

Male captus bene detentus?
Surrendering suspects to the
International Criminal Court

SCHOOL OF HUMAN RIGHTS RESEARCH SERIES, Volume 41.

The titles published in this series are listed at the end of this volume.

Male captus bene detentus?
Surrendering suspects to the
International Criminal Court

Christophe Paulussen



Antwerp – Oxford – Portland

This volume is an adapted version of a dissertation defended at Tilburg University on 24 September 2010.

The research for this dissertation was financially supported by the Netherlands Organisation for Scientific Research (NWO).

Christophe Paulussen

Male captus bene detentus? Surrendering suspects to the International Criminal Court

Cover: Escorted by police motorcycles, two vehicles, one reportedly carrying ICC suspect Thomas Lubanga Dyilo, arrive at Scheveningen prison, the Netherlands, on 17 March 2006. (AP Photo/Fred Ernst.)

ISBN 978-94-000-0100-8
D/2010/7849/94
NUR 828

© 2010 Intersentia
www.intersentia.com

Behoudens uitzondering door de wet gesteld, mag zonder schriftelijke toestemming van de rechthebbende(n) op het auteursrecht c.q. de uitgevers van deze uitgave, door de rechthebbende(n) gemachtigd namens hem (hen) op te treden, niets uit deze uitgave worden vereenvoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of anderszins, hetgeen ook van toepassing is op de gehele of gedeeltelijke bewerking. De uitgevers zijn met uitsluiting van ieder ander onherroepelijk door de auteur gemachtigd de door derden verschuldigde vergoedingen van kopiëren, als bedoeld in artikel 17 lid 2 der Auteurswet 1912 en in het KB van 20-6-'64 (Stb. 351) ex artikel 16b der Auteurswet 1912, te doen innen door (en overeenkomstig de reglementen van) de Stichting Reprorecht te Amsterdam.

Niets uit deze uitgave mag worden verveelvoudigd en/of openbaar gemaakt door middel van druk, fotocopie, microfilm of op welke andere wijze ook, zonder voorafgaande schriftelijke toestemming van de uitgevers.

No part of this book may be reproduced in any form, by print, photo copy, microfilm or any other means, without written permission from the publishers.

*To my father Charles and my mother Liesbeth,
the kind of parents that any child should be entitled to*

ACKNOWLEDGEMENTS

In the introductory words of his 2007 article ‘Abducted Fugitives Before the International Criminal Court: Problems and Prospects’, Robert J. Currie puts forward the question of why one would wish to revisit “*every* international law student’s favourite essay topic [emphasis added, ChP]”. Now, Currie’s article is original, inspiring and well-written, but here, he appears to be wide of the mark: he does not provide the reader with any further evidence to sustain this bold statement, thereby seemingly violating one of the most precious commands in the scientific world, namely to write in a verifiable way.

However, was there really any need for Currie to insert a footnote with references here? Of course not. Some statements are simply so true that they do not need to be supported by further evidence.

In 2004, I wrote and defended my master’s thesis, entitled ‘Male Captus Bene Detentus? Human Rights and the Transfer of Suspects to International Criminal Tribunals’, at the Law Faculty of Tilburg University. Luckily, I was (and, by the way, still am) so intrigued by this fascinating topic that I was able to transfer some of my enthusiasm regarding this subject to the text and its readers. As a result, the thesis was well-received, which, among other things, enabled me to gain a position in the first generation of students following the research master of the Tilburg Graduate Law School. This, in turn, led to a PhD position, as from September 2005, at the Department of International and European Public Law, a very competent and cosy department where I already had the privilege to work between 2001 and 2003 as a student-assistant.

Now, four and a half years later, I am writing the final words of this PhD thesis – the acknowledgements. Being aware of the fact that these are normally the most often read words of *any* PhD thesis, especially of those which are so massive that they could be used in a ripping-huge-books-in-half challenge of a strongman competition, I will choose my words carefully.

Acknowledgements

Obviously, my first words of thanks go to Willem Van Genugten and Marc Groenhuijsen, my supervisors. I will not easily forget their enormous confidence and support in every project I was involved in over the last years, whether it was related to this thesis, to an article, to a lecture, to a presentation or to a project such as Alpe d’HuZes, which had absolutely nothing to do with my work as a PhD researcher in international criminal law. It has been great to work with such excellent researchers and – far more importantly – with such kind personalities.

Secondly, I must mention the distinguished members of the reading committee who were willing to read and comment on my PhD thesis: Bert Swart, Harmen Van der Wilt, Göran Sluiter and Anne-Marie De Brouwer. I knew from the start that these experts in the absorbing field of international criminal law were the persons I wanted to ask for my committee and I am therefore grateful and honoured that they all accepted the invitation.

Special thanks should go to Steve Lambley of Steve Lambley Information Design in The Hague. While stressing that I have made the final choices with respect to his suggestions and thus that any errors remain, of course, my own, Steve has done a truly outstanding job in very swiftly and precisely “polishing up” the English of the main text.

In addition, I would like to thank Tom Scheirs, Isabelle Van Dongen and Myriam-Alexandra Vreven for their help at Intersentia Publishers and the Netherlands Organisation for Scientific Research (NWO) for financially supporting this research.

More personal thanks go to (my roomies and paranymphs) Vera and Maartje and my many other dear friends and colleagues about whom I could write a *laudatio* of such length here that even the strongest man in the world would not be able to rip this book in half. With dinners, concerts, visits to amusement parks, sporting events, ‘(vrimi)bo’s’, movies, holidays abroad, stupid e-mails or just a simple good conversation, they have, in the words of a good friend, “kept me sane in this otherwise oh-so-lonely profession”, and hopefully will continue to keep me that way for the rest of my life.

My final words of thanks go to my family, in particular Charles, Liesbeth, Caroline, Maurice and Rens. The endless and unconditional support of these wonderful people in everything I do is moving, to say the least.

Christophe Paulussen
Tilburg, 1 March 2010

TABLE OF CONTENTS

Acknowledgements	vii
Table of contents	ix
List of abbreviations	xv
PART 1 INTRODUCTION	1
Chapter I	
General introduction	3
1 Contextualising the problem	3
1.1 From the past...	3
1.2 ...via the 'war on terror'...	6
1.3 ...to the International Criminal Court	8
2 Goals, central question and methodology	13
3 Outline	16
PART 2 ANALYSING <i>MALE CAPTUS BENE DETENTUS</i>	17
Chapter II	
The origin of the maxim	19
1 Introduction	19
2 Roman origin?	20
3 Modern origin?	25
4 Origin of the reasoning behind the maxim	26

Chapter III	
Dissecting the maxim: concepts, delimitations and definitions	29
1	Which <i>male captus</i> situations exist? 29
1.1	Introduction 29
1.2	Common context 32
1.3	Disguised extradition 35
1.4	Luring 38
1.5	Kidnapping/abduction 39
2	What is violated by these <i>male captus</i> situations? 41
2.1	State sovereignty 41
2.1.1	Exceptions 47
2.1.1.1	Consent 48
2.1.1.2	Self-defence 53
2.1.1.3	Humanitarian grounds 63
2.2	Human rights 69
2.2.1	Article 9, paragraph 1 of the ICCPR 78
2.2.2	Case law from the HRC 85
2.2.3	Article 5, paragraph 1 of the ECHR 89
2.2.4	Case law from the ECmHR and the ECtHR 91
2.2.5	Exception: war or other public emergency 115
2.3	The rule of law 123
3	Who violates? 125
3.1	States/State officials 125
3.2	Private individuals 125
3.2.1	Human rights 127
3.2.2	State sovereignty 133
3.3	States through private individuals 137
3.3.1	Draft articles on responsibility of States for internationally wrongful acts (Part I) 138
3.3.2	Intermezzo: the <i>Eichmann</i> case revisited 139
3.3.3	Draft articles on responsibility of States for internationally wrongful acts (Part II) 148
3.3.4	Due diligence 150
4	What are the consequences of such violations? 153
4.1	Reparation 153
4.2	Remedies 160
4.3	Abuse of process 167
4.4	The final outcome: <i>bene detentus</i> or <i>male detentus</i> (or something in between)? 168

PART 3	<i>MALE CAPTUS BENE DETENTUS IN PRACTICE</i>	179
Chapter IV	Introduction	181
Chapter V	Cases between States	185
1	Cases from the common law system	185
1.1	Older cases	185
1.2	More recent cases	196
2	Cases from the civil law system	262
2.1	Older cases	262
2.2	More recent cases	274
3	Interesting cases not (clearly) falling under either system	314
3.1	Older cases	314
3.2	More recent cases	320
Chapter VI	Cases between States and international(ised) criminal tribunals	347
1	Introduction	347
2	Main characteristics of the cooperation and transfer regime in the context of the ICTY and ICTR	349
3	Cases in the context of the ICTY and ICTR	381
3.1	Cases in the context of the ICTY	381
3.1.1	<i>Dokmanović</i>	381
3.1.2	<i>Todorović</i>	407
3.1.3	<i>Milošević</i>	429
3.1.4	<i>Nikolić</i>	436
3.1.5	<i>Tolimir</i>	494
3.1.6	<i>Karadžić</i>	503
3.2	Cases in the context of the ICTR	520
3.2.1	<i>Barayagwiza</i>	520
3.2.2	<i>Semanza</i>	548
3.2.3	<i>Kajelijeli</i>	559
3.2.4	<i>Rwamakuba</i>	572
4	General remarks on cooperation regimes in the context of the internationalised criminal tribunals	582
5	Cases in the context of the internationalised criminal tribunals	584
5.1	The <i>Duch</i> case before the ECCC	584
6	Final interesting observations stemming from the context of the internationalised criminal tribunals	605

Chapter VII	
Creating an external evaluative framework: principles distilled from Part 3	611
1 Introduction	611
2 Principles distilled from the cases between States	611
3 Principles distilled from the cases between States and international(ised) criminal tribunals	634
PART 4 THE INTERNATIONAL CRIMINAL COURT	673
Chapter VIII	
General information on the arrest and surrender regime	675
1 Introduction	675
2 Model of cooperation: a first appraisal	677
3 The arrest and surrender regime	697
3.1 The arrest and surrender regime Part I	697
3.2 The arrest and surrender regime Part II: Article 59, paragraph 2 of the ICC Statute	707
3.3 The arrest and surrender regime Part III	729
4 Model of cooperation: a second appraisal	749
Chapter IX	
Creating an internal evaluative framework: Article 21 of the ICC Statute	755
1 Introduction	755
2 Article 21, paragraph 1	756
2.1 Correlation between the three parts of paragraph 1	756
2.2 Article 21, paragraph 1 (a)	762
2.3 Article 21, paragraph 1 (b)	792
2.3.1 Applicable treaties	792
2.3.2 Principles and rules of international law	794
2.3.2.1 Customary international law...	797
2.3.2.2 ...or more?	801
2.4 Article 21, paragraph 1 (c)	806
3 Article 21, paragraph 2	819
4 Article 21, paragraph 3	820

Chapter X	
Finding the current ICC position on the <i>male captus</i> issue	839
1 Introduction	839
2 <i>Lubanga Dyilo</i>	839
3 <i>Bemba Gombo</i>	903
4 <i>Katanga</i>	914
PART 5 CONCLUSION	963
Chapter XI	
Answering the central question, recommendations and epilogue	965
1 Introduction	965
2 Answering the central question	965
2.1 The ICC's current position on the <i>male captus</i> issue	966
2.2 The ICC's current position on the <i>male captus</i> issue assessed in the context of this book's external evaluative framework	975
2.3 The ICC's current position on the <i>male captus</i> issue assessed in the context of this book's internal evaluative framework	991
3 Recommendations	995
4 Epilogue	1016
Summary	1017
Samenvatting (Dutch summary)	1053
Bibliography	1093
Table of selected cases	1141
Index	1173
Curriculum vitae	1189
School of Human Rights Research Series	1191

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AIDC	Académie Internationale de Droit Comparé
AIDP	Association Internationale de Droit Pénal
ARACHR	Arab Charter on Human Rights
Art(t).	Article(s)
ASP	Assembly of States Parties
ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute
AU	African Union
CAR	Central African Republic
<i>cf.</i>	<i>confer</i> [compare]
CISCHR	Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms
CPI	Cour Pénale Internationale
DARS	Draft articles on responsibility of States for internationally wrongful acts
DEA	Drug Enforcement Administration
Doc.	Document
DRC	Democratic Republic of the Congo
EAW	European Arrest Warrant
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ed(s).	editor(s)
edn.	edition
enl.	enlarged
EofC	Elements of Crimes
<i>et al.</i>	<i>et alii/aliae/aliam</i> [and others]
<i>etc.</i>	<i>et cetera</i> [and so on]
<i>et seq.</i>	<i>et sequentes</i> [and the following ones]
EU	European Union
EUFOR	European Union Force

List of abbreviations

FBI	Federal Bureau of Investigation
<i>ff</i>	<i>foliis</i> [and (on) the following pages]
FRY	Federal Republic of Yugoslavia
FTCA	Federal Tort Claims Act
GA	General Assembly
GC	Geneva Convention
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
<i>Ibid.</i>	<i>Ibidem</i> [In the same place]
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFOR	Implementation Force
ILC	International Law Commission
IMT(s)	International Military Tribunal(s)
IRA	Irish Republican Army
KFOR	Kosovo Force
LRA	Lord's Resistance Army
MLC	Mouvement de Libération du Congo
MONUC	Mission de l'Organisation des Nations Unies en République démocratique du Congo (UN Mission in the DRC)
NATO	North Atlantic Treaty Organisation
No(s).	Number(s)
OAS	Organisation de l'Armée Secrète
OAS	Organization of American States
OR	Official Records
OTP	Office of the Prosecutor
p(p).	page(s)
para(s).	paragraph(s)
PCIJ	Permanent Court of International Justice
QC	Queen's Counsel
Res.	Resolution
rev.	revised
RPE	Rules of Procedure and Evidence
RS	Republika Srpska
SC	(US) Supreme Court
SCSL	Special Court for Sierra Leone
SFOR	Stabilisation Force
SG	Secretary-General
STL	Special Tribunal for Lebanon
Supp.	Supplement

List of abbreviations

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMID	United Nations-African Union Mission in Darfur
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in Sudan
UNSC	United Nations Security Council
UNTAES	United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Mission Transitional Administration in East Timor
US(A)	United States (of America)
USSR	Union of Soviet Socialist Republics
Vol.	Volume
WW	World War

