaps stop following it altogether because the ICC, an international court, does not seem to follow international law either. In order to comply with the object and purpose of the Rome Statute, to increase respect for and enforcement of international law,

38. *See, e.g.*, Seth Engel, *The Libya Trial-Victor's Justice at the ICC?*, HUFFINGTON POST, https://www.huffingtonpost.com/sethengel/international-criminal-court-libya_b_1200963.html (last updated Mar. 13, 2012) (accusing the ICC of creating impossibly high barriers to domestic jurisdiction in order to assert victor's justice).

39. *See, e.g.*, Corrigendum of the challenge, *supra* note 16, ¶¶ 8, 12, 106.

40. *See* Engel, *supra* note 38.

41. *See* Rome Statute, *supra* note 9, pmbl.

the ICC must change its interpretation of arrest in Article 59(2) to include domestic arrests and detentions. In light of the Rome Statute's object and purpose and the ordinary meaning of arrest discussed above, "arrest" should be read broadly to include domestic arrests, extending the protections of Article 59(2) past the narrow timeframe after issuance of an official warrant.

One concern with defining arrest broadly in Article 59(2) is that it may create *ex post facto* consequences for the arresting State by holding them accountable for breaking a law they did not know applied to them. In reality, this concern is unfounded because no ex post facto lawmaking would occur because the law would be the same as it has always been. What would change is that the Court would begin to enforce the law. The Rome Statute specifies that judges will apply national law, which the state is bound by regardless of whether it knew the detainee would be brought before the ICC.[42] Both of the states implicated so far by an Article 59(2) claim have laws regarding the right to counsel and the right to a fair and speedy trial, which the state is subject to regardless of the Court's interference.[43] If the states did not have such rights, then the concern of *ex post facto* law-making would potentially be valid. Finally, the prohibition against torture is a peremptory norm, so the state would also be expected to follow this law regardless of whether the ICC was involved.[44] Because the state is subject to its national laws, peremptory norms, and customary international law regardless of whether the ICC is involved or not, the ICC's extension of Article 59(2) to domestic arrest and detention will not constitute *ex post facto* lawmaking. Instead, it will be enforcing already established law.

In short, nothing in the text demands the Court's current interpretation of "arrest" in Article 59(2). Broadening the definition of arrest to include domestic arrest is compatible with the text, maps onto the ordinary meaning of arrest, and aligns better with the object and purpose of the Rome Statute. Furthermore, broadening the definition will be enforcing established law, rather than creating laws ex post facto. Therefore, a textual interpretation of Article 59(2) supports an understanding of arrest that includes domestic arrests.

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42. *See* Rome Statute, *supra* note 9, art. 59.

43. *See* Corrigendum of the challenge, *supra* note 16, ¶¶ 142-57, 164-77; Prosecutor v. Katanga, ICC-01/04-01/07-3436-AnxI, Public Redacted Version of the Defence motion for a declaration on unlawful detention and stay of proceedings, ¶¶ 51, 55 (Mar. 7, 2014).

44. *See* Prosecutor v. Furundzija, Judgment, ¶¶ 155-57 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

IV. Travaux Preparatoire

The VCLT recognizes *travaux preparatoire* as a supplementary means of treaty interpretation, which may be used to confirm the meaning of the text.[45] *Travaux preparatoire* are official records of treaty negotiation and provide unique insight into drafters' intent. As can be seen by the *travaux preparatoire* of the Rome Statute, Article 59 was a particularly "delicate" provision because it concerns the transfer of power from the State to the Court.[46] The Court gains power by demanding the state judiciary examine arrests and detentions in a certain way, and the custodial state loses power as it accedes to the Court's request.[47] Because of this, delegates voiced concern throughout the drafting process about a "balanced division of responsibilities between the ICC and national authorities."[48]

In order to achieve this balance, the drafters gave the State and the Court different powers with little overlap, emphasizing that "certain matters were within the purview of the State and others were within the purview of the Court."[49] To preserve state sovereignty, "only those functions performed by the Court" were to be regulated by the Rome Statute.[50] Because arrests occurred at the state level by national authorities, the judicial proceedings reviewing arrest "should be conducted under the control of the relevant national authorities."[51] This idea appeared in 1995, the second year of drafting the Rome Statute, and remained unchallenged until it was codified as Article 59(2), showing strong support for the measure.[52] While this seems to grant national authorities unreviewable decision-making authority, the drafters explicitly left some powers to the ICC.

Once the ICC has issued a warrant, it has the power to hear the case; thus the state, while making determinations based on domestic law, is in fact acting "on behalf of the ICC."[53] Therefore, the Court may rule upon "the lawfulness of its arrest warrants and its requests for the

45. Vienna Convention on the Law of Treaties, *supra* note 36, art. 32.

46. Mohamed M. El Zeidy, *Critical Thoughts on Article 59(2) of the ICC Statute*, 4 J. Int'l Crim. Just. 448, 450 (2006).

47. See id.

48. Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Ct., Vol. 1 ¶ 239, U.N. Doc. A/51/22 (Sept. 13, 1996).

49. *Id.* ¶ 52.

50. *Id.*

51. *Id.* ¶¶ 52, 67.

52. *See* Rep. of the Ad Hoc Comm. on the Establishment of an Int'l Crim. Ct., at 32, U.N. Doc. A/50/22 (Sept. 6, 1995).

53. Zeidy, *supra* note 30, at 458.

detention of the suspect" because it was acting as an agent of the Court at the time it carried out these activities.[54] Furthermore, Article 99(1) gives the Court the power to review the arrest and detention to make sure that it complied with national law.[55] The drafters further emphasized that "respect for the rights of the accused were fundamental and reflected on the credibility of the court."[56] And in drafting numerous articles, emphasis was placed on the accused being afforded the greatest possible protection.[57]

While a concern of the drafters in Article 59(2) was to achieve balance between the Court and the State, it is apparent from *travaux preparatoire* that a greater concern of the drafters was to ensure full respect for the rights of the accused and uphold the highest standards of human rights. Because the intent to safeguard human rights was expressed throughout the *travaux preparatoire*, Article 59 should be read to extend to domestic arrests and detentions so human rights can be adequately protected, in keeping with the overarching intent of the drafters.

V. Compliance with Article 21(3)

The Court is also bound by Article 21 of the Rome Statute when conducting a trial. Article 21 of the Rome Statute lists applicable sources of law, including treaties, principles, and rules of international law.[58] The Court's "application and interpretation of law . . . must be consistent with internationally recognized human rights,"[59] and the Court should go beyond mere consistency, instead "aspir[ing] to the highest standards set by international human rights treaties, customary international law, and general principles of law."[60] The Court's current interpretation of Article 59(2) arrest and detentions as applying only to arrests and detentions done at the behest of the Court often falls short of this standard by allowing states to violate human rights recognized in treaties, customary international law, and general principles of law.[61]

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54. 1996 Preparatory Committee Report, *supra* note 32, ¶ 243.

55. Rome Statute, *supra* note 9.

56. *Id.* ¶ 270.

57. 1995 Rep. of the Ad Hoc Comm., *supra* note 36, ¶ 132.

58. Rome Statute, *supra* note 9, art. 21(1).

59. *Id.* art. 21(3).

60. Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 Yale J. Int'l L. 111, 117 (2002).

61. *See* Goran Sluiter, *Human Rights Protection in the ICC Pre-Trial Phase*, *in* The Emerging Practice of the International Criminal Court 459, 474 (Carsten Stahn & Goran Sluiter eds., 2009).

The enforcement of Article 21(3) gives rise to two conflicting concerns for the Court. The Court is reluctant to interfere with state actions because it depends on the cooperation of states when conducting an investigation. Interfering with a state may impact its willingness to cooperate with the Court. However, if the Court does not interfere with a state's sovereignty, it may be allowing human rights violations, which aside from being morally repugnant also tarnish the Court's reputation. Ultimately, because the conception of state sovereignty has weakened and the rights of individuals have gotten strong, the Court should enforce human rights violations, even if that means interfering with a state's sovereignty.

In all three cases to raise an Article 59(2) challenge, the detainees' human rights had been violated. For example, Thomas Lubanga Dyilo was not told of the reasons for his arrest and never went before a judge in regard to his domestic arrest and detention.[62] Arbitrary arrest and detention, as seen in this case, violates the Universal Declaration of Human Rights ("UDHR") Article 9,[63] ICCPR Article 9,[64] the European Convention on Human Rights ("ECHR") Article 5,[65] ACHPR Article 6,[66] and the American Convention on Human Rights ("ACHR") Article 7.[67] Germain Katanga was unrepresented when brought before national authorities,[68] and Laurent Gbagbo was denied counsel for the first six weeks of his detention, only meeting with his counsel four times over the next seven months of his national detention.[69] Denying an accused the assistance of counsel violates ECHR Article 6(3)[70] and ACHPR Article 7(1)(c).[71] Over the seven months that Laurent Gbagbo was detained, national authorities isolated him in a three-by-three-meter room and deprived him of necessary medication, ultimately resulting in his loss of ability to walk unassisted.[72] The Convention against

62. Prosecutor v. Dyilo, ICC-01/04-01/06, Application for Release, ¶ 9 (May 23, 2006) [hereinafter Application for Release].

63. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 9 (Dec. 10, 1948).

64. ICCPR, *supra* note 6.

65. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter EHCR].

66. ACHPR, *supra* note 7.

67. American Convention on Human Rights, art. 7, Nov. 22, 1969, 1144 U.N.T.S. 143.

68. Prosecutor v. Katanga, ICC-01/04-01/07-1666-Conf-Exp, Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings, ¶ 34 (Nov. 20, 2009) [hereinafter Motion of the Defence].

69. Decision on the Corrigendum, *supra* note 15, ¶ 71.

70. EHCR, *supra* note 65.

71. Corrigendum of the challenge, *supra* note 16, ¶¶ 124-26.

72. *Id.* ¶ 21.

Torture defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing for an act he or a third person has committed or is suspected of having committed."[73] Mr. Gbagbo's treatment amount to torture because his detention, solitary confinement, and lack of access to medical care caused him severe mental and physical suffering.[74] The prohibition on torture is *jus cogens*, and as such is "absolute and inalienable."[75] The above-mentioned rights are some of the most commonly violated during national arrests and detentions but are not exhaustive.

The Court has never declined jurisdiction because of the above-mentioned breaches of rights, even though it has the authority to decline jurisdiction where "to do otherwise would be odious to the administration of justice."[76] While this is an "exceptional" remedy, the Court may stay proceedings when the infractions "make it otiose, repugnant to the rule of law to put the accused on trial."[77] The Court will only stay proceedings, however, when those infractions can be attributed to the Court or a Court organ.[78] Attribution means "that the act of violation of fundamental rights is: (i) either directly perpetrated by persons associated with the Court; or (ii) perpetrated by third persons in collusion with the Court."[79] Because no organ of the Court committed the above-mentioned human rights violations in the cases of Gbagbo[80] and Dyilo, the Court refused to consider whether any violations occurred.[81]

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73. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

74. Corrigendum of the challenge, *supra* note 16, ¶¶ 214-227.

75. *Id.* ¶ 228. A *jus cogens* rule, also known as a peremptory norm, is a "norm accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties, *supra* note 36, art. 53. To be *jus cogens*, a rule must: (1) be a norm of general international law; (2) be accepted by the international community of states as a whole; (3) be immune from derogation; and (4) be modifiable only by a new norm having the same status. *Id.* No derogation is allowed under any circumstances for rules that are *jus cogens*. Thus, if a *jus cogens* rule is at odds with another rule encompassed in a treaty or Statute, the *jus cogens* rule will prevail. *See* Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT'L L. 72, 73 (2005). In the case of *Belgium v. Senegal*, the International Court of Justice recognized the prohibition on torture as *jus cogens*. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, ¶ 99 (July 20).

76. Judgment on the Appeal of Lubanga Dyilo, *supra* note 9, ¶ 27.

77. *Id.* ¶ 30.

78. *See id.* ¶ 27.

79. *Id.* ¶ 42.

80. *See* Decision on the Corrigendum, *supra* note 15, ¶ 112.

81. *See* Decision on the Defence Challenge, *supra* note 14, at 12.

A. *State Sovereignty*

The Court has declined to consider breaches of human rights by states because it would impact the states' willingness to cooperate with the Court. This would effectively end the Court's ability to hear cases or even exist, because the Court depends on states to give it money, evidence, suspects, witnesses, and prison facilities.[82] Most importantly, it does not have jurisdiction unless a state consents because the Court's jurisdiction is based on the principle of complementarity.[83] This means that the Court may only exercise jurisdiction when a national legal system is unwilling or unable to do so.[84] The Court "depend[s] on the goodwill of the parties," and if the Court begins to examine and criticize state conduct, states are less likely to cooperate.[85]

Traditionally, states have absolute sovereignty over their territory and may do whatever they want within it.[86] The Court's investigation of a state for actions committed within its own territory invades this sovereignty. While an erosion of state sovereignty may be unpalatable to states, this argument ignores the release of sovereignty inherent in the international criminal court system. In the three cases involving an Article 59(2) issue, the State asked the Court to investigate and adjudicate the case. By doing so, they invited an invasion of sovereignty. Even where states do not ask the Court to investigate, consent is still necessary to get evidence, suspects, and witnesses.[87] This requires not only consent, but also cooperation and subordination to the Court's requests for information.[88] By choosing to relinquish sovereignty to this extent, the state is put on notice that it releases sovereignty with regard to human rights determinations as well. It cannot just choose to relinquish the elements of sovereignty that will result in a benefit to the state. It must relinquish all elements of sovereignty around the case, including elements that will potentially result in censure.

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82. Cogan, *supra* note 60, at 119.

83. Rome Statute, *supra* note 9, art. 1.

84. Prosecutor v. Katanga, ICC-01/04-01/07-1015-Anx, Annex to Defence Reply to Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19(2)(a), 3 (Apr. 1, 2009), https://www.icc-cpi.int/RelatedRecords/CR2009_02250.PDF.

85. Cogan, *supra* note 60, at 120 (quoting Christian Chartier, former ICTY spokesperson, as quoted in Mark Rice-Oxley, *Tribunal Depends on the Kindness of Foes*, Nat'l L.J., June 3, 1996, at A10).

86. *See* Schooner Exchange v. McFaddon, 11 U.S. (1 Cranch) 116, 137 (1812).

87. *See* Rome Statute, *supra* note 9, art. 87.

88. See id.

B. *Human Rights*

Furthermore, international courts should be enforcing human rights law because they are supposed to be the vanguard of human rights.[89] Human rights treaties are creatures of international law, as is the Court, so it would be especially egregious if the Court failed to consider human rights violations. National courts are not creatures of international law, and thus it would "be inconceivable that an international tribunal . . . would be held less stringently to human rights norms than national legal systems."[90] If international courts will not follow international law, national legal systems will not follow it either. To ensure the respect and enforcement of international law, the Court should hold states to the highest standards of human rights, just as it holds criminals to that standard. At the very least, it should enforce human rights to ensure that it does not provide an excuse for national courts to stop following international law.

The Court's reputation is especially delicate, as war tribunals are often subject to accusations of victor's justice.[91] Properly functioning courts provide a sense of justice to not only the victims, but also the community as a whole. When courts ignore the law or due process restraints, a sense of justice is lost, and closure is not brought to the victims or community, negating the purpose of a criminal trial. For example, Japanese army general Tomoyuki Yamashita doubtless sanctioned brutal war crimes.[92] However, his trial at the hands of a United States military commission deprived him of basic rights of due process.[93] Although he was ultimately hanged for war crimes, he came to be viewed sympathetically as a victim of victor's justice.[94]

To avoid the same pitfalls of the Yamashita military tribunal, the Court must adhere to the most stringent standards for human rights. The Court's current failure to enforce human rights lends credence to critiques of the ICC and the international justice system as instruments of the victor. This perception would be remedied by extending the protections of Article 59(2) to national arrests and detentions, which would allow the Court to enforce Article 21(3) and would help the Court maintain its legitimacy.

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89. *See* Sluiter, *supra* note 61.

90. Cogan, *supra* note 60, at 118.

91. *See Justice on Trial*, ECONOMIST (Feb. 26, 2004), http://www.economist.com/node/2460574.

92. *See* Robert Trumbull, *Horror Recital on in Yamashita Trial*, N.Y. TIMES, Oct. 29, 1945, at 1.

93. A. FRANK REEL, THE CASE OF GENERAL YAMASHITA 241 (1949).

94. *See, e.g.*, Jerry White, Letter to the Editor, WASH. POST, Oct. 27, 1949, at 10.

VI. Compliance with Article 55

The Court's interpretation of Article 59(2) contravenes Article 55(1) of the Rome Statute, which guarantees the rights of persons during investigations.[95] Specifically, it guarantees that the person under investigation will not be coerced, threatened, tortured, or treated degradingly, and will not be arrested or detained arbitrarily.[96] States often violate this Article when they detain persons, yet the Court does not examine these violations because Article 55 says it applies to "investigation[s] under this Statute." The Court interprets this to mean that Article 55 applies to investigations done by the Prosecutor or by national authorities on behalf of the Prosecutor because "they can be attributed to the Court."[97] Informal coordination between national authorities and the Prosecutor is not enough to make an investigation attributable to the Court.[98]

This overly formalistic conception of Article 55 ignores the reality that Prosecutors depend on States prior to every investigation. Further, there is often a heavy amount of collaboration and coordination between state and Court authorities before the Court initiates an investigation, so even domestic investigations are attributable to the Court. If Article 59(2) were extended to cover domestic arrest and detention, "investigations under this Statute" would cover the informal investigation period because informal investigations by the Prosecutor usually begin only after the person has been arrested and detained at the state level.[99] This interpretation of 59(2) would better guarantee enforcement of Article 55, because persons would be fully protected from the beginning of informal investigations.

Investigations at the ICC are initiated either by referral from the Security Council or a State Party, or by the Prosecutor initiating an investigation *proprio motu* based on information about crimes within the Court's jurisdiction.[100] Only when the Security Council requests an investigation can the state theoretically not be participating with the

95. *See* Paulussen, *supra* note 11, at 928-29.

96. "In respect of an investigation under this Statute, a person: (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute." Rome Statute, *supra* note 9, art. 55(1).

97. Decision on the Corrigendum, *supra* note 15, ¶¶ 92, 96.

98. *See id.* ¶ 98.

99. *See, e.g.*, Motion of the Defence, *supra* note 68, ¶ 19; Application for Release, *supra* note 62, ¶¶ 1, 3.

100. Rome Statute, *supra* note 9, art. 15.

Prosecutor. When a state refers a crime to the Prosecutor, it gives the Prosecutor evidence of the crimes it has collected, partnering Prosecutor and State before an investigation has even begun.[101] In all three of the cases where an Article 59(2) challenge has been raised, the State requested investigation by the Prosecutor.[102] Even if the State doesn't request an investigation, to initiate an investigation *proprio motu*, the Prosecutor must get information and evidence of the alleged crime in order to establish that there is "a reasonable basis to proceed with the investigation."[103] This information can come from any source, including human rights organizations, the state, victims, and witnesses.[104] Therefore, before an investigation has formally begun the Prosecutor has usually already collaborated with the State.

The reality of collaboration is further enforced by two limits on the Court: prosecutorial power and complementary jurisdiction. First, the Prosecutor cannot take "intrusive measures" in a state's territory.[105] Instead, the Prosecutor must rely on the state to execute such intrusive measures, like searches and seizures, at the request of the ICC.[106] This makes the Court dependent on states to give them things such as evidence, defendants, witnesses, court personnel, and promises of enforcement.[107] Without this cooperation, the Court would not even have a basis to issue an arrest warrant, let alone hear a trial. Because the Prosecutor must depend on the State for all actions within the State's borders, he will only be able to bring a case if the state guarantees cooperation.[108] Therefore, the Prosecutor will contact State officials before beginning an investigation to ensure the State's cooperation. These limitations on the Prosecutor require communication and coordination with the State throughout the entire process.

The second limitation requiring cooperation by the state is that the Court has only complementary jurisdiction.[109] It cannot exercise

101. *Id.* art. 14.2.

102. *DRC: All You Need to Know about the Historic Case Against Germain Katanga*, AMNESTY INT'L (Mar. 6, 2014), https://www.amnesty.org/en/latest/news/2014/03/drc-all-you-need-know-about-historic-case-against-germain-katanga/; *Cote d'Ivoire: ICC Judges OK Investigation*, HUM. RTS. WATCH (Oct. 3, 2011, 10:18 AM), https://www.hrw.org/news/2011/10/03/cote-divoire-icc-judges-ok-investigation.

103. Rome Statute, *supra* note 9, art. 15(3).

104. *See id.* art. 54(a).

105. Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 615 (2003).

106. Id.

107. Cogan, *supra* note 60, at 119.

108. Rome Statute, *supra* note 9, art. 87.7.

109. *Id.* art. 1.

jurisdiction unless the state is unwilling or unable to do so.[110] This also requires that the Prosecutor communicate with the state prior to an investigation to ensure that the state will not exercise jurisdiction, thereby precluding the ICC's jurisdiction.[111] These limits on the Court necessitate communication between the state and Prosecutor prior to a formal investigation. To suggest that investigations at the national level cannot be attributed to the Court is disingenuous, because most of the investigating is done per the Prosecutor's request or in an attempt to persuade the Prosecutor to take the case.

The case of Laurent Gbagbo serves as an example of typical collaboration between a state and the Prosecutor prior to a formal investigation. The following communications all occurred prior to the Court's issuance of a formal arrest warrant for Gbagbo on November 23, 2011[112] and prior even to a request to open a formal investigation in Cote d'Ivoire on June 23, 2011.[113] In March 2011, lawyers for Alassane Ouattara, the President of Cote d'Ivoire, submitted a memorandum to the Court about why it should exercise jurisdiction and the crimes for which they thought Gbagbo could be tried.[114] In turn, the Prosecutor's investigation focused almost solely on Gbagbo months before a formal investigation into Cote d'Ivoire began.[115] In April 2011, just one month after the President's memorandum to the Court, the Prosecutor prophesied that Gbagbo would come to a "bad ending."[116]

On May 3, 2011, the President requested that an investigation be opened, and the Pre-Trial Chamber granted the investigation for the exact dates the President requested.[117] National authorities showed their confidence that Gbagbo would be prosecuted by the ICC when they charged Gbagbo at the national level only for economic crimes, which are not within the jurisdiction of the ICC.[118] They declined to bring more serious charges, presuming that the ICC would bring them. Ivorian authorities' surety that Gbagbo would be prosecuted at the ICC, coupled with the Prosecutor's focus on Gbagbo from the beginning of the investigation, "reveals links with organs of the Court

110. *Id.* art. 17.
111. *Id.* art. 1.
112. Corrigendum of the challenge, *supra* note 16, ¶ 6.
113. *Id.* ¶ 240.
114. *Id.* ¶ 243, annex 51.
115. *Id.* ¶¶ 236-40.
116. *Id.* ¶¶ 237, 240.
117. *Id.* ¶ 244.
118. *Id.* ¶ 248.

that raise suspicions of complicity."[119] From the actions of both the Prosecutor and Ivorian authorities, it is clear that they communicated with each other early and often. Each side cooperated with the wishes of the other; the ICC by investigating the exact period requested by the President and focusing on Gbagbo, and the Ivorians by providing a memorandum with reasons why Gbagbo should be prosecuted, only prosecuting Gbagbo for economic crimes, and agreeing to the Court's jurisdiction.[120] Because of this close cooperation, the national investigation prior to initiation of a formal investigation on May 3rd is also attributable to the Court.

Because the Court has not extended the scope of Article 59(2), the Prosecutor had no "duty of care" for Gbagbo prior to issuance of an official warrant, and the Court found that Article 55 did not protect Laurent Gbagbo.[121] In so finding, the Court resorted to a formalistic conception of what constitutes involvement. It found that "mere knowledge" of the Prosecutor about a national investigation or communication between the Prosecutor and the State is not enough to find involvement in national proceedings.[122] If Gbagbo had been detained at the Court's request or the Court was directly involved in domestic proceedings, then the Court would find that the investigation warranted Article 55 protection.[123] Because the investigation by Ivorian authorities was not attributable to the Court or an organ of the Court, and the Prosecutor had no duty towards the detainee, the Court declined to extend Gbagbo Article 55 protection.[124]

As is evident from Gbagbo's case, the Court's refusal to acknowledge that an organ of the Court, the Prosecutor, is involved in investigations at the national level prior to a formal arrest warrant ignores the reality of investigations. Prior to any investigation the Prosecutor must communicate with the state to determine whether it will assert jurisdiction.[125] Thus begins the first of many necessary communications. The Prosecutor is heavily involved in investigations at the national level, as it is the only way he will receive evidence. By ignoring this reality and finding that Article 55 extends only to investigations begun after a formal arrest warrant has been issued, the Court creates a "legal vacuum," where the Prosecutor is involved in and oftentimes directs

119. *Id.* ¶ 286.
120. *Id.* ¶¶ 241-54.
121. *Id.* ¶ 111.
122. Decision on the Corrigendum, *supra* note 15, ¶ 109.
123. *Id.* ¶ 108.
124. *Id.* ¶ 92.
125. Rome Statute, *supra* note 9, art. 1.

investigations, yet is not responsible for any violations of the detainee's rights.[126] The Court's involvement in national investigations and its subsequent willingness to ignore its involvement sends the message that the Court will allows state infringement of detainees' rights so long as the Prosecutor does not actually order this infringement. Furthermore, the Court is the only judicial body capable of addressing these human rights violations.[127]

The Court could remedy this problem by extending Article 59(2) to domestic arrests and detentions, which usually occur before the state begins an investigation. If the protections of Article 59(2) were provided at that point, then the Court would be responsible for the detainee because it would have the power to review whether the detainee's rights had been respected.[128] The Court would also have the power to review any investigation occurring after domestic arrest, because it would be an "investigation under this Statute."[129] This would remedy the legal vacuum created by the Court's current interpretation of Articles 59(2) and 55, and more accurately reflect the coordination between the Prosecutor and the State.

The reason the Court has declined to consider violations during an investigation is that they are done in the State, by the State, before the Court has officially intervened through a warrant.[130] To consider actions done by the state to the detainee would invade state sovereignty, which also violates international law.[131] The Westphalian conception of sovereignty is reflected in the *Lotus Case*, where the Permanent Court of International Justice found that in regard to international law, "restrictions upon the [sovereignty] of States cannot therefore be presumed."[132] Therefore, a state was "bound by international law only by consent or a clear rule of custom."[133] While states have bound themselves to international law through other human rights treaties, they have not bound themselves to judgment from the ICC for their actions, as the ICC is a court for individual criminal defendants.[134] Because

126. Corrigendum of the challenge, *supra* note 16, ¶ 256.

127. *See* DE MEESTER, *supra* note 11, at 588.

128. Rome Statute, *supra* note 9, art. 59(2).

129. *Id.* art. 55.

130. Judgment on the Appeal of Lubanga Dyilo, *supra* note 9, ¶ 41.

131. S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7).

132. Id.

133. Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT'L L. & COM. REG. 375, 391 (2013).

134. Rome Statute, *supra* note 9, art. 1.

states have not consented to the ICC's jurisdiction over their actions and it is not customary international law for international courts to exert jurisdiction over states, examining a state's actions would violate state sovereignty.

This argument ignores the current understanding of state sovereignty that arose after World War II.[135] State sovereignty is no longer an absolute power and is subordinate to certain obligations in the international community.[136] One such obligation is to respect human rights.[137] The international community increasingly restricts state sovereignty in the name of human rights, as can be seen by the creation of the International Court of Justice, which holds states accountable for human rights violations,[138] state intervention in Libya spurred by the U.N. Security Council Resolutions,[139] and its launch of Responsibility to Protect, or "R2P."[140] R2P is a commitment by the international community to end violence and persecution through intervention.[141] It was passed in 2005 in response to the international community's failure to prevent the atrocities in the Balkans, Rwanda, and Kosovo.[142] The third element of R2P calls for the international community to intervene if a state does not protect its citizens.[143] Human rights are therefore displacing sovereignty as the supreme rule of law, and if the Court chose to encroach upon state sovereignty in order to fully protect human rights, it would be following the modern conception of sovereignty.

Extending Article 59(2)'s scope would help to ensure the promises of Article 55 to the accused. Investigations would be covered by "under the Statute" because investigations almost always take place after detention. Therefore, even when the investigation is not formally done at the behest of the Prosecutor, the State will still be held responsible for it. While this may raise sovereignty concerns, ultimately the Court's

135. Root, *supra* note 133, at 392.

136. *See id.* at 393.

137. *Id.*

138. Statute of the International Court of Justice art. 36, Apr. 18 1946, 33 UNTS 993; Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 103 (Nov. 30); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 1996 I.C.J. 595 (July 11).

139. S.C. Res. 1970 (Feb. 26, 2011).

140. *Responsibility to Protect*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, http://www.un.org/en/genocideprevention/about-responsibility-to-protect.html.

141. Id.

142. Id.

143. Id.

placement of human rights over sovereignty accords with the modern hierarchy of sovereignty and human rights.

VII. Conclusion

Although the Court has developed strong precedent restricting Article 59(2) to arrests and detentions done pursuant to a Court warrant, it is not bound by precedent and may change its interpretation of Article 59(2) in future cases.[144] The text of Article 59(2) leaves the scope of "arrest" open to interpretation, but interpreting it in light of the Rome Statute's object and purpose would lead to a broader scope. While the drafters were concerned about an equal division of State and Court power, they were also concerned about respecting human rights, which an extension of Article 59(2) would better foster. Extending Article 59(2) will also bring the Court into compliance with Article 21(3) of the Statute, mandating respect of human rights, and with Article 55, guaranteeing rights of detainees during investigations. While extending Article 59(2)'s scope would encroach upon State sovereignty, this is reflective of an ongoing trend of subjugating sovereignty to ensure enforcement of human rights, and States have already consented to a loss of some sovereignty by asking the Court to try a detainee in the International Criminal Court rather than in a domestic court.

As a matter of policy, ignoring violations of human rights based on an overly narrow reading of Article 59(2) undermines respect for international justice because the Court is perceived as a tool of the states and encourages nations to ignore international law by its example. Extending the definition of arrest to domestic arrests would encourage respect for international justice because it would highlight the universal nature of human rights, which apply to all people regardless of their status in the criminal justice system. Strictly enforcing human rights would also encourage other states to follow suit in their own judgments, and to make sure that they do not commit human rights violations for fear they will be punished by the international justice system. Strict enforcement of human rights would enhance the legitimacy of the Court and lead to better public perception.

While it is uncertain when the next Article 59(2) issue will come before the ICC, when it does the Court should change its interpretation of Article 59(2). Extending Article 59(2) to domestic arrests and detentions will add legitimacy to the Court, bolster State compliance with international law, and most importantly fully protect the rights of detainees.

144. Safferling, *supra* note 10, at 114.