

# **Annex B**

## Public

## Article 92

### Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

- (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
- (b) A concise statement of the crime for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
- (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and
- (d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting

5. the request are delivered at a later date.

Directly Relevant Rules of Procedure and Evidence: Rules 188 and 189.

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### A. Introduction/General remarks

- 1 Article 92 was included in the Statute because in some circumstances, it may be necessary for the person to be arrested on an urgent basis, before the submission of the formal request

for arrest and surrender. The provision was included in the Draft Statute<sup>1</sup> and it remained substantially unamended at Rome. While the article did not generate much debate, because of its practical, technical nature, some States which advocated for the elimination of any evidentiary requirements<sup>2</sup> questioned the need for provisional arrest at all. If there were no evidentiary requirements to be met, a request for arrest and surrender would not differ greatly from a provisional arrest request and thus there would be no need for the two distinct processes. However, when compromise was achieved on the evidentiary issue and it was clear that evidence may have to be adduced in some instances, there was general agreement that a process for provisional arrest was needed.

The article is similar in content to article 9 of the United Nations Model Treaty on Extradition<sup>3</sup> and to provisions included in many State to State, extradition agreements<sup>4</sup>. It sets out clearly when such a request can be made, what the request should contain and the consequences of a failure to follow up with a full and complete request for surrender. Other than article 89 para. 1, the article does not spell out that the requested State Party is under a duty to comply with the request. However, this obligation is contained in article 59 para. 1.

## B. Analysis and interpretation of elements

### I. Paragraph 1

#### 1. Urgent cases

Consistent with general extradition practice, cases where provisional arrest may be sought are limited to circumstances of urgency. While no finite list of urgent circumstances exists, the most common would be where the arrest of the person is necessary to ensure that they will be available for surrender or where they may pose a danger to the community. In this context, the Court will most likely seek provisional arrest in the case of person who has taken steps to conceal his or her location or identity or where the existence of an arrest warrant is suspected or becomes known, such that the person might be motivated to flee. The term 'provisional arrest' is a term of art in international extradition practice. It connotes the interim arrest of the person pending the receipt of a formal request.

#### 2. Provisional arrest 'pending the presentation of the request'

This phrase recognizes that provisional arrest is sought to avoid the delay which might occur in awaiting the preparation of a full request for arrest and surrender, in compliance with the content of request provisions in article 91. As noted above, because the Court may have to submit some documents, statements or information, which cannot be compiled on an immediate basis, the ability to seek the person's detention on an interim basis is an important power for the Court.

### II. Paragraph 2

Given the urgent nature of provisional arrest, there is a slight departure from the requirements of article 87. All requests for provisional arrest may be transmitted through any mechanism that leaves a written record *i.e.* fax, electronic communication. In this instance, there is no need for subsequent transmission of an original.

<sup>1</sup> UN Doc. A/CONF.183/2/Add.1, pp. 166 *et seq.*

<sup>2</sup> See, however, article 91 para. 2 (c).

<sup>3</sup> UN Doc. A/CONF.144/28/Rev.1.

<sup>4</sup> For example article 16, European Convention on Extradition, 359 UNTS 273.

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- 6 The content of the request is prescribed in mandatory terms. The subsections which follow outline information which, on a practical level, is essential for the execution of the request.

**1. Information describing the person sought and to that person's probable location**

- 7 This subparagraph is identical to subparagraph 2 (a) of article 91 and reflects that this information is essential to the execution of a provisional arrest request.

**2. A concise statement of the alleged crimes**

- 8 Unlike a request for arrest and surrender under article 91, in the case of provisional arrest, there is no variation between States as to the type of documents or information to be provided in support of the request. It is common extradition practice amongst States to require only a concise description of the crime and underlying facts when seeking provisional arrest. This subparagraph reflects that requirement in language which is similar to that found in article 9 para. 2 of the United Nations Model Treaty on Extradition<sup>5</sup>.

**3. A statement on the founding decision**

- 9 Again, in recognition of the urgent nature of the process, the Court is only required to state the existence of the relevant document. It is not necessary for time to be lost in obtaining and providing a copy of the warrant or judgment of conviction. This too is consistent with extradition practice<sup>6</sup>.

**4. Announcement of a request for surrender**

- 10 Provisional arrest is only viable when it is an interim measure to be followed by a full request for surrender. Thus, before any State would be prepared to action such a request, there would need to be an assurance from the Court that the arrest is being sought because of circumstances which make it urgent, pending the presentation of a request as described in article 91.

### **III. Paragraph 3**

**1. Release from provisional arrest**

- 11 In most instances, a person provisionally arrested on the basis of a request from the Court will be detained in custody<sup>7</sup>. In the absence of a full request, it is recognized that the person cannot be detained indefinitely. Consistent with State to State extradition practice, this paragraph allows for the release of the person from custody where the request for surrender and relevant supporting materials are not received within a prescribed period. Because of the evidentiary requirements of some States, the language makes it clear that the obligation on the Court is to provide both the request and relevant materials outlined in article 91 within the set period.

**2. Time limits specified in the Rules**

- 12 At Rome, there was division amongst States as to the appropriate time period for submission of the full request. This reflected the fact that there is a variation in State to State extradition practice on this point as well. Ultimately, as the principles underlying this

<sup>5</sup> UN Doc. A/CONF.144/28/Rev.1.

<sup>6</sup> See UN Doc. A/CONF.144/28/Rev.1, article 9, United Nations Model Treaty on Extradition.

<sup>7</sup> In accordance with article 59, there is a possibility that the judicial authorities in the requested State could order the interim release of the person. It is highly unlikely to occur in the case of a provisional arrest executed in urgent circumstances. However, if that were to occur than this provision should be interpreted to require the release of the person from the terms and conditions of release.

subparagraph were not in dispute, it was agreed that the relevant time period should be left to the Rules, which would allow for greater flexibility, permitting a change in the time period much more easily. The difficulties regarding an agreed time period were overcome in the discussions of the rules such that Rule 188 provides for a period of 60 days from the time of arrest within which the documents must be submitted.

### 3. Consent to surrender

In the interests of practicality, this incorporates the concept of simplified surrender into the cooperation regime. Based on article 6 of the Model Treaty on Extradition<sup>8</sup>, it permits the immediate surrender of the person after provisional arrest, where the person consents and such a process is permitted under the law of that State. Use of this provision avoids the preparation of the materials by the Court and the continued detention of the person in the requested State for a period of time, where the person is prepared to go before the Court immediately. It is beneficial to the Court and the person sought. 13

As simplified surrender is intended to avoid unnecessary delay, the wording makes it clear that where the person consents, surrender should be carried out as soon as possible. In addition Rule 189 notes that the Court is not required to submit the full documentation required for a normal surrender process unless the State involved specifically requests otherwise. 14

## IV. Paragraph 4: No prejudice for subsequent arrest and surrender

This paragraph, similar to article 9 para. 5 of the Model Treaty<sup>9</sup>, reflects the principle that the release of a person after provisional arrest, in the circumstances outlined in paragraph 3, will not prevent the reinitiation of surrender proceedings against that person, upon receipt of a full request for extradition. This well accepted principle in State to State practice is incorporated here to prevent an individual from using a problem with respect to provisional arrest to shield himself or herself from facing prosecution before the Court. It provides that the arrest and release does not constitute a bar to subsequent proceedings. However, in recognition of the rights of the individual, it precludes repeated provisional arrests by indicating that a subsequent arrest can be carried out only upon receipt of the full request for surrender, with supporting documents. 15

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<sup>8</sup> UN Doc. A/CONF.144/28/Rev.1.

<sup>9</sup> UN Doc. A/CONF.144/28/Rev.1.