## The shared protection of human rights at the International Criminal Court

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# CHAPTER 2: The Basis for the Human Rights Obligations of the ICC and States

## 2.1. Introduction

The study's research question places human rights at centre stage. The approach to assessing the adequacy of human rights protection has been to understand protection by understanding obligations. By setting out which actor owes which obligation to an individual at each shared stage of ICC proceedings, it is possible to identify where problems may arise. This Chapter builds the groundwork for this exercise by providing an overview of where those obligations are to be found and what their basis is. In other words, this is the sources of obligations Chapter.

Throughout the study, reference is made to actors having 'human rights obligations' or 'obligations to protect human rights'. These terms are used as equivalents and encompass different types of obligations. The first type of obligations are those expressly phrased as human rights, for example, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) which states that 'Every human being has the inherent right to life'. All signatories to the ICCPR have both positive and negative obligations that correspond to this right. The second type of obligations are those that are not framed in human rights terms, but whose effect is the protection of human rights. For example, Article 68(1) Rome Statute obliges the ICC to 'take appropriate measures to protect the safety of witnesses'. Another example is Rule 96(1) of the Regulations of the Registry, which obliges the Registry of the ICC to establish and maintain a witness protection programme. Neither provision contains words such as 'a witness shall have a right to protection of their human rights', and yet the effect of the provisions is precisely that. In this sense the terms 'human rights obligations' or 'obligations to protect human rights' are used more broadly in this thesis than under international law more generally.

The three actors potentially involved in shared stages of ICC proceedings are the ICC, the State Parties, and the ICC host State. While the ICC is always involved, the other actor will depend on the particular stage: release following an acquittal can involve the ICC, multiple State Parties, and the host State, whereas arrest and surrender involves only the ICC and one State Party. For both States Parties and the host State there are important

questions concerning how their human rights obligations operate in a shared situation involving the ICC. Sections 2.3 and 2.4 of this Chapter will explore how the ICC's involvement can change the nature of these obligations. Section 2.2 is dedicated to the obligations of the ICC.

For all the actors in this study, a distinction is made between obligations found within the Rome Statute protection framework, and obligations found beyond this framework. The Rome Statute protection framework is a collective term covering the Rome Statute, the instruments that derive their binding force from the Rome Statute (including the Rules of Procedure and Evidence, the Regulations of the Registry[1], and the Regulations of the Court), and agreements made between the ICC and States (such as the Headquarters Agreement, agreements on the protection of witnesses, and agreements on the enforcement of sentences). Any other source of obligations is considered to be outside the framework. Drawing this distinction is done, in large part, for the sake of analytical clarity, however there are also two other reasons. First, the entire Rome Statute protection framework is subject to Article 21(3) Rome Statute which, as will be discussed below, is of great significance for human rights. Second, the distinction helps to understand the nature and outcome of conflicts of obligations for States Parties and the host State. This last issue will be addressed in section 2.3.3.

## 2.2. Obligations of the ICC

### 2.2.1. Within the Rome Statute Protection Framework

The Rome Statute tells readers specifically where to look to find the obligations of the ICC. Article 21 dictates the law to be applied by the Court, and was one of the innovative developments of the Rome Statute. Article 21 states as follows:

1. The Court shall apply:
    a. In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
    b. In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
    c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. […]

[1] Regulations of the Registry 6 March 2006 ICC-BD/03-01-06 2006.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

By setting out in detail the law to be applied by the ICC, the aim of Article 21 was to increase legal certainty by restricting judicial discretion.[2] Although the provision's complexity and ambiguity means that this goal was only partly achieved,[3] Article 21 provides a useful structure for examining the human rights obligations of the ICC within the Rome Statute protection framework. This section will work through Article 21, considering whether the Court is bound to apply human rights law under its different subparagraphs.[4]

Not only did Article 21 set out the sources of applicable law for the ICC, it also established a hierarchical relationship between them. As one might expect, Article 21(1)(a) stipulates that 'in the first place' the Court must apply the 'internal' sources of law:[5] the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence. Within these instruments there are a number of important provisions detailing the ICC's obligations to protect human rights. One clear example is Article 55, which lists a number of rights for suspects that must be respected during an investigation, including the right to an interpreter and the right to remain silent. Another example is Article 67 which, mirroring Article 14 of the ICCPR, lists the rights of an accused during trial, including to be tried without undue delay and to adequate time and facilities to prepare a defence. Of a more general character is Article 64(2), which imposes overarching human rights obligations on the ICC to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused'. In addition to the provisions that are phrased in human rights terms, there are provisions that safeguard rights more indirectly, such as Article 40 on the principle of the independence of ICC judges. Even though they are not listed in Article 21(1)(a), the author considers that the Regulations of the Court and the Regulations of the Registry should also be considered

[2] Gudrun Hochmayr, 'Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute' (2014) 12 4 Journal of International Criminal Justice 655, 656; Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 3 European Journal of International Law 543, 559.

[3] Hochmayr (*supra* note 2), 656.

[4] For many parts of this Chapter I am greatly indebted to the work of Krit Zeegers. The research in Chapters 2 and 3 of his book entitled Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualisation* (International Criminal Justice Series, vol 5, Asser Press 2016) has been instrumental and provides the basis on which much of this section of the Chapter is written.

[5] For example, Hochmayr (*supra* 2), 656; Gilbert Bitti, 'Article 21 and the Hierarchy of Sources of Law before the ICC' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 411, 414; Zeegers (*supra* note 4), 65.

internal law, and applied 'in the first place', as long as they are read subject to the Statute and RPE.[6]

One tier down in the hierarchy, and to be applied 'in second place' and 'where appropriate', are the sources listed in Article 21(1)(b): applicable treaties and the principles and rules of international law. These are 'external' sources of law. As to applicable treaties, this clearly includes treaties to which the ICC is a party, such as the Headquarters Agreement with the Netherlands, and the relationship agreement with the UN.[7] The VCLT, in particular Articles 31 and 32, has also been found to be applicable in this sense.[8] Beyond this though, it is not obvious what makes a treaty 'applicable', and whether the Court under this provision can apply human rights treaties. When the provision was drafted, a change was made from 'relevant treaties' to 'applicable treaties',[9] which could indicate that a narrow approach was preferred. One suggestion is that a human rights treaty is applicable if the State with respect to which the ICC is exercising jurisdiction has ratified it. However, as Zeegers points out, this would raise problems regarding the equality of ICC defendants from different countries.[10] As to what is encompassed by the term 'principles and rules of international law' in Article 21(1)(b), there is also a degree of ambiguity. A common approach among a number of academics is to see this as referring to international law generally, including customary law and general principles.[11] Where human rights constitute custom therefore, the ICC could apply them under this provision.

Yet another tier down in the hierarchy, and to be applied only if the sources in subparagraphs a) and b) do not yield an answer, Article 21(1)(c) empowers the ICC to apply 'general principles of law derived by the Court from national laws of legal systems

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[6] In this respect, the author agrees with authors such as Hochmayr (*supra* note 2, 660) and deGuzman (Margaret deGuzman, 'Article 21: Applicable Law' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: a commentary* (C.H. Beck 2016) 933). The Regulations of the Court were adopted pursuant to Article 52 Rome Statute, and importantly for this study, contain provisions relevant to interim release. The Regulations of the Registry were adopted pursuant to Rule 14 RPE, and contain provisions relevant to the protection of witnesses. Article 52(1) and Rule 14(1) stipulate that both sets of Regulations must be read subject to the Rome Statute and the RPE.

[7] "Article 21" in William Schabas, *The International Criminal Court: a commentary on the Rome Statute* (Oxford University Press 2010), 390.

[8] ICC-01/04-01/07-3436-tENG *The Prosecutor v Germain Katanga* (Judgment pursuant to article 74 of the Statute) 7 March 2014 (Trial Chamber II) §43. Although the Trial Chamber does not explicitly state that the VCLT is an applicable treaty pursuant to Article 21(1)(b), Hochmayr offers a convincing explanation of why this is the case (*supra* note 2), 667.

[9] Zeegers (*supra* note 4), 68.

[10] Zeegers (*supra* note 4), 69, footnote 116. Hochmayr also points out that 'the ICC does not derive its sanctioning powers from those States normally holding jurisdiction over the case. Thus the criterion cannot depend on which treaties these States have ratified' (*supra* note 2), 666.

[11] deGuzman (*supra* note 6), 939 provides an overview of different scholars who share this view, as does Zeegers (*supra* note 4), 70 in footnote 121.

of the world'. The provision is the 'awkward' result of compromise during the drafting process,[12] and leaves a clear potential for overlap between the principles referred to in b) and those referred to in c). This problem can be averted if b) is deemed to refer to international law principles, and c) to principles derived from a comparative study of national law. This seems supported by the wording of Article 21(1), academic commentary,[13] and the drafting history.[14] While it remains to be seen whether this provision will be used to import human rights into the law and practice of the ICC, it is certainly a possibility.

It is clear from this discussion of Article 21 that a number of questions surrounding Article 21(1)(b) and (c) remain unanswered. This is perhaps exacerbated by the fact that the Court refers to sources of law without explaining under which section of Article 21(1) it is doing so.[15] While it is desirable that these questions be addressed, they are beyond the scope of this study, given that Article 21(3) provides a necessary and sufficient gateway for the application of human rights.

For those endeavouring to interpret the Rome Statute protection framework, Article 21(3) is both a great ally and a challenging nemesis. It states that 'the application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights'. Considering that the provision is made up of a number of vague terms – 'application', 'interpretation', 'consistent', 'internationally recognised' – it is unsurprising that academic opinion is contrasting[16] and the practice of the Court often contradictory.

While some academic commentators oppose the view,[17] the author agrees with those who consider that Article 21(3) places human rights law in the position of *lex superior* as regards the rest of the sources in Article 21.[18] The formal hierarchy of sources set out in

[12] deGuzman (*supra* note 6), 942.

[13] Raimondo lists a number of these scholars. See Fabian Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Academisch Proefscrift, 2007), 45.

[14] Zeegers (*supra* note 4), 69 explains that during the drafting process the Working Group stated that the phrase 'international law' in Article 21(1)(b) should be understood to mean public international law.

[15] Zeegers (*supra* note 4), 71.

[16] The different opinions on different issues are summarised in Rebecca Young, "Internationally Recognised Human Rights' Before the International Criminal Court' (2011) 60 01 International and Comparative Law Quarterly 189.

[17] For example Kenneth Gallant, 'Individual Human Rights in a New International Organisation: The Rome Statute of the International Criminal Court' in M. Cherif Bassiouni (ed), *International Criminal Law - Volume II: Enforcement* (Transnational Publishers 1999) 693; Gerhard Hafner and Christina Binder, 'The Interpretation of Article 21(3) ICC Statute Opinion Reviewed' (2004) 9 Austrian Review of International and European Law 163; J. Verhoeven, 'Article 21 of the Rome Statute and the ambiguities of applicable law' (2002) 33 Netherlands Yearbook of International Law 2.

[18] For example Alain Pellet, 'Applicable Law' in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (First edn Oxford

Article 21(1) is overlaid by another hierarchy, but this hierarchy is based not on the source of the law, but on the subject matter of the norms.[19] In other words, Article 21(3) does not establish a hierarchy of sources, but a substantive hierarchy of norms.[20] This view of Article 21(3) is supported by the decisions of the Court: 'Article 21(3) makes the interpretation as well as the application of the law applicable under the Statute *subject to* internationally recognised human rights', with the consequence that 'human rights underpin the Statute; every aspect of it' (emphasis added).[21]

That Article 21(3) creates a *lex superior* has a number of consequences. Firstly, it means that if a written provision is capable of multiple interpretations, Article 21(3) requires that the interpretation that best protects human rights be preferred.[22] Secondly - and whether a provision is capable of multiple interpretations or not - all interpretations of the applicable law must be subject to a compulsory review, to ensure that they are consistent with human rights. In this sense, Article 21(3) has been referred to as a 'mandatory principle of consistency'.[23] Throughout this thesis, this is termed the 'Article 21(3) test', and is the final stage in the interpretative process for all obligations whose source is within the Rome Statute protection framework.

The third consequence of human rights being *lex superior* is that if on applying the Article 21(3) test it is found that a provision of the applicable law is not consistent with human rights, then adjustments must be made to make it so. For example, if a provision is phrased so as to give an actor *discretion* in whether to protect rights, Article 21(3) can require that this be interpreted as an *obligation* to protect rights. Sometimes the modifications made in order for ICC to act consistently with human rights are quite substantial. For this reason, commentators have described Article 21(3) as having 'generative powers', meaning that Article 21(3) empowers the Court to go beyond the provisions of the Statute, for example by creating a new procedural remedy. During the

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University Press New York 2002) 1051; Daniel Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute' (2010) 10 1 International Criminal Law Review 43; Zeegers (*supra* note 4); Schabas (*supra* note 7); Hochmayr (*supra* note 2); Göran Sluiter, 'Human Rights Protection in the Pre-Trial Phase' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 459.

[19] Pellet (*supra* note 18), 1077.

[20] Zeegers (*supra* note 4), 78.

[21] ICC-01/04-01/06-772 *The Prosecutor v Thomas Lubanga Dyilo* (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) 14 December 2006 (Appeals Chamber) §37.

[22] Hochmayr (*supra* note 2), 673; Hafner and Binder (*supra* note 17), 171.

[23] Zeegers (*supra* note 2) at 78, citing Vasiliev (Sergey Vasiliev, 'Proofing the Ban on `Witness Proofing: Did the ICC Get it Right?' (2009) 20 2 Criminal Law Forum 193), 216, Gallant (*supra* note 17), 704, and Young (*supra* note 16), 207.

*Lubanga* trial, the Prosecution created a situation where full disclosure of exculpatory evidence to the Defence was not possible, as evidence had been given to the Prosecution on the basis of confidentiality.[24] Deciding that a fair trial was no longer possible, the judges of Trial Chamber I unconditionally stayed proceedings against the defendant.[25] Nothing in the Rome Statute protection framework mentions stay of proceedings as an available remedy.[26] However, the Appeals Chamber upheld the Trial Chamber decision, holding that on the basis of Article 21(3), the Court was empowered not only to grant a stay where justice could not be done, but that two types of stay were possible: permanent and conditional.[27] Some commentators suggest that these powers arose entirely out of Article 21(3) and demonstrate judicial acceptance of the provision's generative effect.[28]

While the potential for Article 21(3) to expand human rights protection beyond what is contained in the Rome Statute protection framework is clear, the author would dispute the assertion that it can generate powers and/or remedies with no basis in the framework whatsoever. The remedy of stay of proceedings identified in the *Lubanga* decision could be based on Article 67(4) of the Rome Statute, which obliges the Court to ensure that the trial as a whole is fair.[29] Interpreting Article 67(4) in light of Article 21(3) could certainly lead to the remedy of stay of proceedings on facts such as those in the *Lubanga* case.[30]

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[24] The Prosecution had acquired evidence through Article 54(3)(e), which permits confidentiality on the condition that the evidence is used solely for the purpose of generating new evidence.

[25] Trial Chamber I decided that the Prosecution had misused Article 54(3)(e), 'with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him' ICC-01/04-01/06-1401 *The Prosecutor v Thomas Lubanga Dyilo* (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008) 13 June 2008 (Trial Chamber I) §§92-4.

[26] In the words of the Appeals Chamber: 'neither the Rome Statute nor the Rules of Procedure and Evidence provides for a "stay of proceedings" before the Court', ICC-01/04-01/06-1486 *The Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008") 21 October 2008 (Appeals Chamber) §77.

[27] *Lubanga* 21 October 2008 (*supra* note 26) §§79-8. Trial Chamber I had ordered a permanent stay of proceedings and ordered that the accused be released. The Appeals Chamber substituted the permanent stay for a conditional once, and reversed the release order. The trial later resumed.

[28] Sheppard (*supra* note 18), 62.

[29] Vasiliev (*supra* note 23), 218-219.

[30] Another case that is often cited in this regard concerned whether the Court was obliged to fund the family visits of indigent defendants detained at the ICC detention centre. The Presidency held that there was a positive obligation under the right to family life to provide this funding. However, this decision can also be formulated as Article 21(3) being used to add substance to certain provisions of the Regulations of the Registry that would not otherwise be there, rather than being a completely free standing obligation. ICC-RoR217-02/08-8 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008") 10 March 2009 (The

Even though the Trial and Appeals Chambers based their decisions on Article 21(3) entirely, this does not seem supported by the text of that provision, which refers to the 'interpretation and application of law'. Furthermore, in a previous decision, the Pre-Trial Chamber in *Lubanga* stated that:

> The Chamber considers that prior to undertaking the analysis required by article 21 (3) of the Statute, the Chamber must find a provision, rule or principle that, under article 21 (1) (a) to (c) of the Statute, could be applicable to the issue at hand.[31]

As such, it is proposed that the correct role of Article 21(3) is in adding human rights protections to existing provisions, and not in creating entirely new, free-standing obligations. That being said, there are key provisions in the Rome Statute that are sufficiently general that, as far as the ICC is concerned, this is not of great significance. As the substantive chapters will demonstrate, the contrary is true when it comes to the obligations of States.

The fourth and final consequence of Article 21(3) placing human rights in the position of *lex superior* is that if a particular provision is not consistent with human rights, and cannot be made so through the process just described, then the Court cannot apply the provision at all.[32]

There are, of course, a number of other issues surrounding Article 21(3) - the above discussion does not purport to be a comprehensive examination of the provision. The focus has concentrated on those aspects of the provision that are most relevant to the present study. Issues such as how to determine which human rights are 'internationally recognised' are important,[33] but as few would contest that the rights included in this

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Presidency). See also Denis Abels, *Prisoners of the International Community: the Legal Position of Persons Detained at International Criminal Tribunals* (T.M.C. Asser Press 2012).

[31] ICC-01/04-01/06-679 *The Prosecutor v Thomas Lubanga Dyilo* (Decision on the Practices of Witness Familiarisation and Witness Proofing) 8 November 2006 (Pre-Trial Chamber I) §10.

[32] Support for this position can be found in both academic commentary and the case law of the Court. For academic commentary see Pellet (*supra* note 18), 1079-81, M. Arsanjani, "The Rome Statute of the International Criminal Court" 93 American Journal of International Law 22 (1999), 29, and Sheppard (*supra* note 18) who states that 'even a conservative interpretation of the Article could support the proposition that, in the case of a conflict between the Statute and a human rights norms, the court could decline to apply the statutory rule', 62. For case law see ICC-01/04-01/07-3003-tENG *The Prosecutor v Katanga and Ngudjolo* (Decision on an Amicus Curiae application and on the "Requête tenant à obtenir présentations des témoins DRC D02 P 0350, DRC D02 P 0236, DRC D02 P 0228 aux autorités néerlandaises aux fins d'asile" (articles 68 and 93(7) of the Statute)) 9 June 2011 (Trial Chamber II) §73 in which Trial Chamber II refused to apply Article 93(7) because it could not be done in a way that was consistent with human rights. However, not all academics agree, see Hafner and Binder (*supra* note 17).

[33] Judge Pikis did little to clarify the term when he said that internationally recognised human rights are those 'acknowledged by customary international law and international treaties and convention' (ICC-01/04-01/06-424 *The Prosecutor v Thomas Lubanga Dyilo* (Decision on the Prosecutor's "Application

research[34] would meet any definition of that term, discussion of it does not further the purpose of answering the research question.

### 2.2.2. Beyond the Rome Statute Protection Framework

As an actor on the international stage, it is necessary to consider human rights law obligations that the ICC may have beyond the Rome Statute protection framework, under general international law. Zeegers provides an overview of the different arguments on this issue, and the author agrees with his conclusion. What is presented here is essentially a summary of this conclusion.[35]

The Rome Statute, in Article 4, makes clear that the ICC has international legal personality. As such, in terms of obligations under general international law, it is in the same position as an international organisation.[36] The proposition that international organisations are bound by general international law is widely accepted in practice and legal theory.[37] General international law is understood to refer to the unwritten sources of international law, namely custom and general principles. As to basis for international organisations being so bound, there is much support for the 'subject thesis', which posits that international organisations are bound by international law because they possess international legal personality, and are therefore subjects of international law. The following pronouncement of the International Court of Justice (ICJ) is often cited as support for the subject thesis:

> [i]nternational organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions, or under international agreements to which they are parties.[38]

In line with this position, the ICC is bound by human rights law to the extent that it is reflected in general international law (as the Court is not itself party to any human rights treaties). It is safe to assume that the rights included in this study – the right to life, to a fair trial, to liberty, and to protection from inhuman treatment – are considered customary international law. Importantly however, international organisations are not bound by general international law in the same way as States. To this limitation we know turn.

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for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'") 12 September 2006 (Appeals Chamber) §3). Zeegers (*supra* note 4) provides a succinct overview of this debate at 91-96.

[34] The rights to life, fair trial, liberty, and protection from torture and inhuman and degrading treatment and punishment are common to all human rights treaties and instruments.

[35] Zeegers (*supra* note 4), Chapter 2.

[36] The author stops short of defining the ICC as an international organisation as this can be a controversial stance, and is not necessary for the arguments made.

[37] Zeegers (*supra* note 4), 20.

[38] ICJ Reports 1980 *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (Advisory Opinion) 20 December 1980, 37.

### 2.2.3. The Limits of the ICC's Human Rights Law Obligations

The ICC is bound by human rights law, both under the Rome Statute protection framework and beyond it, but there are limits to these obligations. Beginning with the limitations to obligations whose source is general international law, as just mentioned international organisations are not bound by general international law in the same way as States. As the ICJ stated in the *Reparations for Injury* case: '[w]hereas a State possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity such as the [UN] must depend on its purposes and functions'.[39] The author subscribes to the functional approach to the obligations of international organisations, support for which Zeegers discerns in the scholarship. According to this approach, the only obligations under general international law that bind international organisations are those that pertain to the functions exercised by that organisation.[40] So, for example, the ICC is not bound by norms relating to drilling for oil on the high seas, because such norms are unconnected to its functions.

If an organisation's obligations are limited by its institutional *functions*, the logical corollary is that an organisation's obligations are also limited by its institutional *capacities*. This is an embodiment of the idea that there is no obligation to do the impossible. In other words, an organisation can only be bound by obligations which it has the capacity to carry out. For instance, while the ICC may be bound by certain elements of refugee law, it cannot be obliged to host refugees in the way that States are, because it lacks the territory, and therefore the capacity, to do so.

The case law of the European Court of Human Rights (ECtHR) supports this position with respect to obligations under human rights law. In two cases involving Poland and Russia, defendants in criminal proceedings argued that their Article 6 right to a fair trial had been violated. Part of the evidence used in the trials was from a witness who, at the time of the trial, could not be located. As such, the defendants did not have an opportunity to challenge the witness. The ECtHR held that the State's failure to secure the witness' presence at the trial was not *per se* a violation of the defendants' right to challenge adverse witnesses under Article 6, as long as the State had exercised its best efforts and due diligence to find the witness.[41] If the witness still cannot be found, the State cannot be obliged to do the impossible and produce the witness. The circumstances converted the State's obligation from an obligation of result (to produce the witness), to an obligation of conduct (due diligence and best effort).

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[39] ICJ Reports 1949 *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion) 11 April 1949.

[40] Zeegers (*supra* note 4), 24.

[41] Application no. 6293/04 *Case of Mirilashvili v Russia* (Judgment) 11 December 2008 §163; Application no. 43643/04 *Case of Biełaj v Poland* (Judgment) 27 April 2010 §56.

The capacity limitation to the ICC's obligations also applies to interpreting the Rome Statute protection framework. For an illustrative example we return to Louise's case from Chapter 1. Louise is an ICC accused entitled to interim release, and the ICC has the obligation to see that the right to liberty as protected by this entitlement is respected. However, the ICC does not possess a territory, and as such it relies on the assistance of States to host Louise. There are two ways of thinking about the ICC's obligation in this case. Either, the Court has the obligation to fulfil the right in the way a State would have to, and is responsible if it fails to do so; or the obligation is limited by capacity. The author adopts the latter position. This is not altered by Article 21(3). The potential of Article 21(3) is significant, but it cannot change the fundamentals of the ICC's institutional capacities, and it cannot require that the obligations of the ICC be interpreted in such a way that it is obliged to host Louise itself, as the ICC lacks a territory and is factually and legally incapable of this. The limitations on the ICC's obligations are therefore important to the protection of human rights.

### 2.2.4. The Approach to the ICC's Obligations Adopted in this Thesis

To summarise the above, there are four bases on which the ICC is obliged to apply international human rights law:

i. Where a specific provision of the Rome Statute protection framework obliges the ICC to protect human rights
ii. Where human rights law applies by means of Article 21(1)(b) and/or (c)
iii. Where human rights law shapes the interpretation and application of the law through Article 21(3)
iv. Where the ICC has human rights obligations under general international law.

The approach taken in this thesis is to focus on i) and iii), for the simple reason that obligations under ii) and iv) add little to the discussion and do not alter any outcomes.

The sources of law in Article 21(1)(b) and (c) are already of limited importance because the wording of Article 21 places them on the lower rungs of the hierarchy of sources, to be applied on 'where appropriate'. Furthermore, according to Pre-Trial Chamber I in the *Al-Bashir* case, those sources are only to be used where there is a lacuna in the law that 'cannot be filled by the application of the criteria provided for in articles 31 and 32 of the VCLT and Article 21(3)'.[42] As far as the situations covered in this thesis are concerned, the situations in which Article 21(3) cannot provide an answer are those in which no other source of law can either. This is because the lacuna exists due to a lack of capacity on the part of the ICC, and as the previous section explained, neither the sources listed in Article

[42] ICC-02/05-01/09-3 *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) 4 March 2009 (Pre-Trial Chamber I) §126.

21(1)(b) and (c), nor general international law, can oblige the Court to do something which it lacks the capacity to do. As such, the situations in which it would be necessary and appropriate to look at the sources in ii) and iv) are the situations where those sources will be of no assistance. Discussion of the ICC's human rights obligations therefore centres around those found in the provisions of the Rome Statute protection framework, as interpreted and applied in light of Article 21(3).

## 2.3. Obligations of State Parties to the Rome Statute

### 2.3.1. Within the Rome Statute Protection Framework

Just as the Rome Statute protection framework contains human rights obligations for the ICC, so does it for State Parties. Article 55, for example, which grants individuals rights during investigation and interrogation, is aimed at both the ICC *and* States (depending on the circumstances). Article 59 requires States to protect rights during arrest and surrender proceedings. Article 21(3) also applies to State human right obligations under the Rome Statute protection framework, requiring that any State obligation be interpreted and applied consistently with human rights.

Beyond obligations explicitly set out in written provisions, the cooperation regime of the ICC (set out in Part 9 of the Rome Statute) also allows the ICC to create obligations for States, including obligations the effects of which directly or indirectly protect human rights. Article 86 Rome Statute contains an overarching cooperation obligation: 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Article 87 provides that the ICC 'shall have the authority to make requests to States Parties for cooperation'. If a State fails to comply with a request for cooperation, the ICC may make a finding of non-compliance under Article 87(7) and refer the matter to the Assembly of State Parties (ASP).[43] A request for cooperation may, for example, require a State to place police officers around a witnesses' house. While this is not phrased in human rights terms, the effect of the State's actions will be to safeguard the witness' rights, such as the right to life and to protection from inhuman treatment.

The phrasing of the Article 86 obligation to cooperate is broad, and the range of assistance that it allows the ICC to request from States is diverse. Importantly though, it is not unlimited. The ICC cannot require a State to do something which exceeds the scope of the State's consent to the Rome Statute. While this line will be hard to draw, in the context of this study it only applies to one type of situation, and in this situation the lack of consent is clear: a State cannot be obliged to accept an individual onto its territory who

[43] Or where the situation was referred to the ICC by the UN Security Council, the non-compliance is referred to the Security Council also.

is not already present there and whom the State is under no obligation to accept.[44] For example, as was the case with Joe from Chapter 1, when a witness testifies in an ICC trial this may place them in such danger that they need to be relocated to another State. For this to take place, a State must agree to host the witness – in Joe's case this was Belgium. However, nowhere in the Rome Statute protection framework, nor in any source of law beyond it, is there an obligation on States that requires them to host protected witnesses. As the substantive chapters will show, in situations of this type, States did not agree when drafting and signing the Rome Statute to an obligation to individuals on its territory. The scheme for doing so was designed to be voluntary.

Herein in lies not only the limit to the cooperation regime at the ICC, but also to the potential of Article 21(3) to alter and create obligations. That provision does not provide for the creation of entirely new obligations for States which have no basis at all in the Rome Statute protection framework. The Rome Statute is an international treaty, the basis of which is the consent of the States that drafted and/or signed it. Being the product of State consent, Article 21(3) cannot be a vehicle used to exceed the scope of this same consent.

### 2.3.2. Beyond the Rome Statute Protection Framework

Apart from obligations to protect human rights that a State may have under the Rome Statute protection framework, any individual on a State Party's territory is entitled to protection under international law generally. A State must protect the human rights of all those on its territory and subject to its jurisdiction,[45] whether or not they are an ICC suspect or witness. States do not assist the ICC in a legal vacuum. When providing assistance to the ICC, their actions may activate other obligations the State has under international law, including human rights obligations. To understand how individuals are protected at shared stages of ICC proceedings therefore, we must also look at obligations that a State has beyond the Rome Statute protection framework.

Treaties and custom are the sources of international law from which most State human rights obligations derive. The relevant treaties will differ depending on the State in question, but the four rights at the centre of this study – the right to life, liberty, protection from inhuman treatment, and fair trial – are included in all major human rights treaties. Due to its wide ratification, the human rights treaty most often referred to with respect to State Parties is the ICCPR, and by extension the decisions of the Human Rights Committee. Even though the ECHR is a regional treaty, the case law of the ECtHR

[44] A State may be under an obligation to accept an individual onto its territory if, for instance, they were a national of that State.

[45] Article 2(1) ICCPR: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.

contains important information on the development of the human rights law and is influential beyond the borders of the Council of Europe. As such it is also referred to.

In assisting the ICC, the State may activate its human rights obligations, but these obligations may be different from those that would apply if the State were acting on its own behalf. The ICC is an organisation with separate international legal personality, and with this comes the general international law rule that it is the organisation that is responsible for any wrongful acts, and not its' State Parties.[46]

To illustrate why this is significant in the ICC context, let us return to Louise from Chapter 1. Before being transferred to the ICC, Louise was residing in Ivory Coast. The Ivorian authorities carried out the arrest at the request of the ICC, as they are required to do by the Rome Statute. In the course of her arrest, Louise's rights were violated because she was prevented from seeing a judge for an unreasonable amount of time. In a normal situation, there would be a link between the action of Ivory Coast in failing to bring Louise before a judge promptly, and Ivory Coast's responsibility for the resulting violation of Louise's rights. However, as Ivory Coast was acting pursuant to an obligation to assist the ICC, this link is interrupted. Ivory Coast can claim that the action was in fact an action of the ICC, a distinct legal person, and that Ivory Coast was merely carrying it out. This hypothetical may concern attribution for breach, but as will become clear in this section, this dynamic between the State and the ICC also complicates the obligations of States Parties.

As there is no doctrine through which to understand this 'interruption', the author proposes a framework that derives from the case law of the ECtHR, in particular the *Bosphorus* case.[47] The ECtHR has been dealing with the human rights dimension of the relationship between international organisations and States for some time, and has issued a number of decisions in this regard. While the case law is at times contradictory and problematic,[48] on the whole it reflects a balance between important interests. On the one hand, there is a need to preserve the distinct personality of international organisations, and States' ability to create and use these organisations to further international cooperation. On the other hand, States cannot be permitted to use these organisations to shield themselves from needing to comply with their human rights obligations. The

[46] Karl Zemanek, 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations Towards Third Parties' (1995) 66-I Annuaire de l'Institut de Droit International 325: Article 6(a) ILA Res: 'Save as specified in Article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable concurrently or subsidiarily, for the obligations of an international organization of which they are members.'

[47] Application no. 45036/98 *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (Judgment) 30 June 2005.

[48] See for example, Tobais Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10 3 Human Rights Law Review 529.

*Bosphorus* case,[49] which is one the early cases of the ECtHR on this point, developed a satisfactory balance between these interests. The principles that can be distilled from these decisions are termed by the author 'the *Bosphorus* principles', and it is submitted, should be seen as reflecting customary international law.[50] The principles will be set out first, followed by how they can be applied to the ICC-State Party context.

## The Bosphorus Principles

The *Bosphorus*[51] case was brought against Ireland by an airline company. Pursuant to a European Community (EC) Regulation, Ireland was required to impound an aircraft owned by the applicant.[52] The question was whether, in so doing, Ireland had violated Article 1 of Protocol 1 ECHR. The matter of jurisdiction was never at issue, as it was accepted that the action could be attributed to the Irish authorities and the impounding of the aircraft had taken place on Irish territory. The question was whether, in complying with the EC Regulation, Ireland had violated Article 1 of Protocol 1, and it was held that it had not. From the ECtHR's reasoning in the case, the following principles can be discerned.

First, that States are entitled to transfer some element of sovereign power to an international organisation in order to pursue cooperation in certain fields.[53] This is a logical stance, especially as this is the process by which the ECtHR itself came into being. Such a transfer of competence is necessary if international organisations are to fulfil the purposes and functions for which they were created. Second, that where such a transfer is made, it does not follow that States are absolved of the obligations they have under human rights law. The transfer of competence can only be made if human rights can still be secured, and the obligations of the State continue even after the transfer of competence to an international organisation.[54] If this were not the case, it would constitute

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[49] *Bosphorus* (*supra* note 47).

[50] The following examples are evidence of this acceptance. Firstly, the ILC Commentaries on the ARIO cited with approval this case law of the ECtHR, suggesting that the jurisprudence represents general international law on the subject ('Commentaries on the Articles on the Responsibility of International Organisations' (2011) II Part Two Yearbook of the International Law Commission, at 94-95). Secondly, The Human Rights Committee has cited *Matthews v UK* (Application no. 24833/94 *Case of Matthews v the United Kingdom* (Judgment) 18 February 1999), a prelude to the *Bosphorus* (*supra* note 47), with approval in CCPR/C/94/D/1472/2006 *Sayadi and Vinck v Belgium* (Communication No. 1472/2006) 29 December 2008 §5.8.

[51] *Bosphorus* (*supra* note 47).

[52] *Bosphorus* (*supra* note 47) §110.

[53] *Bosphorus* (*supra* note 47) §152.

[54] The Bosphorus case adopted this principle from previous case law, such as Application no. 26083/94 *Case of Waite & Kennedy v Germany* (Judgment) 18 February 1999 §51, and *Matthews v UK* (*supra* note 50) §32.

a significant limitation on the effectiveness of human rights.[55] Of all the cases prior to and subsequent to *Bosphorus* dealing with this issue, this second principle is always constant and invariably reiterated by the ECtHR.[56] The second *Bosphorus* principle has been taken up by the Human Rights Committee with respect to the ICCPR.[57]

In recognition of the importance that States should not use international organisations to avoid their human rights obligations, *Bosphorus* principle number three requires that whenever a State has discretion in how it implements an obligation imposed on it by an international organisation, the State must use this discretion to secure human rights.[58] As the ECtHR spelt out in a subsequent case, where there is discretion the State must do everything possible to avoid a violation of human rights.[59]

It will sometimes be the case that no discretion exists for a State in carrying out an obligation imposed by an international organisation. In such a situation, the potential for conflict between the first and second *Bosphorus* principles is clear. The fourth principle addresses these situations of no discretion, is a compromise between the first two principles, and in deference to the separate legal personality of international organisations,[60] is a way of reconciling them. The fourth principle is as follows: when a State is acting pursuant to an obligation deriving from its membership of an international organisation, its actions are presumed to be justified where the international organisation in question has equivalent or comparable human rights protection to that of the ECHR. The presumption can be rebutted only if, under the circumstances of a particular case, the protection of Convention rights was 'manifestly deficient'.[61] This presumption is called the 'presumption of equivalent protection'. On the facts of *Bosphorus* itself, it was held that the EU did have equivalent human rights protection to that under the ECHR, and no manifest deficiency was found. As such, the outcome was that Ireland's impounding of the aircraft was justified, and it was not responsible for any human rights violations that may have occurred.

## Applying the *Bosphorus* Principles to State Parties

State Parties to the ICC are in a similar position to that of Ireland in the *Bosphorus* case. In becoming signatories to the Rome Statute, they transferred certain competences to the

[55] *Bosphorus* (*supra* note 47) §154.

[56] See *Waite and Kennedy* (*supra* note 54) §51.

[57] *Sayadi* (*supra* note 50) §5.8.

[58] *Bosphorus* (*supra* note 47) §157 – 'It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict legal obligations'.

[59] Application no. 10593/08 *Case of Nada v Switzerland* (Judgment) 12 September 2012 §§196-197.

[60] Cedric Ryngaert and Holly Buchanan, 'Member State Responsibility for the Acts of International Organisations' (2011) 7 1 Utrecht Law Review 131.

[61] *Bosphorus* (*supra* note 47) §156.

ICC, and as State Parties they must comply with obligations imposed by the Court. When cooperating with the ICC, States are acting within their jurisdiction just as Ireland was when it impounded the aircraft; the actions in question are attributable to the State Party, and take place on the State Party's territory. What the *Bosphorus* principles tell us is that, despite the existence of jurisdiction, it will not automatically follow that the State Party will be responsible for human rights violations that result from it implementing ICC imposed obligations.

The *Bosphorus* case dealt with the responsibility of a State under the ECHR once a violation had taken place, and its principles are designed to identify when the State will be responsible for violations that result from its actions. This study however, focuses on the situation before a breach has occurred, rather than after, with the aim of understanding the content and nature of the obligations themselves. So in the context of ICC State Parties, the *Bosphorus* principles must be approached from an *ex ante* perspective. The question is, therefore, not 'when will a State be responsible for violations of human rights', but rather 'what is a State obliged to do in order to not violate its human rights obligations?'

Applying the *Boshphorus* principles to the State Party context means as follows. When complying with an obligation under the Rome Statute protection framework or with a cooperation request under Part 9 of the Rome Statute, ICC State Parties must first inquire whether they have discretion in how they do so. If they do have discretion, then the State must do all it can to secure human rights. In the majority of cases, there will be discretion. For instance, a State may be obliged to enforce a sentence, but it is left a broad discretion by the Rome Statute in how it handles the conditions of enforcement. As such, it must ensure that the conditions of enforcement comply with human rights under international law. The existence or otherwise of discretion can be difficult to ascertain. In the *Nada* case,[62] the ECtHR held that Switzerland did have discretion in how it implemented sanctions imposed by the UN Security Council Sanctions Committee,[63] despite the sanctions appearing to admit no discretion at all. In *al-Dulimi*, another case against Switzerland dealing with UN sanctions, the ECtHR came to the opposite conclusion.[64] This issue will therefore remain challenging. For ICC State Parties, the question of discretion is affected not only by the wording of the particular obligation, but also by

[62] *Nada (supra* note 59).

[63] Established by UN Security Council Resolution 1267 (1999), originally with the aim of providing sanctions against the Taliban. With the subsequent resolutions 1989(2011) and 2253(2015), the committee now covers ISIL (Da'esh) and Al-Qaida. For more information, see the website of the sanctions committee at <https://www.un.org/sc/suborg/en/sanctions/1267> last accessed 28th August 2016.

[64] For analysis on these cases, and for the particulars of how they were decided, see Stephan Hollenberg, 'The Diverging Approaches of the European Court of Human Rights in the Cases of *Nada* and *Al-Dulimi*' (2015) 64 02 International & Comparative Law Quarterly 445.

whether the cooperation regime in Part 9 provides any scope for the State to decline to implement a request, or to seek to alter it.[65]

If the State concludes that it does not have discretion, then it must inquire whether the presumption of equivalent protection applies. This will require that the State consider whether, in the circumstances, the ICC has comparable or equivalent human rights protection. If there is equivalent protection, the State must then inquire whether, in the particular circumstances of the case, protection is manifestly deficient. Where the outcome of this chain of inquiry is that the State Party cannot comply with an ICC imposed obligation without violating its human rights obligations, this produces a conflict of obligations.

### 2.3.3. Conflicting Obligations

There will inevitably be situations where obligations conflict, with one obligation pointing one way and the other a different way. If a conflict arises between obligations *within* the Rome Statute protection framework, then the mechanisms of that framework can be used to resolve it. For instance, applying Article 21(3) will often point to one obligation over the other, namely the one that better protects human rights. However, there can also be conflicts between obligations under the Rome Statute protection framework, and obligations outside this framework, and these are less easily resolved. When this occurs, international law does not provide a way to resolve it.[66] In such a case, a State must choose between complying with its obligations under the Rome Statute protection framework, and complying with its obligations under human rights law or another source beyond the Rome Statute protection framework.

Human rights lawyers have argued that human rights law has a special nature, a constitutional nature, that places human rights in a hierarchically superior position to other international legal obligations. In other words, that human rights are *lex superior* to other norms of international law. These arguments call on a number of theories as their

[65] There is scope for a State to refuse a cooperation request. For instance, there might be a competing request for extradition (Article 90 Rome Statute) or there may be a question of immunity (Article 98). Article 93(3) allows a State to refuse a cooperation request where to do so would breach 'an existing fundamental legal principle of general application'. If this arises, the Court and the State shall consult, and if it cannot be resolved then the Court must modify its request. Article 97 obliges a State Party to consult with the Court where problems arise with a cooperation request.

[66] Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press Cambridge 2002) 18, 24 and 35; Stephan Hollenberg, *Challenges and Opportunities for Judicial Protection of Human Rights Against Decisions of the United Nations Security Council* (Academisch Proefscrift, 2013), 107.

justification, spanning from natural law, to sociology, to utilitarianism.[67] The author does not agree that general international law supports this position. The only universally accepted hierarchy of norms in international law is the one that places *jus cogens* norms above other norms,[68] and this is rarely used.[69] To the extent that a particular human right is a *jus cogens* norm, it will prevail over a State's other obligations. In this study, the prohibition on torture would fall into this category, but the prohibition on less serious inhuman treatment may not. The *jus cogens* rule does therefore not provide much assistance to States in resolving conflicting obligations. When it comes to choosing between an obligation owed to the ICC and an obligation owed to an individual under human rights law, the State must simply choose the obligation it considers more important, or the obligation the violation of which will produce the least negative consequences. Either way, one obligation will be breached.

When making this decision, States should be guided by the fact that human rights performance in ICC proceedings has an effect on the legitimacy of the Court, and greater legitimacy will mean greater effectiveness. If the ICC stakeholders do not perceive it to be legitimate, they will not cooperate with it, in which case it cannot function at all. One need only mention the backlash against the ICC from African countries and the consequent refusal to arrest Omar Al Bashir despite numerous opportunities.[70] Legitimacy can be acquired and retained only if international criminal justice complies with human rights,[71] meaning that human rights should be promoted in the ICC proceedings, or the

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[67] Dinah Shelton, 'Hierarchy of Norms and Human Rights: Of Trumps and Winners 2001 Ariel F. Sallows Conference: Human Rights and the Hierarchy of International Law Sources and Norms' (2002) 65 Saskatchewan Law Review 301 at 303.

[68] Article 53 VCLT.

[69] 'jus cogens is like a car which has never left the garage': Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights' (2009-2010) 20 Duke Journal of Comparative & International Law 69, 71.

[70] ICC-02/05-01/09-139 *The Prosecutor v Oman Hassan Ahmad Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) 12 December 2011 (Pre-Trial Chamber I); ICC-02/05-01/09-151 *The Prosecutor v Oman Hassan Ahmad Al Bashir* (Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir) 26 March 2013 (Pre Trial Chamber II).

[71] This statement reflects the opinion of the author, but is a simplification of a complex debate. See: Daniel Bodansky, 'The Concept of Legitimacy in International Law' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer Berlin Heidelberg 2008) 309; Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence' (2006) 4 Journal of International Criminal Justice 765; Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998); David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Court' (2008) Georgetown Law, Faculty Working Papers; Hitomi Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) Amsterdam Law Forum 3.

project as a whole is jeopardised. As such, when presented the choice, the author would suggest that the State choose to honour the obligation it has under human rights law over the conflicting obligation, even if the latter originates with the ICC.

## 2.4. Obligations of the ICC Host State

### 2.4.1. Within Rome Statute Protection Framework

The Netherlands has obligations that attach specifically to its host State capacity. These are found mainly in the Headquarters Agreement, as well as some other instruments within the Rome Statute protection framework. While these obligations are not expressed in human rights terms, they can form a link in the chain of human rights protection in shared stages of ICC proceedings. For example, the Netherlands is obliged to transport individuals between the premises of the Court and the airport, so that they can enter and leave the country.[72] If it is a witness who is departing, the Netherlands may well be facilitating their transfer to a place of safety and away from their home country where they would face retaliation.

### 2.4.2. Beyond the Rome Statute Protection Framework

As is the case with State Parties, when the Netherlands assists the ICC in its capacity as host State, even just by having the Court on its territory, it may activate other obligations under international law. The most pertinent set of human rights obligations for the Netherlands are those contained in the ECHR, as this is the instrument most invoked in domestic proceedings. Also as is the case with State Parties, the obligations are complicated by the involvement of the ICC. The complication here however, relates to jurisdiction.

Witnesses and accused who come to the ICC necessarily enter the territory of the Netherlands, in the sense that they are physically present there. Normally a State would have jurisdiction over everyone on its territory (the ECtHR has stressed that 'jurisdictional competence is primarily territorial'[73]), meaning that it owes human rights obligations to those on its territory. However, in shared situations involving an international organisation this link between territory and jurisdiction can be interrupted.

This interruption will affect those restricted to the premises of the ICC itself, but not those who can move around the Netherlands freely. The majority of witnesses who come to the ICC to give evidence will be accommodated away from the premises of the ICC

[72] Article 45 Headquarters Agreement.

[73] Application no. 71412/01 *Behrami and Behrami v France; Saramati v France, Germany and Norway* (Admissibility Decision) 2 May 2007 §69.

itself, in an apartment or a hotel. They come to the Court voluntarily, and are free to wander around The Hague at leisure, perhaps even visit other cities. These circumstances mean that, although they entered the country under the auspices of the ICC, they are very much within the jurisdiction of the Netherlands in the normal way, and the Dutch authorities have accepted as much.[74] The Dutch authorities have also accepted that individuals who are in the process of being transported from the ICC premises to the point of departure from the Netherlands are within Dutch jurisdiction.[75]

The case is different for those who are detained on the premises of the ICC itself, either because they are a suspect or because they are a detained witness. The term 'premises' includes the Court's detention facility. The ICC premises have a special nature, given them by the Headquarters Agreement: the premises are inviolable,[76] the law of the Netherlands only applies to them to the extent that it is consistent with the rules of the Court,[77] only staff of the Court can carry weapons on the premises of the Court,[78] the ICC has privileges and immunities,[79] and so on. With respect to the detention of individuals at the seat of the Court, section 88 of the Implementation Act – that being the domestic legislation that implemented the Rome Statute and Headquarters Agreement in the Netherlands – states that Dutch law does not apply to the deprivation of liberty at the Court.

According to the case law of the ECtHR, the general rule is that a State hosting an international criminal tribunal does not have jurisdiction over individuals located on the premises of these tribunals. One could say that jurisdiction is suspended over that portion of territory, making this an exception to the principle of territoriality, whereby jurisdiction is deemed to be primarily linked to territory.[80] The ECtHR has reiterated this exception specifically in the ICC context in the *Longa* case.[81] The case concerned detained witnesses located on the ICC premises. The four witnesses were detained in the Democratic Republic of Congo (DRC) on a number of charges, and had travelled to the ICC to give testimony. As they were detained in the DRC, they remained detained while at the seat of the Court. Once their testimony was complete, and claiming to fear for their

[74] Letter from the Minister of Justice to the Speaker of the Lower House of Parliament, The Hague July 2002, 28 098 (R 1704) at 8.

[75] In a letter written by the Dutch Minister of Justice to the Dutch Parliament, it is stated that the Netherlands would be obliged to interrupt the transport if it appeared that to remove the person would violate human rights law (*supra* note 74, 6). Furthermore, according to the domestic legislation implementing the Headquarters Agreement, a person who is being transported falls under the Dutch authority (Section 85 International Criminal Court (Implementation) Act 2002 (Implementation Act)).

[76] Article 6, Headquarters Agreement.

[77] Article 8(3) Headquarters Agreement.

[78] Article 8(5) Headquarters Agreement.

[79] Article 5 Headquarters Agreement.

[80] Application no 22617/07 *Galić v The Netherlands* (Decision on Admissibility) 9 June 2009 §42.

[81] Application no. 33917/12 *Djokaba Lambi Longa v The Netherlands* (Decision) 9 October 2012.

safety if returned to the DRC, the witnesses applied for asylum in the Netherlands. The legal issues this claim gave rise to were complicated, and are addressed in detail in Chapter 6. For now, it suffices to say that while these legal issues were being resolved, the witnesses remained detained at the ICC detention centre for an extended period of time. In an attempt to end this detention, one witness brought a claim to the ECtHR against the Netherlands, claiming that his right to liberty was being violated. The question for the ECtHR was whether the witness was within the Netherlands' jurisdiction. The answer given was no.

The ECtHR held that 'the fact that the applicant is deprived of his liberty on Netherlands soil does not itself suffice to bring questions touching on the lawfulness of his detention within Dutch "jurisdiction"' under Article 1 ECHR.[82] In support of this, the ECtHR cited other examples of exceptions to the territoriality principle, including NATO Status of Forces Agreements and the Scottish court set up in The Hague to try the suspects in the Lockerbie bombing.[83] In a different case, two defendants on trial at the International Criminal Tribunal for the Former Yugoslavia (ICTY) made a number of complaints before the ECtHR on the basis of Article 6 ECHR (fair trial). They argued that since the ICTY was on Dutch territory, and since the Netherlands had signed a Headquarters Agreement with the ICTY, the violations of their rights were attributable to the Netherlands.[84] The ECtHR also held that case to be inadmissible: 'the Court cannot find the sole fact that the ICTY has its seat and premises in The Hague sufficient ground to attribute the matters complained of to the Kingdom of the Netherlands'.[85] While the latter case concerns attribution rather than jurisdiction, the reasoning of the ECtHR is the same: it is not enough that the international court was simply present on Dutch territory.

There is what one might call an 'exception to the exception', resulting from a decision of a Dutch domestic court. The same situation of detained witnesses that gave rise to the *Longa* decision also gave rise to a number of other decisions. The witnesses claimed that they could not return to the DRC because of safety concerns, and so pursuant to Article 3 of the ECHR, the Netherlands was precluded from removing them. The Dutch government argued that it had no jurisdiction under the ECHR, as the witnesses were on ICC premises. Unlike in *Longa*, this argument was rejected by the domestic court.[86] It was held that, in the circumstances of that case, there were sufficient grounds to establish jurisdiction. This case pre-dates *Longa*, was not appealed by the Dutch government, and has not been challenged since. The substantive chapters will show that his 'exception to

[82] *Longa* (*supra* note 81) §73.
[83] *Galić* (*supra* 80) §44.
[84] *Galić (supra* 80) § 40.
[85] *Galić (supra* 80) §46.
[86] ECLI:NL:RBSGR:2011:BU9492, The Hague District Court (sitting in Amsterdam), 28 December 2011.

the exception' will not *always* permit a prohibition on removal claim to be made from ICC premises, but for some individuals it will prove an important decision.

The *Longa* case represents the state of the law on the question of the Netherlands' jurisdiction *vis-à-vis* individuals held on the ICC premises. The discussion of obligations in the substantive chapters is done according to that decision. That being said, it will be argued in Chapter 7 that the decision is flawed. It will be shown that the *Longa* decision leaves significant problems for the adequacy of human rights protection, and an alternative way of approaching host State obligations will be put forward.

## 2.5. Conclusion

The aim of this Chapter was to provide an overview of the sources and bases of the human rights obligations of the different actors that can be involved in ICC proceedings. Ascertaining the obligations of these actors is the first step to assessing the adequacy of human rights protection during the shared stages of ICC proceedings.

For each actor there is a unique set of questions, meaning that the emphasis of the different Chapter sections was different. In setting out the obligations of the ICC, section 2.2 focused on Article 21 Rome Statute, which establishes both a hierarchy of sources to be applied by the Court, and a hierarchy of norms, with Article 21(3) ensuring that human rights are central to all obligations stemming from the Rome Statute protection framework. While the section concluded that the ICC also has obligations beyond this framework, under general international law, the inclusion of Article 21(3) in the Statute render those obligations superfluous in the present context.

When looking at the State Party human rights obligations in section 2.3, the source of obligations was much more straightforward to establish. As well as having obligations stemming from the Rome Statute protection framework, State Parties also have obligations beyond it under human rights treaties and customary law. The complicated issue for State Parties was the fact that the ICC's involvement changed the nature of the obligations, as States are acting to assist the ICC rather than on their own behalf. By applying the *Bosphorus* principles to the State Party context, the author proposed a structure through which to understand these changes to the States' obligations. The result of this proposal means that State Parties must work through a number of steps when assisting the ICC that will determine whether or not they are free, under human rights law, to comply with the ICC's requests.

Finally in section 2.4, the source of the host State's obligations beyond the Rome Statute protection framework can be straightforwardly identified as the ECHR. However, there are complications surrounding the question of jurisdiction. According to the case law of

the ECtHR, the Netherlands does not have jurisdiction over individuals held on the premises of the ICC, given that these premises have a special status. The Netherlands will have jurisdiction over other individuals who come to the Netherlands for ICC purposes, where they are not restricted to the ICC premises.