



UvA-DARE (Digital Academic Repository)

The shared protection of human rights at the International Criminal Court

Irving, E.-L.

Publication date

2017

Document Version

Other version

License

Other

[Link to publication](#)

Citation for published version (APA):

Irving, E.-L. (2017). *The shared protection of human rights at the International Criminal Court.*

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

CHAPTER 4: Convicted and Acquitted

4.1. Introduction

The Presiding Judge finishes speaking, attendees leave the public gallery, and the Press write up their reports on the judgment. The trial of an ICC accused is concluded and the world's attention shifts elsewhere. But the story of international justice does not end when the verdict is read; for both the communities affected by the violence, and the individual accused, the story continues. An important question remains: what happens now?

There are, in essence, two possible outcomes to a criminal trial. Either the person is acquitted or the person is convicted.¹ For either outcome, the prevailing concern of the former ICC accused will be their personal safety. For convicted persons, safety concerns may be associated with the conditions of detention in which they will serve their custodial sentence. For acquitted persons, safety concerns are linked to the place where they will be released and whether they will be exposed to a risk of harm there.

Dealing with these concerns requires the cooperation of the ICC and States. When a person is convicted, they will serve their sentence not at the seat of the Court, but in a domestic prison facility in a State Party. When a person is acquitted they will be released, but the ICC cannot offer them a new home, and instead a State must be found willing to host them. This involvement of multiple actors in these stages of ICC proceedings makes them highly relevant for this study. As the discussion below will demonstrate, the sharedness that characterises these two stages is illustrative of the different forms that sharedness can take, and of the problems for human rights protection it can give rise to.

The Chapter begins with convicted persons, and the shared role that the ICC, the State of enforcement, and the host State play in protecting the right to protection from inhuman treatment during the period of detention. After this the alternative scenario is considered, namely the sharedness that is seen for acquitted persons, and in particular acquitted person who cannot return to their home countries because of safety concerns. The chapter concludes with examining the position of persons who have been convicted but who have

¹ Within the category of acquitted are included those instances where charges were dropped or proceedings otherwise ended without a conviction.

completed their sentence and have been released. This last section will explain how, in fact, that stage in ICC proceedings is not shared in the way that might be assumed.

4.2. The Position of Persons Convicted by the ICC: Treatment in the Enforcement State

4.2.1. Introduction

With a guilty verdict pronounced, appeals exhausted, and sentence handed down, the punishment in the name of the international community can begin. The most common form that this punishment takes is a custodial sentence. The period of imprisonment can be up to 30 years, or a life sentence in very extreme cases.² Enforcing these sentences has been described as the backbone of the international criminal justice system.³

The ICC does have its own detention centre, but this is designed to hold accused during the trial and on a temporary basis thereafter. Instead, the predominant feature of the enforcement of sentences at the international level is that it is done in domestic prison facilities provided by States, and not at the ICC itself. So once a conviction is finalised, the individual will be sent to a State Party of the Court, and serve his or her sentence in that State (hereafter the ‘enforcement State’). The enforcement State carries out the day-to-day aspects of the sentence, while the ICC, as the actor that handed down the guilty verdict and custodial sentence, maintains a supervisory role.

There are a number of reasons why the drafters of the Rome Statute chose this approach to enforcement. One is that, by delegating enforcement to States, the drafters could avoid developing ICC prison rules;⁴ another is that this way the costs of enforcement lie with the State.⁵ As the title suggests, the focus of this chapter section is on the period of time that the convicted person spends in a domestic prison, and not the time spent at the ICC detention facility. While the current practice of the ICC seems to be to host convicted

² Article 77 Rome Statute.

³ Claus Kreß and Göran Sluiter, ‘Enforcement’ in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court* (2002b) 1751, 1752.

⁴ ‘Article 106’ in William Schabas, *The International Criminal Court: a commentary on the Rome Statute* (Oxford University Press 2010), 1082.

⁵ Rule 208 ICC RPE. The cost aspect is important: numbers may seem small at present, but the ICTY in its 20 years convicted 80 individuals with at least some more to come before the Tribunal closes (ICTY website, <www.icty.org/en/cases/key-figures-cases> visited 22 April 2016). With housing one person in the ICC detention centre costing hundreds of euros a week, the financing would soon become untenable.

persons for an extended period after their conviction,⁶ the applicable legal regime in such cases has been dealt with extensively elsewhere.⁷

The ICC host State, the Netherlands, is also at times involved in this shared situation. By virtue of being tasked with transporting convicted persons between the ICC and the enforcement State, the Netherlands becomes inextricably involved in that person's situation. It is the obligations of these three actors - the ICC, the enforcement State, and the host State - that are discussed in the following section, with a focus on the obligations pertaining to the protection from torture and inhuman and degrading treatment and punishment (hereinafter termed 'inhuman treatment'). Through understanding the obligations of these actors, it can be understood how the right is protected.

Faced with a long stretch in detention, the prisoner's main concern will be the treatment they receive during that period. The right to protection from inhuman treatment encompasses a number of concerns: is the prison overcrowded? Is there sufficient food and water, good hygiene, and access to medical treatment? Is corporal punishment used? The right corresponds to both negative and positive obligations on the part of the State. The principal negative obligation is to refrain from conduct amounting to inhuman treatment; among the positive obligations is the duty to protect an individual from inhuman treatment at the hands of third parties. Indeed, this positive obligation applies regardless of whether the person is detained or at liberty.⁸

Another obligation that the right gives rise to is to ensure that an individual is not removed to a State where he or she would be at risk of inhuman treatment in the first place.⁹ The

⁶ Following his conviction for war crimes and crimes against humanity, Germain Katanga was sentenced to 12 years imprisonment in May 2014. Thomas Lubanga, convicted of war crimes, had his sentence of 14 years confirmed by the Appeals Chamber in December 2014. And yet, it was not until December 2015 that the ICC designated the DRC as the enforcement State for both individuals, and transferred them there that same month (ICC website, <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1181.aspx> visited 22 April 2016). In the interim, both spent an extended period of time in ICC detention, present on Dutch territory.

⁷ Denis Abels, *Prisoners of the International Community: the Legal Position of Persons Detained at International Criminal Tribunals* (T.M.C. Asser Press 2012).

⁸ Jean-François Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights' (2007) Human Rights Handbooks, No. 7, 28-29.

⁹ The circumstances that give rise to a claim to protection from removal under human rights law will often qualify the individual for protection from refoulement under Article 33 of the Convention Relating to the Status of Refugees 1951 (Refugee Convention). That provision prevents the removal of an individual to a State where their 'life or freedom would be threatened'. However, for present purposes, human rights law provides protection from these same risks, and so separate consideration of protection from removal under Article 33 of the Refugee Convention has not been necessary. Furthermore, Article 33 requires that the harm facing the individual be linked to his or her membership

prohibition on removal¹⁰ aspect of the right is well established in the case law of international human rights bodies, including the ECtHR¹¹ and the Human Rights Committee,¹² and codified in Article 3 of the Convention Against Torture.¹³ The obligation has positive and negative aspects. In order to be protected from removal, the individual must have access to a procedure in which to make a claim for protection. This corresponds to a positive obligation on the State to install a proper mechanism for hearing claims for protection from removal, and allow individuals within the State's jurisdiction access to this mechanism. Where the claim is found to have merit, the individual is entitled to remain in the State and not be removed. This corresponds to a negative obligation on the State to refrain from removing the individual.¹⁴

The Rome Statute provisions establishing the system for the enforcement of sentences was one of the most delicately drafted in Part 10 of the Statute.¹⁵ It seeks to balance the reality that sentences will be administered in a State, with the Court's overall responsibility for sentence enforcement;¹⁶ balance States' desire for autonomy with the need to ensure uniform human rights protection.¹⁷ As is often the case with systems that are the product of careful compromise, the regime is at times specific and at times vague. Understanding how the right against inhuman treatment is protected through the obligations of the three

of a racial, religious, national, or social or political group; human rights law requires no such connection.

¹⁰ In literature and case law, the term 'non-refoulement' is often used in reference to both Article 33 of the Refugee Convention *and* the prohibition on removal under human rights law. So as to avoid confusion, the term non-refoulement has been avoided in this thesis. Instead, and in order to indicate that the focus of the analysis is on human rights law, the terms used include 'protection from removal' and 'protection in the State'. Instead of terms such as 'asylum application', the thesis refers to 'applications for protection'.

¹¹ One of the first instances of this was the *Soering* (Application no. 14038/88 *Case of Soering v. The United Kingdom* (Judgment) 07 July 1989) case before the ECtHR, in which the UK was prevented from sending an individual to the United States, as to do so would violate Article 3 ECHR by exposing him to a real risk of inhuman treatment. Other ECHR provisions have since been interpreted as containing similar prohibitions, including Article 2 and Article 6 ECHR (See generally Maarten den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights' (2008) 10 3 *European Journal of Migration & Law* 277).

¹² CCPR/C/49/D/469/1991 *Ng v Canada* (Communication No. 469/1991) 7 January 1994, §16.2; General Comment 31 Human Rights Committee (Eightieth session) cl U.N. Doc. CCPR/C/21/Rev.1/Add.13, §12.

¹³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

¹⁴ For detail on the different negative and positive obligations of States, see Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009), 317-331.

¹⁵ Hiram Abtahi and Steven Arrigg Koh, 'Emerging Enforcement Practice of the International Criminal Court, The' (2013) 45 *Cornell International Law Journal* 1, 12.

¹⁶ Kimberley Prost, 'Chapter 14: Enforcement' in Roy Lee (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), 673.

¹⁷ Michael Stiel and Carl-Friedrich Stuckenberg, 'Article 106' (Case Matrix Network) <<http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-10/>> visited 22 September 2016, 1243.

relevant actors has involved some creative interpretation in order to flesh out the sometimes ambiguous provisions.

4.2.2. Obligations of the ICC

The ICC's obligations can be divided into two categories. The first relates to the prohibition on removing a convicted person to a State where they will be subjected to inhuman treatment. These are discussed first in this section since they are logically prior. The second category of obligations relates to those applicable once a convicted person is already in a State of enforcement.

Prohibition on Removal

When a sentence of imprisonment is handed down, it is the task of the ICC to designate an enforcement State. Article 103 of the Rome Statute gives the ICC discretion in doing so, and the task is carried out by the Presidency of the Court.¹⁸ States that have expressed their willingness to enforce sentences are included on a list, and will generally conclude an 'Enforcement of Sentences Agreement' with the Court (Enforcement Agreement). From this group of States, the Presidency will designate an enforcement State in a particular case.¹⁹ It is then for the designated State to either accept or reject the designation (more on this below).

Article 103(3) Rome Statute constitutes the key obligation on the ICC's part that protects convicted persons from removal to a situation of risk. This provision sets out the factors that are to guide the Presidency's discretion in designating an enforcement State. They include the convicted person's nationality, the convicted person's own preferences, and the principle of equitable distribution among States. Importantly, one of the factors guiding the Presidency's discretion is the 'application of widely accepted international treaty standards governing the treatment of prisoners'.²⁰ This term, while somewhat broad and vague, will undoubtedly include treaty provisions that require States to protect individuals from inhuman treatment while in detention. Examples include Article 3 ECHR, Article 7 ICCPR, and Article 5 ACHPR.

Article 103 does not leave much space for interpretation, and its wording is unambiguous: it gives the ICC Presidency the discretion to choose an enforcement State, as long as, in exercising this discretion, the Presidency 'take(s) account' of certain considerations, including human rights. Despite being indicated by the wording of the Statute, such an application of the law would not, it is submitted, satisfy the Article 21(3) test. To

¹⁸ Rule 199 RPE.

¹⁹ Article 103(1) Rome Statute.

²⁰ Article 103(3)(b) Rome Statute.

safeguard the right to protection from removal to a situation of risk, it is necessary that there be legal constraints on the exercise of discretion, not just guidance. Otherwise the Presidency would be free to designate any State as long as it had ‘taken account’ of human rights, regardless of whether there is a real risk of inhuman treatment or not. The author therefore proposes that, in light of Article 21(3), Article 103 must be interpreted so as to create an obligation on the ICC to refrain from designating an enforcement State where the convicted person would face a real risk of inhuman treatment. A necessary corollary of this is that the ICC is also obliged not to transfer a convicted person to a State of this type, nor to ask another actor to do so on its behalf.

Conditions of Imprisonment and Inhuman Treatment

Once an appropriate enforcement State has been designated by the Presidency, and that State has agreed to enforce the sentence, then the convicted person can be transferred to the enforcement State’s custody. At this point, concern shifts away from protecting a convicted person from exposure to a risk of inhuman treatment, to protecting the person from conditions of imprisonment that would constitute inhuman treatment. As the individual is, by this point, no longer under the ICC’s physical control, the Court’s obligations relate to supervising the conduct of the enforcement State.

That the ICC has a supervisory role when it comes to the enforcement of sentences is clear from Article 106:

- (1) The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
- (2) The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

However, what is not clear from the wording of the provision is the precise scope and nature of this supervisory role. In particular, two questions of importance are left unanswered: firstly, does the supervisory role require the ICC to monitor the conditions of imprisonment in a State of enforcement’s detention facilities; and secondly, if there is such an obligation and the Court identifies that the enforcement State is failing to uphold the proper standards of treatment, what can the Court do to address this?

In terms of the first question, the very set up of Article 106 adds to the ambiguity. The ICC’s supervisory role is mentioned only in the first subparagraph, and not in the second, and it is the second that specifically mentions conditions of detention. If subparagraphs (1)

and (2) are read conjunctively, one could propose that the ICC is endowed with an overarching supervisory role, and the division in the article was done for the sake of readability. Alternatively, the two subparagraphs could be read disjunctively, in which case the ICC would have no supervisory role over the conditions of detention, which instead is left entirely to the enforcement State.

It is submitted that a conjunctive reading of the provision is the more plausible interpretation. Article 106(1) links the supervisory role of the ICC with the ‘widely accepted international treaty standards governing treatment of prisoners’. As these treaty standards concern the *treatment* of prisoners, they are clearly linked to conditions of imprisonment. Therefore, even though the term ‘conditions of imprisonment’ is only used in Article 106(2), it must be envisaged that the Court will have some supervisory role. Support for this proposition is found in the opinions of academic commentators²¹ and developments at the Special Court for Sierra Leone. The Statute of that court, drafted two years after the Rome Conference, states that the conditions of imprisonment are governed by national law, but specifically makes them subject to the supervision of the Court.²²

Still further support stems from the broader context in which the Article 106 is located, namely other provisions of the Rome Statute protection framework. Both Rule 211 RPE and provisions in the Enforcement Agreements between States and the Court all provide the ICC with ways to collect information concerning sentence enforcement. According to Rule 211(a), the Presidency is obliged to make arrangements to ensure that a sentenced person’s right to communicate confidentially and freely with the Court, as provided in Article 106(3) Rome Statute, is respected. In this way, the convicted person can inform the Court of any problems. Rule 211(b) and (c) allow the Presidency to request information from the enforcement State (or other reliable sources) and to delegate a judge of the Court or member of ICC staff to meet with the sentenced person without the national authorities present. In all of the Enforcement Agreements concluded to date, States have agreed to permit regular inspections of their detention facilities by the Court, the International Committee of the Red Cross (ICRC), or the European Committee on the

²¹ Stiel and Stuckenberg (*supra* note 17): ‘enforcement’ ‘must be understood to include not only the enforcement of the sentence as such but also the modalities of this enforcement, which is indicated by the reference to “standards governing the treatment of prisoners” in both paragraphs and further supported by Rule 211(1)(a)’, §1244; Kreß and Sluiter provide a number of reasons why the term ‘enforcement’ in Article 106(1) should be read broadly, and thereby extend the supervisory power of the Court to conditions of imprisonment, Claus Kreß and Göran Sluiter, ‘Imprisonment’ in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court* (2002a) 1757, 1805.

²² Article 22 of the Statute of the Special Court for Sierra Leone 2002. Furthermore, this is mirrored in Article 3(2) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Special Court for Sierra Leone on the Enforcement of Sentences of the Special Court for Sierra Leone 2007.

Prevention of Torture and Inhuman and Degrading Treatment and Punishment.²³ The existence of these inspection provisions strongly points towards an interpretation of Article 106 in which the ICC does supervise the conditions of enforcement, as otherwise information gathering would be without purpose.

The question which necessarily follows on from this is what action, if any, is the ICC empowered to take if it finds that a State of enforcement is not upholding the necessary standards of treatment (as to what these standards of treatment are, this is discussed in the section below on the obligations of the enforcement State). This is the second question left open by the wording of Article 106.

One course of action open to the Court is contained in Article 104 Rome Statute, and indeed the very existence of this article is further support for the interpretation of Article 106 proposed above. In what has been termed the ‘ultimate’ exercise of supervision,²⁴ Article 104 permits the ICC to move a convicted person to a different enforcement State. While not a common practice, moving a prisoner to a different enforcement State is not unheard of in international criminal justice. After the ICTY convicted Kristić on genocide charges, he was transferred to the UK to serve his sentence. In 2010 he was attacked by three fellow inmates and severely injured.²⁵ While the decisions on the situation remain confidential, it would seem that the UK was deemed unable to secure Kristić’s safety, resulting in his transfer back to The Hague. In 2014 the ICTY designated Poland as the enforcement State, where Kristić remains today.²⁶ In another case dealing with the UK, Charles Taylor applied to be moved from an English prison to a detention facility in Rwanda. He cited threats to his safety, inhuman treatment resulting from his isolation, and his right to be closer to his family, who he claimed could not visit because of immigration constraints. In this case the SCSL did not consider it necessary for him to be moved, and dismissed his arguments.²⁷

Limiting the ICC’s options to that contained in Article 104 would give the ICC an ‘all-or-nothing’ supervisory approach: either it must do nothing, or it must move the individual elsewhere.²⁸ The wording of Article 106 itself fails to provide any information on whether

²³ ICRC countries: Belgium (Article 7), Denmark (Article 7), Finland (Article 7), Mali (Article 4(1)(b) and Serbia (Article 7). ICC: Austria (Article 7). Torture Committee (Article 6); UK.

²⁴ Stiel and Stuckenberg (*supra* note 17), 1244.

²⁵ ‘Srebrenica Genocide Convict Sues Britain Over Attack’ (Denis Dzidic, Balkan Transitional Justice, 6 November 2014) <<http://www.balkaninsight.com/en/article/srebrenica-genocide-convict-sues-great-britain>> visited 25 September 2016.

²⁶ ‘Polish Jail Takes Bosnian War Criminal’ (news.com.au, 22 March 2014) <<http://www.news.com.au/world/breaking-news/bosnian-war-criminal-to-polish-jail/story-e6frfkui-1226861813456>> visited 25 September 2016.

²⁷ ‘Ex-Liberia President Charles Taylor to Stay in UK Prison’ (BBC News, 25 March 2015) <<http://www.bbc.com/news/uk-32055482>> visited 25 September 2016.

²⁸ Stiel and Stuckenberg (*supra* note 17), 1244.

the ICC has other options to address ill treatment by a State, in particular whether it can oblige an enforcement State to make changes in the conditions of detention. For an answer to this question it is necessary to look elsewhere to inform the interpretation, and relevant material can be found in the broader context of the provision, the drafting history, and in scholarly opinion.

From the drafting history of Article 106, it becomes clear that a distinction was intended between the Presidency's supervision of the enforcement of the sentence *as such*, and the obligation to supervise the *modalities* of enforcement.²⁹ The term 'enforcement of the sentence *as such*' refers to the fact that the sentence is served, not the way in which it is served. It concerns issues such as early release and pardon, but not the conditions in the prison. The ICC's supervision of these elements of enforcement is to be strict.³⁰ For example, if a State breaches Article 110(1) Rome Statute by releasing a convicted person before the end of their sentence, the Presidency can make a finding that the enforcement State is in breach of its obligations. The State may be ordered to arrest the person and re-imprison them. Given that issues of inhuman treatment are affected by the modalities/conditions of imprisonment, issues surrounding the enforcement of sentences *as such* need not be further discussed.³¹

As to the Court's supervisory powers over the conditions of imprisonment, the drafting history shows that a proposal to grant the ICC the power to decide on every day aspects of prison life was clearly rejected. As expressed in one academic commentary on the provision, 'the genesis of Article 106 makes it crystal clear that the ICC should not be given the power to order the modification of a condition of imprisonment'.³² Based on this, the door is closed on an interpretation of Article 106 that would grant the ICC such intrusive powers.

The same commentary also argues that this same 'genesis' of the article precludes the ICC even from making any formal findings on the compliance of the enforcement State with 'treaty standards governing the treatment of prisoners'.³³ The author would disagree with this conclusion, and instead favour the view of a different commentary which argues that just because the Court cannot order a change in the conditions of detention does not mean that it could not make a finding on compliance.³⁴ At the very least, the broader context of Article 106 shows that the ICC can indirectly make statements on conditions of detention by using the inspection regime established by the Enforcement Agreements. An example of how this works is Article 6(2) of the Enforcement Agreement between the United

²⁹ Kreß and Sluiter (*supra* note 21), 1805-6.

³⁰ Kreß and Sluiter (*supra* note 21), 1805-6.

³¹ For more detail on enforcement as such, see Kreß and Sluiter (*supra* note 21).

³² Kreß and Sluiter (*supra* note 21), 1805.

³³ Kreß and Sluiter (*supra* note 21), 1805-6.

³⁴ Stiel and Stuckenberg (*supra* note 17), 1244.

Kingdom and the ICC, which stipulates that the ICC and the UK should consult on the findings of the inspection committee, and that the UK should report any changes it has made pursuant to the committee's suggestions. Where multiple interpretations are possible, Article 21(3) points to the interpretation that would best protect human rights. In this case, that would be to permit the ICC to make a finding on an enforcement State's compliance with its obligations. Even though the Court cannot order a change, a public finding, or threat of a public finding, would encourage compliance.

The supervisory options available to the ICC therefore range from the relatively 'light' approach of consulting with the enforcement State through the inspection and reporting procedures contained in the Enforcement Agreements, to the stronger approach of making a formal finding of non-compliance, to the 'firm' approach of moving a convicted person to another State.

All that remains is the Article 21(3) test: is the interpretation and application of Article 106 Rome Statute outlined in this section, in particular as to the contours of the ICC's supervisory role, in accordance with internationally recognised human rights? The author proposes that one alteration is needed for this to be the case. The wording of the Statute is not unequivocally phrased in terms of an obligation for the ICC, but rather gives the ICC powers. If the supervision of conditions of enforcement were a discretionary matter, protection of the right to inhuman treatment would not be sufficiently strong. The ICC should therefore have an obligation to exercise these powers: an obligation to supervise and an obligation to take action when conditions of treatment fall below the required standard.

The fact that the ICC is unable to order a change in the conditions of detention in an enforcement State does not mean that the interpretation fails to accord with Article 21(3). It may have ultimately provided greater protection to convicted persons if this had been the case, as the ICC could have obliged a State to improve conditions if standards were falling short, but Article 21(3) does not require this. The duty to interpret and apply the Rome Statute protection framework in accordance with human rights does not extend to imposing entirely new obligations on States to which they did not consent when signing the Statute. And an obligation to comply with orders to change conditions of enforcement would constitute an entirely new obligation. Article 106 was one of the most delicately drafted in Part 10 of the Statute,³⁵ with respective areas of competence being carefully carved out. The supervisory obligations that the ICC does have allow it to take a range of actions when confronted with a non-compliant enforcement State, and this together with the obligations binding on States detailed below, is enough to comply with Article 21(3).

³⁵ Abtahi and Koh (*supra* note 15), 12.

4.2.3. Obligation of States of Enforcement

The obligations of a State of enforcement will only be relevant when a convicted person is located in a domestic prison facility. As such, this section will first explain how a State becomes an enforcement State, and after this will set out the State's obligations to protect a convicted person from inhuman treatment.⁴¹

To be considered as a potential enforcement State, a State must first express its willingness to accept sentenced persons. This is a voluntary action on the part of the State, as nothing in the Rome Statute protection framework or elsewhere obliges a State to act as an enforcement State for the ICC.³⁶ Once a State expresses this willingness, it is included on a list of potential enforcement States kept by the Registrar.³⁷ From this list, and taking into account the factors in Article 103(3) Rome Statute, the Presidency designates a State to be the enforcer of the sentence in a particular case.³⁸ The designated State is then free to accept or refuse this designation;³⁹ in case of a refusal the Presidency will designate another State.⁴⁰ This has been called a system of double consent: consent to be included on the list of potential enforcement States, and consent to accept an individual in a particular instance.⁴¹

When a State puts itself forward as a potential enforcement State, it is common practice for that State to conclude an Enforcement Agreement with the Court, with the aim of providing further detail and clarification on its duties and obligations.⁴² They are not a pre-requisite to hosting a sentenced person, but are invariably entered into before an individual is accepted by a State.⁴³ Enforcement agreements allow for enhanced flexibility, making States more likely to accept sentenced persons,⁴⁴ albeit with the safeguard that the agreements must be consistent with the Rome Statute.⁴⁵ Eight States have thus far signed enforcement agreements with the ICC, including Austria, Belgium,

³⁶ Kreß and Sluiter (*supra* note 21), 1787.

³⁷ Rule 200(1) RPE. The State is also free to withdraw from the list at any time, Rule 200(4) RPE.

³⁸ Article 103(1)(a).

³⁹ Article 103(1)(c).

⁴⁰ Rule 205 RPE.

⁴¹ Róisín Mulgrew, 'The International Movement of Prisoners' (2011) 22 Criminal Law Forum 103, 127.

⁴² Such agreements are provided for in Rule 200(5) RPE, and are entered into between the Presidency and the State as per Regulation 114 of the Regulations of the Court.

⁴³ In the case of the DRC acting as the enforcement State for Katanga and Lubanga, this was an ad hoc agreement ('Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences' (ICC Press Release, 19 December 2015) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1181.aspx> visited 25 September 2016).

⁴⁴ Gerhard Stijards, 'Enforcement' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 1159, 1166.

⁴⁵ Rule 200(5) RPE.

and Mali. The enforcement agreements signed so far by have been largely based on the model enforcement agreement, without significant departures.⁴⁶

Once the procedure of double consent is completed and the convicted person is accepted and imprisoned in an enforcement State facility, it is at this point that the State acquires obligations. Under the Rome Statute Protection framework, the State must ensure firstly that the convicted person is treated in accordance with ‘widely accepted international treaty standards governing treatment of prisoners’, and secondly that the convicted person not be treated any more or less favourably than other individuals convicted in that State of similar offences. These obligations are found in Article 106(2) Rome Statute:

- (2) The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with *widely accepted international treaty standards governing treatment of prisoners*; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement. (emphasis added)

Conditions of detention are to be governed by domestic law, but the State of enforcement is required to respect a certain floor in the level of protection, below which standards cannot drop. What constitutes this ‘floor’ turns on the meaning of the words ‘widely accepted international treaty standards governing treatment of prisoners’.⁴⁷ Looking at the wording of the provision, it seems clear that soft law instruments and certain regional treaties are not included.⁴⁸

The use of the term ‘treaty standards’ in Article 106(2) excludes soft law instruments. This position is supported by Article 106(2)’s drafting history, which indicates that States were not willing to accept the very detailed and ambitious standards they contain.⁴⁹ Examples of such instruments include the Basic Principles for the Treatment Prisoners⁵⁰ and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁵¹ However, while these instruments are not directly applicable, it is not true that the principles they contain are entirely irrelevant; they are relevant to the extent that they guide the interpretation of provisions in universal treaties such as the ICCPR,⁵²

⁴⁶ Abtahi and Koh (*supra* note 15), 8.

⁴⁷ With the drafting of the Rome Statute a deliberate departure was made from the sentence enforcement practice of the ICTY. In setting out the standards applicable to imprisonment, the ICTY Trial Chamber in the *Erdemović* sentencing judgment included not only universal human rights treaties, but also regional treaties and soft law instruments (Kreß and Sluiter (*supra* note 21), 1779).

⁴⁸ Kreß and Sluiter (*supra* note 21), 1802; Stiel and Stuckenberg (*supra* note 17), 1245.

⁴⁹ *Ibid.*

⁵⁰ General Assembly Resolution 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990).

⁵¹ General Assembly Resolution 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

⁵² Kreß and Sluiter (*supra* note 21), 1802; ‘Article 106’ in Schabas (*supra* note 4), 1082.

which are covered by Article 106(2). For example, the Human Rights Committee calls on States to apply the rules contained in the Standard Minimum Rules for the Treatment of Prisoners (among others) in their compliance with the ICCPR.⁵³ The importance of these principles is further indicated by the fact that a number of Enforcement Agreements between States and the ICC ‘recall’ these bodies of rules.⁵⁴ In respect of the standard of treatment it must ensure for convicted persons, Finland has chosen to omit the word ‘treaty’ from its Enforcement Agreement with the Court, referring instead to ‘international standards’.⁵⁵ In a similar vein, the UK has chosen the wording ‘international human rights standards’.⁵⁶

The use of the term ‘widely accepted’ in Article 106(2) excludes regional treaties. If the ECtHR has given a provision of its Convention a particularly broad meaning, one can see how this might not be a widely accepted standard. While the text of Article 106(2) itself does not provide a way of discerning what would be considered widely accepted and what would not, one commentary suggests that if from a significant number of regional human rights treaties a common standard can be derived, then this may qualify as ‘widely accepted’.⁵⁷ This seems to the author to be an appropriate interpretation.

The proposed interpretation of Article 106(2) that excludes soft law and some regional law may narrow the standard of protection that enforcement States are obliged to provide for ICC convicted persons, but the Article 21(3) test is still satisfied. This is particularly so since the standard of ‘widely accepted international treaty standards’ in Article 106 is

⁵³ General Comment 21 Human Rights Committee (Forty-fourth session) U.N. Doc. HRI/GEN/1/Rev.1, §§5 and 13; Communication No. 458/1991 *Mukong v Cameroon* 21 July 1994, §9.3.

⁵⁴ For example see the third preambular paragraph of the Agreement Between the International Criminal Court and the Government of the Kingdom of Belgium on the Enforcement of Sentences of the International Criminal Court (ICCPRES/06-01-10, 1 June 2010): ‘RECALLING the widely accepted standards of international law governing the treatment of prisoners, including the Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, and the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990’.

⁵⁵ Article 6(1): ‘The conditions of imprisonment shall be governed by the law of Finland and shall be consistent with widely accepted international standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in Finland’ - Agreement between the International Criminal Court and the Government of the Republic of Finland on the Enforcement of Sentences of the International Criminal Court (ICC-PRES/07-01-11, 24 April 2011).

⁵⁶ Article 5: ‘The conditions of imprisonment shall be equivalent to those applicable to prisoners serving sentences under the law of the United Kingdom and shall be in accordance with relevant international human rights standards governing the treatment of prisoners’. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court (ICC-PRES/04-01-07, 8 December 2007).

⁵⁷ Kreß and Sluiter (*supra* note 21), 1803.

arguably broader than the phrase ‘internationally recognised human rights’ in Article 21(3).⁵⁸

The second part of Article 106(2) makes the provision more far reaching than simply providing a minimum threshold of treatment for ICC convicted persons. States are obliged to ensure that conditions for ICC prisoners are ‘no more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement’. One effect of this is that if ICC prisoners must be afforded a certain level of treatment, and they cannot be treated more favourably than domestic convicted persons, then it seems that all prisoners in an enforcement State must be treated in accordance with widely accepted treaty standards, and not just the ICC prisoners. Another effect is that if the enforcement State has obligations beyond the Rome Statute protection framework law that require a higher standard of treatment, this must be extended to ICC convicted as well as domestic convicted. The potential of this provision is therefore very great. If enforcement States with poor prison conditions are obliged to raise standards across the board, this would counteract the practice common in countries such as Rwanda, where special prison facilities have been built to ensure that international prisoners are housed in accordance with human rights, but where these facilities are not available to domestic prisoners.⁵⁹ While the provision seems to be clear in its meaning, academic commentators have registered a degree of scepticism on whether the provision will indeed be applied this way. Instead, it has been suggested that States will interpret this obligation as requiring that they not treat ICC prisoners any worse than their domestic counterparts.⁶⁰ It will be interesting to see how practice around this provision develops.

The final set of enforcement State obligations to consider are those which have their source beyond the Rome Statute protection framework. ICC accused serving custodial sentences on enforcement State territory and subject to enforcement State law clearly fall within that State’s jurisdiction under human rights law. As such, the State will have obligations according to its human rights law commitments, independently from commitments that it has under the Rome Statute. In most situations, this will not alter a convicted person’s situation, as the obligations of the State within and beyond the Rome Statute protection framework will be the same. However, if for example the enforcement State is a member of a regional treaty with stricter inhuman treatment protection, this will entitle the convicted person to a higher degree of protection than that offered under the Rome Statute protection framework.

⁵⁸ Kreß and Sluiter (*supra* note 21), 1803.

⁵⁹ Barbora Holá and Joris van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview' (2014) 12 1 *Journal of International Criminal Justice* 109, 114.

⁶⁰ Damien Scalia, 'Enforcement' in Paul De Hert and others (ed), *Code of International Criminal Law and Procedure, Annotated* (Laciar 2013), 486.

4.2.4. Obligations of the Host State

When it comes to the host State, the distinction is once again relevant between obligations relating to the conditions of detention and obligations relating to the prohibition on removal to a situation of risk. There are three possible scenarios where the host State may have obligations to protect a person convicted by the ICC from inhuman treatment, and all of them arise while the person is still on Dutch territory post-conviction. The first scenario involves conditions of detention, and the last two involve the prohibition on removal.

In the first scenario, the ICC is not able to find an enforcement State to host a particular convicted person. Given the system of double consent, this is a possibility, and arrangements were made in the Rome Statute for such an eventuality. Article 103(4) stipulates that when no State is designated as the enforcement State by the Court, the sentence shall be served in a domestic prison facility made available by the host State. This is designed to be a short term solution, and the ICC must continue to search for a willing enforcement State.⁶¹ Unlike for other enforcement States, in these circumstances the ICC covers the costs of the convicted person's stay in a Dutch prison.⁶² When acting in its role as residual enforcer of sentences, the obligations of the Netherlands will derive from Article 106(2) Rome Statute in the same way as for any other enforcement State: the conditions of detention will be governed by Dutch law⁶³ but subject to minimum human rights standards which the Netherlands must uphold. Also as with other enforcement States, the Netherlands will have obligations beyond the Rome Statute protection framework deriving from its international human rights obligations, namely the ECHR.

In the ICC's practice to date, the Netherlands has not been called upon to fulfil its role as residual enforcer of sentences. As such, fears that enforcement in the host State will become the norm because then the Court bears the costs seem ungrounded.⁶⁴ Instead, while arrangements are made with potential enforcement States, the convicted persons have so far remained on the ICC premises, sometimes for extended periods. This scenario does not appear to have been intended,⁶⁵ but it is the practice of the Court at the moment.

⁶¹ Article 49(3) HQ Agreement.

⁶² Article 103(4) Rome Statute.

⁶³ For the relevant provisions of Dutch law, and more detail on how this operates, see Abels' book (*supra* note 7), 459-460.

⁶⁴ Trevor Pascal Chimimba, 'Establishing An Enforcement Regime' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, Results* (Kluwer Law International 1999), 351.

⁶⁵ Article 50 HQ Agreement: 'If, after conviction and final sentence, or after reduction of a sentence in accordance with article 110 of the Statute, the time remaining to be served under the sentence of the Court is less than six months, the Court shall consider whether the sentence may be enforced in the detention center of the Court'.

The second scenario is where the ICC designates an enforcement State, but the convicted person believes that they would be at risk of inhuman treatment in the designated State. While still in the ICC's detention centre awaiting transfer, the convicted person could transmit an application for protection from removal to the Dutch authorities. The relevant obligation of the Netherlands in this situation is found beyond the Rome Statute protection framework, namely in Article 3 ECHR. Through the case law of the ECtHR, prohibition on removal is now an intrinsic part of this provision.⁶⁶ In order for the Netherlands to be obliged to consider a claim for protection from removal under Article 3, it must be ascertained whether there is jurisdiction over the convicted person. This is by no means straightforward, given that the individual is located on ICC premises. As discussed in Chapter 2, the ICC premises have a special status, and generally speaking the jurisdiction of the Netherlands under human rights law over individuals on those premises is suspended.

There is some practice concerning asylum claims and claims for protection from removal from individuals in the ICC detention centre. The existing practice concerns witnesses, and although the author disagrees that this precedent applies equally to convicted persons, the point needs to be addressed. The situation in question will be discussed in detail in Chapter 6, and for now it suffices to say it involved four detained witnesses held at the ICC detention centre for the purpose of giving testimony, at the conclusion of which they were to be returned to the custody of their home State.⁶⁷ Claiming to fear for their safety if returned, the witnesses requested protection in the Netherlands. The Dutch authorities argued that as they were on ICC premises, Dutch jurisdiction was not engaged, and so the Netherlands owed them no obligations under human rights law (or refugee law). This was rejected by The Hague District Court, which held that Dutch asylum and human rights law did in fact apply to the witnesses, despite the fact that they were confined in the ICC detention centre.⁶⁸ The Netherlands was therefore obliged to hear the applications for protection and make a determination on the merits.

The case is interesting for many reasons, not least of which is the contrast it makes with the *Longa*⁶⁹ case, discussed in Chapter 2. In that case, the ECtHR held that as far as the Article 5 right to liberty was concerned, there was no Dutch jurisdiction over the same detained witnesses. The Article 3 issue was decided prior to *Longa* and has not been challenged in either domestic courts or before the ECtHR, and so represents the state of the law on the question.

⁶⁶ *Soering* 7 July 1989 (*supra* note 11).

⁶⁷ For an overview of the procedural history, 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).

⁶⁸ ECLI:NL:RBSGR:2011:BU9492, The Hague District Court (sitting in Amsterdam), 28 December 2011.

⁶⁹ Application no. 33917/12 *Djokaba Lambi Longa v The Netherlands* (Decision) 9 October 2012.

At first glance it would seem illogical to decide that the Netherlands does have jurisdiction, for the purposes of Article 3, over detained witnesses on ICC premises, but not over convicted persons on the same premises. But in fact the reasoning of the District Court in the detained witnesses case cannot be wholesale applied to convicted persons. The case essentially rested on two considerations. The first was that to apply Dutch asylum law to the detained witnesses did not interfere with the functioning of the ICC; they had already given their testimony, and their involvement with the Court was at an end.⁷⁰ This is not the case with convicted persons. To apply human rights law to them, and to potentially grant their application for protection, would interfere with the ICC's functioning because sentence enforcement is an important part of the criminal justice process. The convicted person is still very much involved with, and a concern of, the Court. The second consideration in the detained witnesses case was that the witnesses had nowhere else to turn.⁷¹ The ICC, as it lacks territory, could not provide the necessary protection. For convicted persons, it is not true that the ICC cannot provide protection. If necessary, a different enforcement State could be designated. Looking more closely at the reasoning of the District Court therefore, it is not a given that the outcome of the case would have been the same for a convicted person. Instead, the author posits that the approach would have been to use the *Longa* decision to decide that no jurisdiction exists while the convicted person remains at the ICC.

Finally there is the third scenario. As in the second scenario, this involves the ICC designating an enforcement State that the convicted person finds problematic for safety reasons. However, instead of submitting the asylum claim from the premises of the Court, the individual waits until he or she is being transported to a Dutch airport for transfer to the enforcement State. This scenario is distinguishable from the second for an important reason: the convicted person is not on ICC premises, but is under the authority of the Netherlands as he or she is transported to the point of departure.⁷² This brings the individual within Dutch jurisdiction. Support for this can be found in a letter written by the Dutch Minister of Justice to the Dutch Parliament, in which 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.⁷³ In the case of an acquitted person requesting protection under essentially the same circumstances, the Netherlands did not contest the existence of its jurisdiction. The Ngudjolo case is explored in detail in the next part of this chapter. Under these circumstances, there are no grounds for assuming that the situation of a convicted person would be treated differently from an acquitted person. In terms of outcome, even where protection is granted, it seems unlikely that the convicted person

⁷⁰ The Hague District Court, 28 December 2011 (*supra* note 68), §9.

⁷¹ The Hague District Court, 28 December 2011 (*supra* note 68), §9.8.

⁷² Section 85 ICC Implementation Act.

⁷³ Letter from the Minister of Justice to the Speaker of the Lower House of Parliament, The Hague July 2002, 28 098 (R 1704), 6.

would remain in the Netherlands. Article 3 ECHR prohibits the removal of a person to the State where they would be at risk of inhuman treatment, but not to a safe third State. In all likelihood, in such a situation the ICC would designate a different, unproblematic enforcement State, and the convicted person could be transferred there.

4.2.5. Problems in Human Rights Protection

As ever with shared stages of ICC proceedings, many potential challenges for human rights protection can be pre-empted through a detailed understanding of the obligations involved. This is the case at this stage in relation to the ICC and the enforcement State. The delimitation of tasks and obligations between these two actors is clear: the enforcement State must ensure that a convicted person is afforded a certain standard of treatment when detained, and the ICC must monitor the enforcement State.

Where issues remain is between the ICC and the host State. The first scenario considered does not present any problems, because the Netherlands is in the same position as any other enforcement State would be. The second scenario, while problematic because the Netherlands bears no obligation, will not raise issues in practice. All convicted persons must be transferred by the host State authorities, meaning that if a claim in the second scenario doesn't succeed, the convicted person need only wait until they are being transported to the airport. For this reason, the third scenario is the one to be examined for challenges to the adequacy of human rights protection.

The third scenario suffers from an implementation problem, but not the one often present in situations involving multiple actors, namely that it is not clear which actor must act. It is clear enough that the ICC is the primary duty bearer: the task of designating the enforcement State is reserved to the ICC, and it is the ICC that issues the request to the Netherlands to carry out the transfer of a convicted person to that State. The Netherlands therefore takes on a secondary role, of providing a safety net for if and when the ICC designates an inappropriate enforcement State.

However, from the general attitude of the Netherlands towards such situations, gleaned from the different cases covered in this study, the Netherlands may show reluctance to uphold this safety-net role. Instead, the author considers it possible that the Dutch authorities will defer largely, if not entirely, to the ICC. The Netherlands may consider that since the ICC also has an obligation not to expose the individual to risk of harm, the Netherlands can rely on the ICC's determination of the convicted person's security situation. In a 2002 letter to the Dutch parliament discussing the possibility of convicted persons applying for asylum/protection during their transfer to the airport, the Minister of Justice already indicated that deference to the ICC would be the government's approach. Even while acknowledging that during the transfer the Netherlands will have a non-refoulement obligation, the minister stated the following:

It is...inconceivable that such a risk of refoulement exists pending the proceedings before the ICC or after those proceedings...the proceedings before the ICC provide all the guarantees required by the human rights conventions. In particular, the possibility that suspects will be subjected there to actions prohibited by Article 3 of the ECHR can be ruled out.⁷⁴

While the Minister for Justice may in many (or even most) instances be right, this clearly indicates that the Netherlands may be reluctant to fully implement its own human rights obligations.

A further problem is that the Netherlands may argue that even if the convicted person would be entitled to protection, the Netherlands' international obligations towards the ICC to conduct the transfer and not interfere in ICC proceedings prevail over its obligations under human rights law. It is true that a human rights court such as the ECtHR would reject this notion wholeheartedly, but as the author argues in Chapter 2, there is indeed nothing that would compel a State to choose one set of obligations over the other. In either case it must violate an international obligation, and it falls to the State to determine which one to choose.

4.2.6. Concluding Observations

The enforcement of sentences stage is illustrative of the different ways that States can be involved shared stages of ICC proceedings. An enforcement State volunteers to be involved with the enforcement of sentences, and when it does so will have a shared role in protecting the rights compromised by this enforcement (protection from inhuman treatment). If no enforcement State volunteers, the Netherlands is obliged to become involved and take up the role of residual enforcer of sentences. The Netherlands must also become involved in the situation because it is obliged to assist the Court by transporting convicted persons. In providing this assistance, the Netherlands may activate human rights law obligations towards ICC convicted persons, namely under the ECHR. These obligations arise beyond the Rome Statute protection framework.

Setting out the obligations that each actor has during the enforcement of sentences stage involves a certain degree of creative interpretation. While the obligations of the ICC and the enforcement States under the Rome Statute protection framework are relatively clear, the obligations of the Netherlands outside of this framework are still unsettled. This leaves scope for implementation problems that have a negative impact on the rights of convicted persons.

⁷⁴ Letter from the Minister of Justice (*supra* note 73), 6-7.

4.3. The Position of Persons Released by the ICC: Acquittal

4.3.1. Introduction

It would be dubious justice indeed if every person on trial at the ICC were convicted. Acquittals can be seen as supporting the legitimacy of international criminal justice, rather than undermining it, as it demonstrates a refusal on the part of the judges to convict where the standard of proof is not met, regardless of the political consequences. Even the International Military Tribunal at Nuremberg, with the accusations of victor's justice and political bias, acquitted three of the defendants.

Arriving at the decision to acquit is a task that the ICC carries out independently, in the same way as convicting an accused would be. Rendering judgment is a function that has been entrusted by the State Parties to the ICC alone. As such, sharedness only arises in the events following an acquittal decision. Upon being found not guilty, the former accused person must be released from custody. Sometimes the individual will return home, as was often the case with persons acquitted by the ICTY. Vlatko Kupreškić was reportedly welcomed back to Croatia with fireworks, a band playing patriotic songs, and thousands of well-wishers.⁷⁵ At other times, the former accused is not guaranteed such a warm welcome. Concerns about security in Rwanda led to acquitted persons needing protection from the ICTR long after their trials concluded. Andre Ntagerura has spent more than 10 years in a Tribunal safe house while waiting for a safe country to agree to accept him.⁷⁶

It is this second group of acquitted individuals, those that cannot return to their home countries, with which this section is concerned. In terms of the types of involvement that we see at this shared stage, there are strong similarities with the previous section concerning treatment in the enforcement State. The ICC requires assistance, as it cannot host acquitted individuals itself. States however, are under no obligations to provide this assistance, but may agree to do so voluntarily. Where a volunteer State is found, the ICC once again needs assistance, this time from the Netherlands. The acquitted person must be transferred to the airport so that they can travel to the volunteer State. In providing this

⁷⁵ Kevin Jon Heller, 'What Happens to the Acquitted?' (2008) 21 *Leiden Journal of International Law* 663, 665.

⁷⁶ 'Acquitted of Rwanda genocide, now left in legal limbo' (Daily Mail, 18 December 2014) <<http://www.dailymail.co.uk/wires/afp/article-2879322/Acquitted-Rwanda-genocide-left-legal-limbo.html>> visited 4 January 2016. It should be noted that not all ICTR acquitted have been unsuccessful: Jean Mpamabara, acquitted of genocide charges by the ICTR in 2007, was permitted by France to join his family on Mayotte, a small French island in the Indian Ocean; Bagambiki, also acquitted by the ICTR, now lives in Belgium. (Heller (*supra* note 75), 669).

assistance, other obligations of the Netherlands will be engaged, namely those beyond the Rome Statute protection framework under human rights law and refugee law.

Faced with security concerns at home, at-risk acquitted persons will be primarily concerned with preventing their removal to a State where they would be at risk of death or inhuman treatment, whether this be their home country or another country. As such, discussion in this section focuses on the prohibition on removal aspects of the right to life and the right to protection from inhuman treatment. An individual whose post-acquittal experience illustrates these issues in practice is Mathieu Ngudjolo Chui. Ngudjolo was charged by the ICC with several counts of war crimes and crimes against humanity, alleged to have taken place in the course of an attack on the village of Bogoro in the Eastern DRC on the 24th February 2003. His co-defendant, Germain Katanga, was found guilty and sentenced to 12 years imprisonment, but Ngudjolo was acquitted of all charges on the 18th December 2012. He was released from ICC custody a few days later.

During his trial, Ngudjolo acted as a witness in his own defence. He gave evidence that implicated the DRC government and President Kabila in the planning of the attack on Bogoro. As a result of having provided this evidence, which in particular took the form of a highly incriminating letter, Ngudjolo contended that he would be seen as hostile to the DRC government and would suffer human rights abuses if returned to the DRC.⁷⁷ Ngudjolo requested protection within the ICC witness protection programme, but his request for relocation was eventually denied.⁷⁸ The ICC proceeded to hand Ngudjolo over to the host State police, who subsequently transported him to the airport and sought to repatriate him to the DRC. As far as the Dutch authorities were concerned, Ngudjolo had no legal basis for residing on the territory of the Netherlands; as soon as he was released from ICC custody he became an illegal alien.⁷⁹ Faced with repatriation to the DRC, Ngudjolo applied for protection in the Netherlands, thereby precluding his departure.⁸⁰

⁷⁷ ICC-01/04-02/12-15-tENG *The Prosecutor v Mathieu Ngudjolo Chui* (Urgent Defence Application for the international relocation of Mathieu Ngudjolo outwith the African continent and his presentation to the authorities of one of the States Parties to the International Criminal Court for the purposes of expediting his asylum application) 21 December 2012 (Appeals Chamber), §§27-29.

⁷⁸ A certain amount of speculation is necessary to reach this conclusion. Information concerning Ngudjolo's status as an ICC protected witness is ambiguous and hard to come by. Support for this conclusion is found in a note verbale transmitted by the ICC Registry to the Dutch authorities, stating that there was no obstacle to his return to the DRC – ECLI:NL:RVS:2014:3833, Council of State, 15 October 2014, §5.2.

⁷⁹ ICC-01/04-02/12-22-tENG *The Prosecutor v Mathieu Ngudjolo Chui* (SECOND ADDENDUM to “Defence request that the Appeals Chamber order the Victims and Witnesses Unit to execute and the host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court”) 8 February 2013 (Appeals Chamber) §§23-24.

⁸⁰ *Ibid* §§4-6.

Ngudjolo based his application for protection on both human rights law and refugee law. Refugee status is granted to an individual who is outside of their country of nationality due to a well-founded fear of being persecuted for reasons of their race, religion, nationality, or membership of a particular social or political group.⁸¹ In the context of this thesis, the granting of refugee status is considered a way in which human rights are protected. Acquiring this status has an advantage over relying on human rights law alone; while both will prohibit the removal of an at-risk individual, only refugee status is accompanied by a regularised status in the country of residence and a set of substantive and procedural rights.⁸² Human rights law only requires that the individual not be removed, but does not regulate their legal position.⁸³

Both of Ngudjolo's applications were rejected by the Council of State on the 15th October 2014.⁸⁴ The Council held that the Secretary of State was correct to exclude Ngudjolo from refugee protection, on the basis Article 1F of the Refugee Convention.⁸⁵ This provision allows for the exclusion of an individual from refugee protection on a number of grounds, including that there are serious reasons for considering that he or she has committed 'a crime against peace, a war crime, or a crime against humanity'. The standard of proof for exclusion under Article 1F is much lower than the criminal standard of proof, and so this exclusion can apply even in case of acquittal. In Ngudjolo's case, the Secretary of State decided that while he may have been acquitted for the attack on Bogoro, there were a number of other instances in which Ngudjolo was implicated in war crimes and crimes against humanity. Furthermore, the Council of State agreed with the Secretary of State's assessment that Ngudjolo would not be at risk of an Article 3 ECHR violation if returned to the DRC,⁸⁶ noting that the Registry of the ICC concurred on this point, having communicated this opinion in a note verbale.⁸⁷

Despite the rejection of his application for protection from removal, Ngudjolo remained on Dutch territory. He had been provided with a document indicating that he could lawfully reside on the territory of the Netherlands pending the outcome of his appeal,⁸⁸ and was housed in an apartment in The Hague at the expense of the ICC. It was in the interest of the Prosecution and of international criminal justice in general that he remained near the seat of the Court, available for hearings in his appeal and easy to re-arrest should

⁸¹ Article 1 of the Refugee Convention. While the term 'persecution' has no agreed upon definition, it does have a broad human rights basis, and should be understood by reference to human rights law (Wouters, *supra* note 14 at 538).

⁸² Articles 12-34 Refugee Convention.

⁸³ Wouters, *supra* note 14 at 325.

⁸⁴ Council of State, 15 October 2014 (*supra* note 78).

⁸⁵ Council of State, 15 October 2014 (*supra* note 78), §2.5.

⁸⁶ Council of State, 15 October 2014 (*supra* note 78), §4.4.

⁸⁷ Council of State, 15 October 2014 (*supra* note 78), §5.2.

⁸⁸ ICC-01/04-02/12-69-Red *The Prosecutor v Mathieu Ngudjolo Chui* (Registry's update on the situation in relation to Mathieu Ngudjolo Chui) 3 June 2013 (Appeals Chamber), §3.

he be convicted on appeal.⁸⁹ Furthermore, Ngudjolo was subject to a UN travel ban, which would only be lifted when it was determined where he would reside,⁹⁰ and that could not be known until the appeal was concluded. So matters stood until the Appeal Chamber's decision.

In February 2015, the appeal was upheld and the acquittal confirmed. As Ngudjolo walked out of the ICC building, he was arrested by Dutch police, transported to the Amsterdam airport, and in this instance his plane made it all the way to the runway before being called back: the protection claim would be heard a second time. Despite these dramatic events, the outcome was unchanged. The District Court of The Hague found that no new facts or threats had arisen to change the situation from that before the Council of State in October 2014.⁹¹ As such, on the 11th May 2015, Ngudjolo was returned to the DRC.⁹²

Ngudjolo's long tale (of which the above is just a portion) shows how the ICC and Dutch aspects of the case overlap and interweave. The discussion of obligations below seeks to untangle the obligations at play in Ngudjolo's case. There is a stark contrast between the number of provisions in the Rome Statute protection framework dealing with post conviction, and the number dealing with post acquittal. Discussion of the obligations within this framework is therefore brief as compared to the discussion in the previous section.

4.3.2. Obligations of the ICC

The ICC's obligations to protect acquitted persons from removal to a situation of risk can be traced to one provision. Following an acquittal, Rule 185 RPE obliges the Court to make such arrangements as it considers appropriate for the transfer of the acquitted person to a State. The receiving State can be one that is obliged to receive the acquitted person, a State that has agreed to receive the person, or a State that has sought the acquitted person's extradition. A State that is obliged to receive a person is, for example, the State of nationality. In arranging the transfer, Rule 185 requires that the views of the acquitted person be taken into account. A decision of the Appeals Chamber indicates that the views

⁸⁹ Göran Sluiter, 'The Practice of Shared Responsibility in Relation to International Criminal Tribunals and their Relation to States' (2016) SHARES Research Paper Series.

⁹⁰ ICC-01/04-02/12-25-tENG *The Prosecutor v Mathieu Ngudjolo Chui* (Registry's observations pursuant to regulation 24 bis of the Regulations of the Court on the "SECOND ADDENDUM" to 'Defence request that the Appeals Chamber order the Victims and Witnesses Unit to execute and the host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court") 22 February 2013 (Appeals Chamber), 7.

⁹¹ ECLI:NL:RBDHA:2015:4659, District Court of The Hague, 23 April 2015.

⁹² 'First ICC Acquitted Defendant Returned to DR Congo: Netherlands Rejected Asylum Claim Over Safety Fears' (Human Rights Watch, May 11 2015) <<https://www.hrw.org/news/2015/05/11/first-icc-acquitted-defendant-returned-dr-congo>> visited 5 June 2016.

of the individual should be interpreted so as to include the person's views regarding their security situation.⁹³

From a reading of the text of Rule 185 alone, it would seem that the ICC can order the person's transfer to any State willing or obliged to receive him, as long as the views of the acquitted person have been at least considered. The views and practice on this point are very limited, but they do not support this simple reading of Rule 185. In a letter by the Dutch Minister of Justice to the Dutch Parliament, elaborating on the Netherlands' position vis-à-vis ICC connected asylum claims, Rule 185 was cited as grounds for preventing the ICC from transferring an acquitted person to an unsafe country.⁹⁴ The practice of the ICTR with respect to acquitted persons is protective. On a number of occasions individuals have been kept in safe houses for years at the Tribunal's expense, rather than being returned to face harm in Rwanda. It is difficult to justify why the approach of the ICTR and the ICC should differ so substantially.

Finally, such an interpretation of Rule 185 would inevitably fail the Article 21(3) test. The ICC's obligations pursuant to this rule must be interpreted and applied consistently with human rights law. The only permissible interpretation of Rule 185 is one that obliges the ICC to make arrangements for an acquitted person's transfer to a *safe* State, not to any State that is willing.

4.3.3. Obligations of State Parties

The potential role of State Parties in this factual stage of proceedings is to provide assistance to the ICC by agreeing to host at-risk acquitted individuals. The question is therefore whether State Parties are under an obligation to do this. There is nothing specific on this point in the Rome Statute protection framework. The only possible basis for such an obligation is Article 93(1)(l) of the Statute, requiring States to cooperate with the ICC in providing 'any other type of assistance...with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court'. This would entail the ICC issuing a cooperation request to a State, obliging it to accept an acquitted person on its territory.

There are a number of arguments against this idea. The first is based on the wording of Article 93(1) itself. The provision permits the ICC to request cooperation 'in relation to investigations or prosecutions'. Based on the plain meaning of the words 'investigation' and 'prosecution', it is difficult to see how protecting acquitted persons fits with this

⁹³ ICC-01/04-02/12-74-Red *The Prosecutor v Mathieu Ngudjolo Chui* (Decision on Mr Ngudjolo's request to order the Victims and Witnesses Unit to execute and the Host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court) 12 June 2013 (Appeals Chamber), §13.

⁹⁴ Letter from the Minister of Justice (*supra* note 73), 9.

provision. By definition, a person's involvement with an investigation and prosecution has concluded once an acquittal has been rendered. Acquittals at first instance may merit different treatment; if an appeal has been lodged then the prosecution is in some ways ongoing. The same cannot be said for acquittals on appeal.

Another argument is based on practice, both of the ICC and of other international criminal tribunals. In the Ngudjolo case, no attempt was made by the ICC to compel any State to host him after his acquittal. Instead this was considered to be a diplomatic and political issue. The judges of the ICTR have been explicit on this point. At the Trial Chamber level it was held that a State's obligation to cooperate on relocating acquitted persons extended to consulting with the Tribunal only; the State was not required to grant residence or extend special treatment to the acquitted individual.⁹⁵ This was confirmed by the Appeals Chamber, which stated that 'there is no legal duty under Article 28 of the Statute for States to cooperate in the relocation of acquitted persons'. Article 28 of the ICTR Statute is the general cooperation provision, and is phrased in an almost identical way to Article 93 Rome Statute.

The Article 21(3) test does not alter the interpretation of State Party obligations. Article 21(3) does not require the creation of entirely new obligations for States, which is what an obligation to host acquitted individuals would constitute. Only if a State Party should volunteer to host an acquitted person, and the person travels to that State's territory, at that point it would have obligations beyond the Rome Statute protection framework under human rights law and refugee law. These obligations would prevent the State Party from itself transferring the acquitted person to an unsafe State, but would not oblige the State Party to accept the acquitted person in the first place.

4.3.4. Obligations of the Host State

The Netherlands could protect an acquitted person from removal to a situation of risk by permitting them to remain on Dutch territory. In its capacity as an ICC State Party, the Netherlands is in the same situation as any other State Party, and not subject to an obligation to host an acquitted person. The question addressed in this section is whether such an obligation exists for the Netherlands in its capacity as host State, whether this be under the Rome Statute protection framework or beyond it.

The Rome Statute protection framework does not contain a provision that directly deals with this issue. In the Headquarters Agreement between the Netherlands and the Special Tribunal for Lebanon (STL), it clearly states that acquitted persons cannot be released into

⁹⁵ Case No. ICTR-99-46-A28 *The Prosecutor v André Ntagerura* (Decision on the Motion by an Acquitted Person for Cooperation from Canada, Article 28 of the Statute) 15 May 2008 (Trial Chamber III), §4.

the host State without the Netherlands' consent.⁹⁶ In the Headquarters Agreement between Tanzania and the Residual Mechanism for Criminal Tribunals (RMCT), it is stated that a person released after an acquittal cannot remain permanently on Tanzanian territory without the latter's consent.⁹⁷ The fact that these agreements do deal with the issue directly, and the ICC Headquarters Agreement does not, could be seen in two ways. On the one hand, it could indicate that the situation at the ICC was intended to be different from these other tribunals, or on the other hand it could indicate that the other agreements reflect the general state of affairs, and in the ICC agreement it was not deemed necessary to be explicit.

An argument has been made in favour of the former conclusion, based on an analogy with Article 103(4). This Article requires that the ICC host State enforce a sentence of imprisonment on its territory where no other State is found to do so. The argument by analogy suggests that the host State has a similar residual role of hosting an acquitted person when no other safe State is found (albeit at liberty in this instance). Sluiter provides some arguments in favour of this position, citing the ECtHR case of *Waite and Kennedy*⁹⁸ as authority for the proposition that host States of international organisations have a residual responsibility for human rights violations by such organisations on their territory. In other words, if the person's protection from removal to a place of risk is jeopardised because they have nowhere safe to reside, the Netherlands has a responsibility to act. Furthermore, Sluiter suggests that this is simply the price that the Netherlands must pay for being the legal capital of the world.⁹⁹

The author disagrees with this argument in the context of the Rome Statute protection framework. It is not appropriate to create obligations for the Netherlands which it did not consent to based on an analogy of this kind. This is particularly so given the debates from the time when the Rome Statute and the Headquarters Agreement were being incorporated into Dutch domestic law. In these debates, concern was expressed by a number of Dutch political parties over the implications of Article 103(4).¹⁰⁰ Instead the author proposes that the headquarters agreements for the STL and RMCT be seen as reflecting the law as it stands. The only obligation of the Netherlands based in the Rome Statute protection framework is to permit acquitted individuals to remain on Dutch territory as long as their presence at the seat of the Court is necessary.¹⁰¹ As to obligations beyond the Rome

⁹⁶ Article 43(3), Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon 2007.

⁹⁷ Article 39, Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals 2013.

⁹⁸ Application no. 26083/94 *Case of Waite & Kennedy v Germany* (Judgment) 18 February 1999.

⁹⁹ Göran Sluiter, 'Shared Responsibility in International Criminal Justice: The ICC and Asylum' (2012) 10 3 *Journal of International Criminal Justice* 661, 665.

¹⁰⁰ Han Bevers, Niels M. Blokker and Jaap Roording, 'The Netherlands and the International Criminal Court: On Statute Obligations and Hospitality' (2003) 16 1 *Leiden Journal of International Law* 135.

¹⁰¹ Article 29 Headquarters Agreement.

Statute protection framework, that is another matter. The idea that the Netherlands has an obligation to intervene where human rights violations are occurring on its territory should be considered in that context.

Intrinsic to Articles 2 and 3 of the ECHR is the prohibition on the removal of an individual to a country where they would be at risk of death or serious harm. These obligations must be considered for two different scenarios. As with persons who have been convicted, an application for protection from removal from the host State can be made at two points in time. First, when the acquitted person is waiting to be released from ICC custody, and second, when the acquitted person is outside the ICC detention centre and/or is in transit to the point of departure from the Netherlands.

A few days can pass, while arrangements are made, between when the accused person is acquitted and when they are actually released. During that time, the individual might make an application for protection to the Dutch authorities. In section 4.2.4 above, it was argued that the decision of the Dutch District Court to allow an application for protection to be made by witnesses detained on the ICC premises did not apply to convicted persons. For acquitted persons, the author argues the opposite: that the reasoning of the District Court applies in the same way for detained witnesses as it does for acquitted persons. The two situations are alike, as in neither case would considering the application for protection interfere with the functioning of the ICC, and in neither case do the individuals have anywhere else to turn because of the structural protection problems at this stage in proceedings (discussed in the next section).

The other point in time when an acquitted person can make an application for protection is once they have been released from ICC custody. The obligations of the Netherlands are the same here as they are when a convicted person applies for protection while being transported to the point of departure from the Netherlands. In Ngudjolo's case, the Netherlands did not contest that he was able to make the claim for protection from removal. Instead the authorities focused directly on the merits of the claim.

4.3.5. Problems in Human Rights Protection

As discussed in the introduction to this section, there are different ways that States become involved in the acquittal stage of ICC proceedings. State Parties are under no obligation to assist the ICC by hosting an acquitted person, but may become involved by volunteering to do so. The Netherlands is obliged to assist the ICC, but only by transporting acquitted individuals to the point of departure from the country. In the course of providing this assistance, other obligations that the Netherlands has under human rights and refugee law may be engaged.

Sharedness of the type between the ICC and State Parties leads to a structural problem. The absence of an obligation on the part of State to host acquitted persons impedes the ICC's ability to comply with its obligation to protect acquitted persons from being sent to a State where they would be at risk. The ICC cannot protect individuals if States do not assist it by agreeing to host them. The issues that can result from this structural problem can be seen in the experience of the ICTR. Acquitted individuals cannot return to Rwanda, and so the ICTR provides them with protection in a safe house near the Tribunal until a host State is found. This process can take years.

Had Ngudjolo's case taken a different turn, he may also have been in this situation, at least pending his appeal. After his acquittal at first instance, the ICC informed the Dutch authorities that, because a UN travel ban was in place against him, it would take time for preparations to be made for Ngudjolo's departure from the Netherlands. As the ICC could not detain him in the meantime,¹⁰² the ICC requested that Ngudjolo be permitted to reside in the Netherlands temporarily. The Dutch authorities rejected this idea, but the ICC and the Netherlands reached a compromise by which Ngudjolo would reside in an 'ICC designated area', namely a room in a hotel at Schiphol Airport. Ngudjolo would wait there while arrangements were made for his stay in a safe country (at this point in time the ICC still considered that he would be at risk if returned to the DRC). The hotel in question has two sections, one on terminal side of the airport, and one on the land side of the airport. An administrative error led to the room reservation being made on the land side, whereas the agreement specified that it must be the terminal side, as then Ngudjolo would be in the international area of the airport. Unwilling to allow Ngudjolo to remain on the land side of the hotel, moves were made to remove him from the country, at which point he requested protection under human rights and refugee law.¹⁰³ Had this administrative error not occurred, Ngudjolo could have spent a considerable time in the hotel room if no State had come forward to host him pending his appeal. He would then have been in a situation analogous to the ICTR acquitted in the Tanzania safe house: found not guilty but still subject to limitations on his liberty.¹⁰⁴

¹⁰² The ICC's obligation to release a person immediately after an acquittal is quite strict. Article 81(3)(c) Rome Statute is unequivocal in the obligation it imposes on the ICC to release acquitted persons from its custody immediately. Where the acquittal is rendered at first instance and is subject to appeal, the possibility to maintain detention is subject to the high threshold of 'exceptional circumstances'. When the Prosecution challenged Trial Chamber II's order that Ngudjolo be immediately released following the acquittal at first instance, the Appeals Chamber followed a strict approach and held that the possibility that the accused would abscond was not sufficient to outweigh the 'fundamental right to liberty of the person'. ICC-01/04-02/12-12 *Prosecutor v Mathieu Ngudjolo Chui* (Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect) 20 December 2012 (Appeals Chamber).

¹⁰³ Details on this series of events can be found in ECLI:NL:RVS:2013:2050, Council of State, 12 November 2013, §1.

¹⁰⁴ The author stops short of saying that this would have constituted an actual violation of the right to liberty *per se*. In the case of the ICTR acquitted, it was often the case that they had declined protection in an African country, preferring to be relocated to Europe or North America. They did therefore have

Ultimately, the events in the Ngudjolo case unfolded differently. In practice, the Netherlands took on the role of filling the gap in protection caused by the structural issue, thereby preventing a situation in which Ngudjolo was left unprotected. As soon as an acquitted person is released from ICC custody, they enter the territory of the Netherlands and are under Dutch jurisdiction. As Ngudjolo in fact did, at that point it is possible for them to apply to the Netherlands for protection from removal.

However, relying on the Netherlands to be the solution is far from unproblematic. Firstly, there are likely to be the same implementation problems in this scenario as there are in section 4.2.5 above. The Netherlands may be reluctant to second guess the ICC's assessment as to the acquitted person's safety, may fail to conduct a proper security assessment of its own, and so may remove the person to another State despite the safety concerns. On the ICC's part, the fact that the Netherlands is available to play a gap filling role might lead to buck passing, whereby the Court relies on the Netherlands to carry out a security assessment in line with its own human rights obligations, instead of the ICC assessing the situation itself.

A further implementation problem may arise if the acquitted person makes their application for protection while being transported by the Netherlands at the ICC's request. In such a case, the Dutch authorities may argue that the obligations under the headquarters agreement to carry out the transport trump its refugee law and human rights law obligations.

In addition to these issues, the present stage in ICC proceedings presents an implementation problem that we do not see in the 'treatment in the enforcement State' stage. In that stage, it was proposed that if the individual's application for protection in the Netherlands was found to have merit, the most likely outcome would be that the ICC would designate a different enforcement State where there was no risk to the person's safety. In the present factual stage, the most likely outcome of a successful protection claim is that the individual will remain in the Netherlands. Indeed, had Ngudjolo's claim for protection been granted, he would probably still reside there. For this reason, the Netherlands is reluctant to allow claims for protection to be made at all. When Ngudjolo was acquitted on appeal, the Dutch authorities sought to remove him with great speed, and it was only quick action by his legal representatives that prevented his removal before a further claim could be made. Indeed, his plane made it to the tarmac at Schiphol Airport before being recalled. A cynical interpretation of the Netherlands' haste is that the authorities were attempting to prevent further claims for protection.

the option to leave if they chose (Case No. ICTR- 99-46-A28 *In Re André Ntagerura* (Decision on Motion to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008) 18 November 2008 (Appeals Chamber), §18). In Ngudjolo's case, it would have depended on how facts had developed had he been confined to the hotel room.

Taken together, these structural and implementation problems lead to the conclusion that the shared protection of human rights at this stage of ICC proceedings is far from adequate.

4.3.6. Concluding Observations

The story of acquitted persons at the ICC is still in its infancy. Time will tell whether the problems that plagued all the actors involved in the Ngudjolo case will be repeated following future acquittals. Much will depend on how the different forms of State involvement present at this stage are handled. The absence of an obligation on the part of State Parties to assist the ICC in hosting acquitted persons creates a structural problem resulting in a gap in protection. This gap was filled in Ngudjolo's case thanks to the involvement of the Netherlands. This involvement arises from the fact that, by assisting the ICC in transporting Ngudjolo, and by the fact that the ICC is on Dutch territory, the human rights and refugee law obligations of the Netherlands are engaged. This allowed Ngudjolo to apply for the protection to which he was not entitled in any other state.

However, there are important implementation problems associated with relying on the Netherlands to fill the protection gap. As the ICC goes forward with its work, it will be necessary to search for an alternative solution to the structural problem, preferably before the next acquittal. By addressing the structural protection issues, the implementation problems need not arise. Until this is done, human rights protection for at-risk acquitted persons is woefully inadequate.

4.4. The Position of Persons Released by the ICC: Release on Completion of Sentence

The prospect of a person convicted by the ICC coming to the end of their sentence is no longer the far off notion that it once was. In November 2015 the ICC Appeals Chamber decided to reduce Katanga's sentence, and scheduled his release for January 2016.¹⁰⁵ Most likely Lubanga will be next, in approximately 2018.¹⁰⁶

This stage presents a challenge because, despite being factually similar to other stages included in this thesis (in particular acquittal), in legal terms it is quite different. There is a

¹⁰⁵ 'Germain Katanga's sentence reduced and to be completed on 18 January 2016' (ICC Press Release, 13 November 2015) <<https://www.icc-cpi.int/pages/item.aspx?name=PR1174#>> visited 5 June 2016.

¹⁰⁶ Lubanga was sentenced in 2012 to 14 years, taking into account the time that he had already spent in detention since 2006. In 2015 the Appeals Chamber declined to reduce his sentence: 'ICC Judges decline to reduce Mr Thomas Lubanga Dyilo's sentence' (ICC Press Release, 22 September 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1153>> visited 5 June 2016.

sense that what happens to a convicted person once their sentence is over must be of concern to both the enforcement State, and the ICC; a sense that as the individual was serving an ICC imposed sentence, the Court must retain some responsibility for them once the sentence is complete. This stage of ICC proceedings is addressed in this study for this reason, because it would otherwise be conspicuous by its absence. That being said, legally speaking, it is not a shared stage in the way set out in Chapter 1, and which unites the other factual stages analysed in this study.

This section differs from all the others in the substantive chapters of the thesis in that it does not seek to show how the stage is shared, how human rights are protected, and what problems there might be. Instead, the section will show that, based on the legal framework, most of what happens to a convicted person post release cannot be described as shared. There are two scenarios that will be used to demonstrate this: where the released person is facing unlawful removal at the hands of the enforcement State, and where the released person is facing criminal prosecution by the enforcement State.

Expulsion by the State of Enforcement

The first of these two scenarios has, factually speaking, much in common with the issues facing acquitted persons. Just as it is not always possible for acquitted persons to return home following an international criminal trial, so convicted persons may also face security risks. For example, Hazim Delić asked to remain in a Nordic country upon his release,¹⁰⁷ having served 12 years of his ICTY imposed sentence for his role as deputy commander of the Čelebići camp in Bosnia.¹⁰⁸

Legally speaking however, the picture is rather different. In the case of convicted persons, there is no equivalent to Rule 185 RPE, which only applies when a person is released ‘other than upon completion of sentence’. The only provision that makes reference to release on completion of sentence is Article 107, which states as follows:

Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

¹⁰⁷ IT-96-21-ES D79-072 *Prosecutor v Hazim Delić* (Order Issuing a Public Redacted Version of Decision on Hazim Delić’s Motion for Commutation of Sentence) 15 July 2008 (The President of the International Tribunal), §15.

¹⁰⁸ *Ibid*, §§1-5.

Despite not saying so explicitly, this provision is aimed at the State of enforcement, not at the ICC. From the wording, it seems clear that the actor intended to conduct the transfer (and take into account the wishes of the individual when doing so) is the enforcement State, given that that is where the released person is located. The drafting history shows that the provision was included to provide guidance to *States*,¹⁰⁹ and in fact mostly reflects rules of international law outside of the Rome Statute protection framework that are already binding on States.¹¹⁰ Academic commentary also supports this interpretation. Schabas deems that ‘the process of transfer appears to be purely bilateral, a matter negotiated between the State of enforcement and any State that is willing to accept the person’. This focus on States to the exclusion of the ICC shows that, in this scenario, the ICC is no longer involved in the convicted person’s situation. As such, this stage in proceedings cannot be described as shared.

Subsequent Prosecution in the Enforcement State

Removal to an unsafe place is not the only problem that can arise for a released person. Rarely will a person be charged at an international criminal court with all the crimes they are associated with. This means that when they are released, or about to be released, they may face new criminal charges at the domestic level. Such charges may be brought by the State of enforcement (under a relevant basis for jurisdiction) or by another State to which the individual was transferred post release.

The first situation of this kind concerning the ICC arose in Katanga’s case. With under two months to go until the completion of his sentence, the DRC was designated as Katanga’s enforcement State, and he was duly transferred there. His release date of the 18th January 2016 came and went, but, at the time of writing, he is still detained. The DRC authorities decided to institute new charges against him based on events other than those dealt with in his ICC trial. He and five co-accused are charged with involvement in the deaths of UN peacekeepers in the Ituri district of the DRC.¹¹¹

Provision was made for such situations in Article 108 of the Rome Statute, which requires that the ICC give permission for subsequent criminal prosecutions in the State of enforcement. This suggests a type of sharedness. However, there is no indication of an ICC function, or of the State providing the ICC with assistance, in the way that characterises the other stages of this study. Instead, it is a case of the State not being able to exercise one of its own functions without the ICC’s permission because of how the individual came to be on that State’s territory. There are interesting questions to be

¹⁰⁹ Kreß and Sluiter (*supra* note 21), 1814.

¹¹⁰ Kreß and Sluiter (*supra* note 21), 1814.

¹¹¹ ‘DRC: Congolese warlord Katanga on trial again at ICC over new war-crime charges’ (International Business Times, 4 February 2016) <<http://www.ibtimes.co.uk/drc-congolese-warlord-katanga-trial-again-icc-over-new-war-crime-charges-1541867>> visited 5 June 2016.

considered on when the ICC should deny a State permission, and how this permission relates to the released person's rights, but they are beyond the scope of this study.¹¹²

4.5. Conclusion

The ICC trial may come to an end, but the sharedness of ICC proceedings continues for convicted persons serving a custodial sentence and for acquitted persons who must be released. Interestingly, and in contrast to what may appear, sharedness does not continue once a convicted person has finished their sentence. Or more accurately, sharedness of the type addressed in this study does not continue. It may be that joining the enforcement State in the situation of released individuals are other States, for example the State or nationality or the State seeking the individual's extradition. But the story of sharedness between the ICC and the enforcement State comes to an end.

Not so for the other two stages of ICC proceedings considered in this chapter. The first of these, treatment of convicted individuals in the enforcement State, is an example of where States agree to assist the ICC, and in so doing agree to share in the protection of the human rights potentially compromised by this enforcement, in this case, protection from inhuman treatment. This is connected mainly to conditions of detention, and ensuring that they do not violate the convicted person's rights. The Rome Statute protection framework carefully distributes responsibilities between the ICC and the enforcement State. The latter is obliged to ensure that the convicted person receives certain standards of treatment, and the former is obliged to monitor the enforcement State's performance. However, the sharedness that we see between the ICC and the enforcement State is not the only way in which a State may become involved. For the convicted person to arrive in the enforcement State, they must be transferred there, a task which falls to the host State. In providing this assistance to the ICC, certain obligations of the Netherlands under human rights law become engaged. It may therefore be the case that a convicted person will seek to prevent their removal to a particular enforcement State by applying to the Netherlands for protection. It is this situation that may lead to problems in the implementation of human rights.

Turning to acquitted persons, the ICC's function of releasing acquitted persons from custody and of not transferring them to a place where they would be unsafe certainly needs to be shared, but States are under no obligation to provide the Court with assistance. As the Ngudjolo case has shown, the structural problem caused by the lack of State Party obligations has left the Netherlands playing a safety net role. Just as with convicted persons, the assistance that the Netherlands provides to the ICC with respect to

¹¹² There will doubtless be much academic commentary to come. To see how Article 108 was dealt with in Katanga's case, see ICC-01/04-01/07-3679 *The Prosecutor v Germain Katanga* (Decision Pursuant to Article 108(1) of the Rome Statute) 7 April 2016 (The Presidency).

transferring acquitted persons means that it too becomes involved in the situation, but this involvement too suffers from implementation problems. The result of the problems present at the two shared stages of this Chapter is that human rights protection is inadequate, a situation for which Chapter 7 has suggestions for improvement.