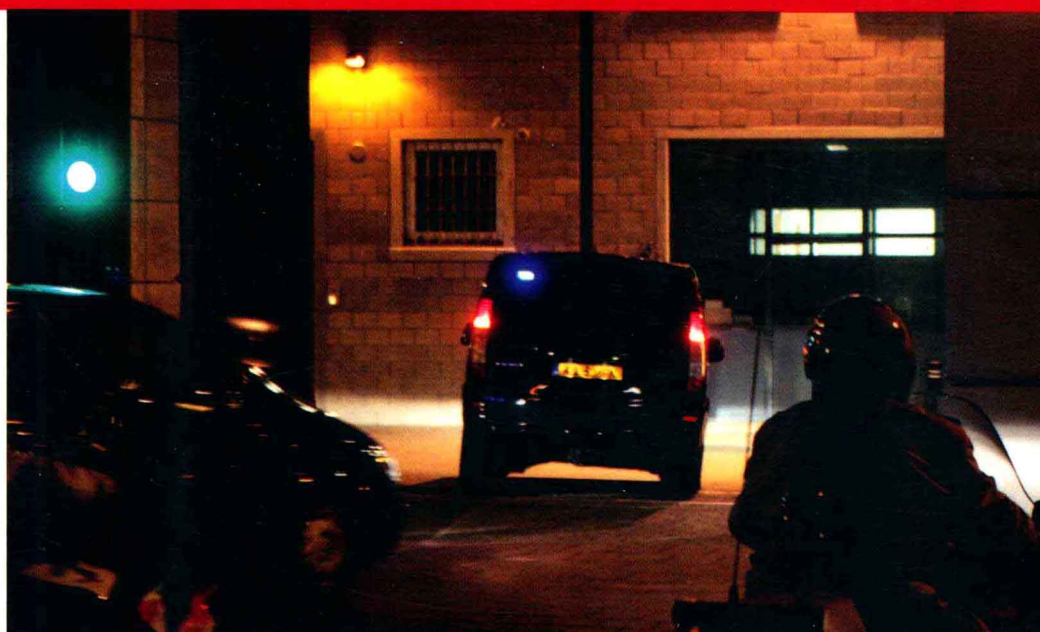


Christophe Paulussen

Male captus bene detentus?

Surrendering suspects to the International Criminal Court



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SCHOOL OF HUMAN RIGHTS RESEARCH

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

Christophe Paulussen



intersentia

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).

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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

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*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.

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
Gilburg, 1 March 2010

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

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

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

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PART 1

INTRODUCTION

CHAPTER I

GENERAL INTRODUCTION

1 CONTEXTUALISING THE PROBLEM

1.1 From the past...

The men in the first car had almost given up hope. They saw the bus stopping but didn't think anything would happen. All of a sudden Kenet noticed someone walking at the side of the road. It was too dark to make out who it was. "Someone's coming," he said to Gabi, "but I can't see who it is." A few seconds later, in a whisper that sounded to him like a shout, he exclaimed, "It's him!" Gabi's heart leapt with excitement. He threw a hurried glance at his men to check that they were all in position. Eli picked out the approaching figure immediately, but it took Gabi another fifteen seconds. Meanwhile, Klement was turning the corner into Garibaldi Street. Kenet hissed in Gabi's ear, "He's got one hand in his pocket – he may have a revolver. Do I tell Eli?" "Tell him," Gabi answered. "Eli," Kenet whispered, "watch out for a gun. He's got his hand in his pocket." Klement was standing right in front of the car. "Momentito," Eli said and sprang at him. Panic-stricken, Klement stepped back. In their practice exercises Eli had used the method called sentry tackle, seizing the man from behind and dragging him backward, but Kenet's warning about the gun forced him to change his tactics. He pounced on Klement to bring him down, but because Klement had stepped back Eli's leap brought them both crashing to the ground. As he fell, Klement let out a terrible yell, like a wild beast caught in a trap.¹

This extract describes the thrilling details of Ricardo Klement's abduction in Buenos Aires, Argentina, on 11 May 1960. Klement, better known as Adolf Eichmann, the former head of the Gestapo section which had to implement the policy of the 'final solution' of the Jews in Europe,² was seized by agents of Israel's Secret Service the

¹ Harel 1975, pp. 165-166.

² See the 1946 Judgment of the IMT of Nuremberg, under 'War Crimes and Crimes Against Humanity' and 'Persecution of the Jews' (read by Judge Nikitchenko and available at: <http://avalon.law.yale.edu/imt/judwarcr.asp>): "In the summer of 1941 (...), plans were made for the "final solution" of the Jewish question in all of Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B4 of the Gestapo, was formed to carry out the policy."