CONTENTS

Dedication to Dr. David Moffie ............................................ xv
Table of Abbreviations ..................................................... xvii
Table of Authorities ....................................................... xxi
Foreword ........................................................................... xxix
Acknowledgments ............................................................. xxxv
Introduction ......................................................................... 1

PART I: GENERAL TOPICS

Chapter I  Conceptualization of the Extradition and Surrender
Frameworks in ICL ................................................................. 9
  1 The Need for a Methodological Integration of
     International Extradition and Surrender ......................... 9
  2 The Conceptual Framework of Extradition
     and Surrender in ICL ................................................... 11
     2.1 Conceptual Distinctions Between
         Extradition and Surrender ................................... 11
     2.2 Conceptual and Functional
         Distinctions Between ICTY-ICTR and
         ICC Surrender Mechanisms .................................. 13
  3 The Functionality of the Surrender Provisions
     of the Ad Hoc Tribunals .............................................. 16
     3.1 Introduction ........................................................... 16
     3.2 The Legal Origin of ICTY and ICTR
         Surrender Provisions ............................................. 17
     3.3 Functional Limitations of the ICTY
         and ICTR Surrender Provisions ............................. 26
  4 The Functionality of the ICC Treaty-Based
     Surrender Model .......................................................... 35
  5 Conclusion ..................................................................... 41

Chapter II  Contemporary Individuals’ Rights Under the ICTY,
ICTR and ICC Surrender Systems ....................................... 43
  1 Introduction .................................................................. 43
  2 Levels of Surrender Obligations and Rights
     to be Surveyed ............................................................ 44
  3 Conclusion ..................................................................... 60
Chapter III  Enforceability of Individuals' Rights Under the ICTY, ICTR and ICC Surrender Systems  

1  Introduction  

2  International Surrender Orders: Reception or Enforcement?  

2.1  General Remarks  

2.2  ICTY and ICTR Reception or Enforcement  

2.3  ICC Reception or Enforcement  

3  Permeability of Locus Standi of Indicted to-Be-Surrendered Persons  

3.1  Locus Standi to ICTY-ICTR Surrender Orders  

3.1.1  Forum and Transit State  

3.1.2  Opposability Before the International Criminal Court, i.e., ICTY and ICTR Itself  

3.1.3  Opposability Before Regional International Human Rights Courts  

3.2  Locus Standi to ICC Surrender Orders  

3.2.1  Forum and Transit State  

3.2.2  Opposability Before the ICC Itself  

3.2.3  Opposability Before Regional International Human Rights Courts  

4  Conclusion  

PART II: SUBSTANTIVE LAW  

Chapter IV  ICTY, ICTR and ICC Surrender Defenses Originating from International Extradition Law  

1  Introduction  

2  Transmission of the Major Extradition Defenses to ICTY, ICTR and ICC Surrender Obligations  

2.1  Treaty Basis as Extradition Prerequisite for International Crimes  

2.2  Evidence and Probable Cause  

2.2.1  Extradition  

2.2.2  ICTY, ICTR and ICC Surrender  

2.3  The Principle or Defense of Dual Criminality to War Crimes  

2.4  The Universality Principle as Extradition Basis?  

2.5  Human Rights Law Defenses in Extradition Cases: Effect on ICTY, ICTR and ICC Surrender  

3  Conclusion: Emerging ICC Surrender Defense
<table>
<thead>
<tr>
<th>Chapter V</th>
<th>ICTY, ICTR and ICC Surrender Defenses</th>
<th>Originating from Human Rights Law</th>
<th>117</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Introduction</td>
<td></td>
<td>117</td>
</tr>
<tr>
<td>2</td>
<td>The Protection of Human Rights at the ICTY, ICTR and ICC Surrender Level Under Customary International Law</td>
<td>117</td>
<td></td>
</tr>
<tr>
<td>2.1</td>
<td>ICTY-ICTR</td>
<td></td>
<td>118</td>
</tr>
<tr>
<td>2.2</td>
<td>ICC</td>
<td></td>
<td>120</td>
</tr>
<tr>
<td>3</td>
<td>The Protection of Human Rights at the ICTY, ICTR and ICC Surrender Level Originating from the Abuse of Rights Doctrine</td>
<td>121</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Contemporary European Court Case Law: Potential Influence on International Surrender Proceedings</td>
<td>122</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Human Rights Law: Resource for Surrender Defenses</td>
<td>128</td>
<td></td>
</tr>
<tr>
<td>5.1</td>
<td>Absolute Human Rights Law Defenses to Extradition and Surrender</td>
<td>129</td>
<td></td>
</tr>
<tr>
<td>5.2</td>
<td>Relative Human Rights Law Defenses to Extradition and Surrender</td>
<td>136</td>
<td></td>
</tr>
<tr>
<td>5.2.1</td>
<td>The Right to a Fair Trial.</td>
<td></td>
<td>136</td>
</tr>
<tr>
<td>5.2.2</td>
<td>The Right to Fair Law Enforcement Practices; Prohibition of Luring</td>
<td>138</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>The Interaction of Surrender Obligations and Jus Cogens or Peremptory Norms of International Law</td>
<td>139</td>
<td></td>
</tr>
<tr>
<td>6.1</td>
<td>ICTY-ICTR</td>
<td></td>
<td>139</td>
</tr>
<tr>
<td>6.2</td>
<td>ICC</td>
<td></td>
<td>145</td>
</tr>
<tr>
<td>7</td>
<td>Conditional Extradition and Surrender as ICL Regime for Human Rights Compliance</td>
<td>146</td>
<td></td>
</tr>
<tr>
<td>7.1</td>
<td>Conditional Extradition and Surrender for Purpose of Transforming Sentences</td>
<td>146</td>
<td></td>
</tr>
<tr>
<td>7.2</td>
<td>Surrender Conditions Before the ICTY, ICTR and ICC; Fora Non Conveniens?</td>
<td>152</td>
<td></td>
</tr>
<tr>
<td>7.3</td>
<td>The ICL Status of Extradition and Surrender Conditions: The Doctrine of Direct Effect on Individuals</td>
<td>154</td>
<td></td>
</tr>
<tr>
<td>7.3.1</td>
<td>ICL Status in General</td>
<td></td>
<td>155</td>
</tr>
<tr>
<td>7.3.2</td>
<td>Doctrine of Direct Effect</td>
<td></td>
<td>156</td>
</tr>
<tr>
<td>7.3.3</td>
<td>Conclusion</td>
<td></td>
<td>158</td>
</tr>
<tr>
<td>7.4</td>
<td>State and Institutional Responsibility for Enforceability of Extradition and ICTY, ICTR and ICC Surrender Conditions</td>
<td>159</td>
<td></td>
</tr>
</tbody>
</table>
Chapter VI  *Sui Generis* Defenses to ICTY, ICTR and ICC

**Surrender Requests**

1 Introduction 163
2 Surrender as Sequel to Expelling the Political
   Offense Exception 164
3 Surrender for International Crimes of a Political
   Character 165
4 Contextualizing the Law of Surrender Defenses
   and the Rendition Systems of ICTY, ICTR and ICC 167
5 Basic ICTY, ICTR and ICC Surrender Obligations 172
   5.1 Rule of Speciality 172
   5.2 Consequences of Substantive and
      Procedural Deficiencies in ICTY, ICTR
      and ICC Arrest Warrants for Surrender 175
   5.3 Irregularities in Surrender Requests and
      Their Impact on ICTY, ICTR and ICC
      Proceedings 178
   5.4 Surrender and the Defense of Alibi or
      Innocence 183
      5.4.1 General Remarks 183
      5.4.2 The Coercive Status of ICTY-ICTR
         Cooperation: Obstacle to This
         Defense? 186
   5.5 Invocations of Domestic Criminal Law
      Defenses in the Realm of Article 59 (3)
      ICC Statute 187
   5.6 Surrender and the Defense of Life
      Imprisonment 187
   5.7 Surrender and Political Asylum 188
6 Interference Between Extradition and Surrender
   Defenses 193
   6.1 Introduction 193
   6.2 Interference with the Political Offense
      Exception 194
   6.3 Interference with the Defense of
      Non-Extradition of Nationals 195
7 National Legislation as Impediment to or Basis
   for Rendition to International Criminal Courts 198
   7.1 General Arguments 198
   7.1.1 ICTY-ICTR 198
### Table of Contents

**Chapter VII**  New Aspects of *Sui Generis* Surrender Defenses Within the ICTY, ICTR and ICC Framework  
1 Introduction 219  
2 Voluntary Surrender as Mitigation and Provisional Release Factor 219  
3 Prosecutorial Due Diligence and Surrender to International Courts: Reasonableness of Detention Length 224  
4 The Defense of the International Exclusionary Rule Within Surrender Procedures 228  
4.1 Introduction 228  
4.2 The Exclusionary Rule in International Law in General 228  
4.3 The International Exclusionary Rule Within the Process of Surrender 233  
4.4 Conclusion 234  

**Chapter VIII**  The Emergence of the Doctrine of Abuse of Process as Surrender Defense *Sui Generis* Before the ICTY, ICTR and ICC  
1 Introduction 235  
2 The Abuse of Process Doctrine and Its Origin in Common Law 236  
3 The Common Law Doctrine of Abuse of Process in International Affairs 238  
4 International Criminal Courts Case Law Relating to Luring and Abduction 243  
4.1 Introduction 243  
4.2 Abduction by Fraud and Abduction by Force 243  
5 Rendition and Conflicting *Jus Cogens* Norms 245  
6 Judicial Consequences in ICL 247  
6.1 Individualizing *Male Captus Bene Detentus* 247
# Table of Contents

6.2 Forcible Abduction in the Course of War or Self-Defense by States as Justificatory Exception .............................................. 254

6.3 The Effect of the Abuse of Process Doctrine on the Jurisdiction of an International Criminal Court ................................. 256
  6.3.1 General Proposition ............................................ 256
  6.3.2 ICTY-ICTR: The Todorović Case ............................ 257
  6.3.3 ICC ............................................................. 259

6.4 Conclusion ............................................................. 260

7 Abusive Methods of Surrender of Detained Witnesses to International Courts ......................................................... 264
  7.1 Introduction .......................................................... 264
  7.2 Abusive Methods of Witness Transfer ................................ 264

Chapter IX Toward a Uniform Framework of ICTY, ICTR and ICC Surrender Standards and Agreements .............................. 269
1 Concurrence of International Obligations of States to International Criminal Courts with International Extradition Defenses ................................................. 269
  1.1 Introduction .......................................................... 269
  1.2 Surrender to International Tribunals as a Form of International Judicial Assistance .................................................. 270
  1.3 Balancing International Surrender Obligations and International Law Protections ..................................................... 271

2 Minimum Safeguards in International Surrender Agreements: The U.S. Model .............................................................. 273
  2.1 Introduction .......................................................... 273
  2.2 Formal Requirements ................................................ 274
  2.3 Habeas Corpus Writs .................................................. 277

3 Judicial Limitations to Be Vested in International Surrender Agreements ................................................................. 280

4 National and International Courts' Review of Habeas Corpus Writs .................................................................................. 282

5 Concluding Observations on International Surrender Agreements ..................................................................................... 286

6 A Uniform ICL Scheme for the Rendition of Fugitive Indictees to International Criminal Courts ..................................... 287

7 Competing Extradition and Surrender Requests: Toward an International Rule ............................................................ 291
PART III: ENFORCEABILITY OF THE SURRENDER CONCEPT

Chapter X  State Responsibility for Compliance with ICTY, ICTR and ICC Extradition and Surrender Standards  ... 297
1  Introduction .............................................. 297
2  The Nature of State Responsibility in International Extradition and Surrender Affairs ...................... 298
3  Remedies for Non-Compliance with ICTY, ICTR and ICC Surrender Conditions and Their Proceedings .................................................... 306
4  The *Aut Dedere Aut Judicare* Principle: Domestic Prosecutions as Defense to ICTY, ICTR and ICC Surrender ...................................................... 312
   4.1  Introduction .............................................. 312
   4.2  Customary International Law Status .................. 313
   4.3  International *Ne Bis in Idem*:
       No Hiding Place ......................................... 316
       4.3.1  State Sovereignty Limitations .................. 316
       4.3.2  International Due Process Norms as Limitation .............................................. 321
       4.3.3  *Ne Bis in Idem* as Defense to Surrender to International Criminal Courts .................. 323
       4.3.3.1  The *Ne Bis in Idem* Defense Status Under the ICC Statute .................. 323
       4.3.3.2  The *Ne Bis in Idem* Defense Status Under the ICTY-ICTR Statutes .................. 328
       4.3.3.3  The *Ne Bis in Idem* Defense Status Under the ECHR .................. 330
       4.3.3.4  Domestic Court Martial and Disciplinary Trials: "Other Courts" ex Article 20 (3) ICC Statute? .................. 332
       4.3.3.5  Surrender and Simultaneously Conducted Trials .............................................. 333
   4.3.4  *Ne Bis in Idem* and Its Restraints on Amnesty .............................................. 335
   4.3.5  Domestic Investigatory Commissions as *Ne Bis in Idem*
       Defense to Surrender ..................................... 339
       4.3.5.1  General Remarks ..................................... 339
       4.3.5.2  Specific Remarks: The Israeli Kahan Commission .............................................. 342
   4.3.6  Conclusion: Principle of Deduction ..................... 346
# Table of Contents

## Chapter XI
State Responsibility for Non-Compliance with ICTY, ICTR and ICC Surrender Requests

1. Introduction. .................................................. 349
2. Enforcement Dualism in ICTY, ICTR and ICC
   Surrender Requests and Sentences ............................. 350
   2.1 Introduction. ................................................. 350
   2.2 ICTY and ICTR Enforcement Dualism ...................... 351
   2.3 ICC Enforcement Dualism .................................... 354
   2.4 ICTY-ICTR and ICC Enforcement Dualism Compared ...... 355
   2.5 Enforcement Dualism and Reflections on Surrender Requests ........................................... 356
3. Compliance with Non-Abusive Invocations of Ne Bis in Idem: Advisory Commissions? ......................... 359

## Chapter XII
State Responsibility and the Emerging Role of NATO and UN Forces in Enforcing Extradition and ICTY, ICTR and ICC Surrender Requests

1. Introduction .................................................. 361
2. NATO and UN Mechanisms of Arrest and Surrender of Persons to International Courts ....................... 362
3. The Non-Mandatory Nature Under ICL of Executing ICTY and ICTR Arrest Warrants and Surrender Requests by UN/NATO Forces ........................................... 364
   4.1 ICTY-ICTR .................................................. 370
   4.2 ICC ......................................................... 374

## Chapter XIII
Summary and Conclusions: Surrender as Privileged Extradition or Extradition Sui Generis ............................. 377

## APPENDICES

### Appendix I
Uniform ICL Scheme for ICTY, ICTR and ICC Surrender of Indictees ......................................................... 385

### Appendix II
Decree on the Procedure Ruling the Cooperation with the The Hague Tribunal of 23 June 2001 of the Federal Government of the Republic of Yugoslavia ......................................................... 393

## Index
............................................................. 401

## Biographical Note
......................................................... 407