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The shared protection of human rights at the International Criminal Court

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CHAPTER 5: Witnesses Located on the Territory of a State Party

5.1. Introduction

The success of the ICC will rise or fall on its ability to secure testimony from witnesses. Eye witness accounts of what happened, who was there, and who was in control, are crucial to all criminal trials. The ICC Prosecutor's case against Kenyan President Uhuru Kenyatta was plagued by problems concerning witnesses: some refused to testify because of fears for their safety, others admitted to having been bribed to provide false testimony. This led first to an adjournment of the case against the accused,¹ and finally to the termination of the proceedings.² Without witnesses to provide key testimony, the Prosecutor had insufficient evidence to proceed.

A crucial element to getting witnesses before the Court is keeping them safe from the negative repercussions of testifying. Witness protection is therefore an essential function of the ICC. Some types of witness protection can be carried out by the ICC independently. These are principally 'in-courtroom' measures, such as the use of pseudonyms, voice and image distortion, and closed sessions. The ICC has control over the proceedings in the courtroom, and can provide these protective measures by, for example, ordering the parties to deal with information confidentially and by controlling the information that the Court conveys to the public. Through these measures the identity of a witness can be kept secret from the public but not from the other parties to the proceedings.

The level and type of protection required will depend on the witness and his or her particular circumstances. For some witnesses, in-courtroom measures are sufficient; for others, the risk they face is more severe, and additional measures are necessary to

¹ 'Kenyatta case: Trial adjourned until 7 October 2014' (ICC Press Release, 31 March 2014) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr99>> visited 6 June 2016.

² 'Kenyatta case: Trial Chamber V(B) terminates the proceedings' (ICC Press Release, 13 March 2015) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1099.aspx> visited 6 June 2016.

guarantee their safety. Such cases will require ‘out-of-courtroom’ measures, designed to protect witnesses before they arrive at the ICC and once they leave it. Out-of-courtroom measures can involve protecting witnesses in their homes, moving them to a different location, or even relocating them to a different country. The risk that these measures seek to address cannot be managed exclusively from the premises of the Court, but rather must be implemented on the territory of the State where the witness is located. As such, the effective protection of witnesses can only be achieved with the assistance of States. Where the ICC seeks to protect witnesses in their home State, the Rome Statute protection framework contains obligations on the home State to provide the necessary assistance. Where the risk to the witness is such that they cannot be protected in their home State, but instead must be relocated elsewhere, the Rome Statute protection framework is not as helpful. In this situation there is a need for assistance, but no obligation on States Parties to provide it.

The following two chapters will set out how witnesses are protected through out-of-courtroom measures. Chapter 5 will examine the protection of witness on the territory of States Parties, and Chapter 6 will examine the protection of witnesses that are located at the seat of the Court. The set-up of these chapters differs from the previous two. For suspects and accused, there is a set timeline, with one stage following on from the other: a suspect is investigated, then arrested, and tried; if convicted they will serve a sentence and be released, if acquitted they will be immediately released. The timeline of a witness’ involvement with the ICC is much more fluid. A need for protection can arise at different times, and can differ depending on the circumstances. The location of a witness will determine which actor’s obligations are engaged. For this reason, the cases are set out not chronologically, but geographically.

By its nature, witness protection is confidential and lacking in transparency. While the legal basis of the obligations can be traced to provisions in the applicable law, detail on their exact nature, and what precisely an actor is required to do, can be lacking. To an extent one can understand this need for secrecy. The more information in the public domain about how witness protection works at the ICC, the easier it will be for the location of protected witnesses to be discovered. For example, if the ICC made public which particular countries have agreed to host relocated witnesses, then an ill-intentioned search for those witnesses could be narrowed down. This would leave witnesses vulnerable. However, the lack of transparency can leave those conducting research into this area to operate at times in the realm of guess work. For this reason, discussion of the obligations of the ICC and States concerning witness protection has required some speculation.

The first situation considered below is the out-of-courtroom protection of witnesses who remain in their home State. As this is the first discussion of ICC and State obligations regarding witnesses, it will include a description of the general framework of obligations,

which in fact apply to all situations involving witnesses. The provisions set out in that section will therefore be relevant for the rest of both Chapters 5 and 6. The second situation in this chapter concerns witnesses who cannot remain in their home State, but who must be relocated abroad. As ever, the obligations of the actors are discussed with a view to understanding how human rights are protected in a given factual situation. This is the basis for understanding the problems in protection that sharedness can give rise to.

5.2. Protecting Witnesses in the Situation State

5.2.1. Introduction

Where witnesses can be protected while remaining in their own country, and possibly their own home, this is to be preferred over more disruptive measures.³ The interference caused to a witness' life by their giving evidence in an ICC trial should be kept to a minimum. What is more, if a witness can be protected within their own country, this is much more cost efficient, an ever pressing concern for the ICC. Indeed, most witnesses are protected while remaining in their home country. While not always the case, for many witnesses their home country is the country where the alleged crimes took place and which is the subject of the ICC investigation. This State is referred to as the 'situation State'.

When a witness remains in the situation State, a concern of great importance will be their safety from harm, both physical and psychological. Threats to a witness' safety can stem from a number of sources. For example, one of the rival factions in the situation State may dislike the fact that the witness has testified in an ICC trial and may retaliate. Alternatively, prior to a witness giving testimony, interested parties may seek to prevent them from doing so, in order to weaken the prosecution or defence case. Such actions are generally accompanied by a threat of use of force, either against the witness or the witness' family. The right to life and to protection from torture and inhuman and degrading treatment are the rights that best address these risks, and as such will be the focus of this section.

As already mentioned, the situation State is obliged by the Rome Statute to assist the Court with witness protection. There are a number of out-of-courtroom measures that the ICC and the situation State can employ. Examples include safe houses, increased police patrols, close protection for government officials, enhanced surveillance of witnesses' homes, and investigations by national authorities. In the Central African Republic (CAR), the Office of the Prosecutor (OTP) and the Victims and Witnesses Unit (VWU) jointly set up a form of neighbourhood watch programme, consisting of local civilian guards

³ 'Summary Report on the Seminar on Protection of Victims and Witnesses Appearing Before the International Criminal Court' (24 November 2010) (2010 Summary Report), §17.

patrolling areas where there is a high density of witnesses.⁴ More extensive measures have seen the ICC request a State to protect an entire zone, camp, or passage way.⁵

While each of these measures is important and relevant, not all can be covered in this section. This is principally due to the availability of information in the public domain, which is greater for some measures than for others. For witnesses that are at liberty, two protective measures will be discussed: the Initial Response System, and internal resettlement. For witnesses that are detained, for example because they have been convicted of a criminal offence by a domestic court, protective measures inside a prison will be discussed. After setting out the general, overarching obligations of each actor to protect the rights of witnesses, the section will discuss the obligations with respect to these three types of measures. This is followed by an inquiry into the issues that sharedness may create for human rights protection.

5.2.2. Obligations of the ICC

The central provision in the Rome Statute protection framework concerning the ICC's obligation to protect witnesses is Article 68(1) Rome Statute. This imposes an overarching obligation on the Court to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. Article 68(1) is reinforced by Rule 86 RPE, which stipulates that all organs of the Court must take account of witnesses' needs in accordance with Article 68 when performing their functions.

Beyond this principal obligation in Article 68(1), the Rome Statute protection framework contains a great many provisions on witness protection. Some are addressed to the Court as a whole, while some are addressed to particular organs, such as Chambers, the Registry, the VWU, and the Prosecution.⁶ This fragmentation of protection obligations across the different parts of the Court has led to some conflict between the different organs, and a great deal of confusion over which organ has responsibility for what and when.⁷ Addressing these issues is not part of this thesis, as the research question concerns sharedness between different international actors, and not between organs of the same actor. The ICC will be treated as a single actor to which all of the obligations in the Rome Statute protection framework attach, regardless of the organ they pertain to.

⁴ Markus Eikel, 'External Support and Internal Coordination - The ICC and the Protection of Witnesses' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015), 1126.

⁵ 'Summary Report on the Round Table on the Protection of Victims and Witnesses Appearing Before the International Criminal Court' (29-30 January 2009), 2.

⁶ Markus Eikel, 'Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice' (2012) 23 *Criminal Law Forum* 97, 101-111.

⁷ Eikel (*supra* note 6), 118.

A question that is central to the ICC's obligations, and which affects all of the Court's obligations discussed in both Chapters 5 and 6, concerns the types of risk that the ICC is obliged to protect against under Article 68(1). Is the ICC obliged to protect a witness from all risks to their safety, or only those linked to their involvement with the Court? If a witness is threatened by the supporters of an ICC accused that he or she testified against, this is clearly a situation in which the ICC should be involved. But where a witness is threatened because a neighbour alleges that they stole money, is the ICC obliged to intervene?

This particular issue arose in the case of the detained Congolese witnesses, which is dealt with in detail in Chapter 6. In that case, Trial Chamber II interpreted the ICC's obligation under Article 68(1) as only applying to risks associated with a witness' involvement with the ICC. The Chamber distinguished between three types of risk: 1) risk incurred on account of cooperation with the Court, 2) risk arising from the broader human rights situation in the situation State, and 3) risk of treatment that would amount to persecution such as would found an asylum claim under the Refugee Convention. It was acknowledged by the Chamber that while the general human rights situation in a country would influence a witness' risk assessment, the three types of risk should not be conflated. The Chamber held that the ICC's witness protection role is restricted to the first type of risk; protective measures need only be provided against risks incurred because of cooperation with the Court, and not against the risk of human rights violations generally.⁸

On a purely textual reading, Article 68(1) does not favour one way or the other. However, support can be found for the Trial Chamber's approach when the Rome Statute protection framework is looked at more broadly: Rules 17 and 87 of the RPE do link protective measures with 'risk on account of testimony'. From other ICC decisions and academic commentary, one can collect more arguments in favour of a limited view of Article 68(1). The ICC has made clear that it is not a human rights court, and is not a court of last resort on human rights issues.⁹ It has been argued that the ICC would be departing from its core mandate if it took a broad approach to the scope of witness protection, and would be directly or indirectly interfering with domestic proceedings.¹⁰

⁸ 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), §§59-62.

⁹ ICC-01/04-01/07-3405-tENG *The Prosecutor v Germain Katanga* (Decision on the application for the interim release of detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350) 1 October 2013 (Trial Chamber II), §26.

¹⁰ Joris van Wijk and Marjolein Cupido, 'Testifying Behind Bars - Detained ICC Witnesses and Human Rights Protection' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015), 1100.

There are however, also arguments in favour of a broad interpretation of the risks covered by Article 68(1). For one, there is an element of double standards that emerges if the Court follows the Trial Chamber's decision. Before a witness testifies, it is almost certainly the case that all necessary measures will be taken to secure their safety and so ensure that they can give their evidence at trial, even if the risk is unrelated to their testimony. But once their witness function is complete, the types of risk they are to be protected from are reduced.

In pragmatic terms, the distinction that the Trial Chamber draws between the three types of risk is not feasible. Indeed, in a decision later that same month, the same Trial Chamber stated that: 'in practice it will be impossible to determine whether any attempt to harm the witnesses will be linked to their testimony'.¹¹ Trying to draw the proposed distinction also raises thorny issues of causation. The ICC VWU has stated, by way of example, that if the threat to a witness' safety is linked to domestic violence that is unconnected to the person's status as a witness, the VWU would not take action.¹² But how can the reasons behind domestic violence be determined?¹³ Perhaps acting as a witness caused the victim to be away from home for an extended period, and it was this that provoked the violence. Another example is the risk that individuals face from crime. Being an ICC witness could be one of the reasons that an individual was made a target for armed robbery, but another reason was their wealth. The author argues that to assume that the reasons for actions can be separated into three neat categories is mistaken and detrimental to human rights protection.

It is this last point which leads the author to conclude that a narrow reading of Article 68(1) would not accord with the Article 21(3) test. A determination of whether the risk facing a witness is due to their association with the ICC will, in many cases, be arbitrary. Especially where decisions need to be made quickly, the necessary information to make the distinction cannot be gathered and examined properly. For this reason, for Article 68(1) to be interpreted and applied in accordance with human rights, the net of protection must be cast broadly. It should cover all risks that are not patently unconnected to the individual's testimony, and the threshold for unconnectedness should be set high.

¹¹ ICC-01/04-01/07-3033 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Decision on the security situation of three detained witnesses in relation to their testimony before the Court (art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with article 93(1)(j) of the Statute) 22 June 2011 (Trial Chamber II), §38

¹² Summary Report on Round Table (*supra* note 5), 2.

¹³ This is a particularly important question in the domestic violence context, given the culture of silence and stigma that discourages victims from disclosing their experience.

Having set out this general basis for the ICC's obligations, we can now turn to the more particular obligations that arise with respect to protecting witnesses through the Initial Response System, internal resettlement, and protective measures in prison.

The Initial Response System (IRS)

The IRS is essentially a 24h emergency hotline that can be used by individuals located within a defined geographical area to seek assistance should their security be threatened. A call to this hotline activates a network of local partners who can then extract the individual to a safe location. In other words, if a witness is afraid of being imminently targeted, or is in fact targeted, they can call the hotline and help will be sent to remove them from the dangerous situation. Once they are safe, a risk assessment is carried out by the ICC VWU to see what further protective measures might be needed.¹⁴ Such programmes have been maintained in the DRC, CAR, Kenya, and Cote d'Ivoire situations.¹⁵ An IRS was also set up in Mali, although so far there has been little need for it,¹⁶ and the one in Uganda has now been discontinued because of the decreased threat level.¹⁷

The only reference to the IRS in the Rome Statute protection framework is in Regulation 93 of the Regulations of the Registry, which refers to 'Local Protection Measures':

1. The Registry shall implement measures for the protection of witnesses, victims who appear before the Court and persons at risk on the territory of the State of their residence.
2. The Registry shall, where appropriate, be responsible for establishing and maintaining an *immediate response system* as a local security measure for witnesses, victims who appear before the Court and persons at risk. The system shall operate round-the-clock for the purposes of extricating and bringing to safety those witnesses, victims who appear before the Court and persons at risk who fall within its purview.

¹⁴ Human Rights Watch, 'Courting History: The Landmark International Criminal Court's First Years' (July 2008), 152-3; Eikel (*supra* 6), 120; Silvana Arbia, 'The International Criminal Court: witness and victim protection and support, legal aid and family visits' (2010) 36 3 Commonwealth Law Bulletin 519, 522.

¹⁵ 'Report on activities and programme performance of the International Criminal Court for the year 2013' Assembly of State Parties (New York, 8-17 December 2014) Thirteenth session ICC-ASP/13/19 (2013 Report on Activities), §171.

¹⁶ 'Report on activities and programme performance of the International Criminal Court for the year 2014' Assembly of State Parties (The Hague, 18-26 November 2015) Fourteenth session ICC-ASP/14/8 (2014 Report on Activities), §261.

¹⁷ 'Report of the Court on the Kampala Field Office: activities, challenges and review of staffing levels; and on memoranda of understanding with situation countries' Assembly of State Parties (New York, 6-10 December 2010 30 July 2010) Ninth session ICC-ASP/9/11 (Report of Kampala Field Office), §8.

(Over time the name of the system has evolved from 'immediate' to 'initial'.¹⁸ No explicit justification is given, but perhaps it is reflective of the fact that the IRS is the first point of contact for a witness at risk.)

The wording of both paragraphs of Regulation 93 is compulsory. The ICC 'shall' put in place local protection measures. This obliges the ICC to establish and maintain IRSs in situation States where needed. Beyond the brief explanation of what an IRS involves, Regulation 93 provides little detail on how the system is supposed to operate in practice. For further elaboration on the obligations of the ICC, it is necessary to look at information from other sources, mainly from ICC reports and academic commentators. From these sources it can be discerned that the ICC's obligation to maintain an IRS requires the training of local partners, regular contact with these partners and the local authorities, and frequent testing of the responsiveness of the IRS in question.¹⁹ In terms of staffing an IRS, this appears to be done in collaboration with the situation State. While details on staffing are hazy, it appears that the ICC provides the management personnel, and the situation State provides the individuals who respond to the calls.²⁰ Paying for these staff, as well as financing the IRS in general, is also part of the ICC's obligation. This can be seen from the fact that the IRS is included in the ICC's budget.²¹

Once a witness activates the IRS and is extracted to a safe place, the VWU must then carry out a new risk assessment to determine what protection measures are necessary going forward.²² If the risk assessment reveals that the witness is at such a degree of risk that they must be transferred to another location, then the ICC may internally resettle them or relocate them abroad.

Internal Resettlement

If a witness cannot remain in their own home and community, the next least disruptive measure is for them to move to another region within the situation State. This is referred to as 'internal resettlement' (as opposed to 'relocation' which will be used to refer to when

¹⁸ By 2013, this change had been made (§171 of 2013 Report on Activities, *supra* note 15) and was maintained in the list of abbreviations for the proposed budget for 2016 ('Proposed Programme Budget for 2016 of the International Criminal Court' Assembly of State Parties (The Hague, 18-26 November 2015) Fourteenth session ICC-ASP/14/10 (2016 Proposed Budget)).

¹⁹ Report of Kampala Field Office (*supra* note 17), §10.

²⁰ I extrapolate from the fact that HRW Courting History report says that the people doing the extraction are local partners and that those running the IRS are ICC staff. Also that the identities of witnesses in the IRS are withheld from these local partners, supposedly by the ICC staff members. (HRW Courting History (*supra* note 14), 152-3).

²¹ 'Proposed Programme Budget for 2008 of the International Criminal Court' Assembly of State Parties (New York, 30 November to 14 December 2007) Sixth session ICC-ASP/6/8, §356 (2008 Proposed Budget); see also Eikel (*supra* note 6), 121.

²² Eikel (*supra* note 6), 120 and HRW Courting history (*supra* note 14), 152-3.

a witness is moved abroad). There are two types of internal resettlement: resettlement through the ICCPP and assisted move. The degree of ICC assistance differs between the two, and the choice between them depends on the level of risk that the witness faces.

The International Criminal Court Protection Programme (ICCPP) is designed to offer protection to the ICC witnesses who are most at risk. Reports are contradictory on the number of individuals who are protected within the programme – from 66 to over 300.²³ Through the ICCPP, witnesses can be internally resettled or relocated to a third State. The obligation on the ICC to establish and maintain the ICCPP is set out in Regulation 96(1) of the Regulations of the Registry: "The Registry shall take all necessary measures to maintain a protection programme for witnesses, victims who appear before the Court and persons at risk." Once again, the language of this provision is compulsory, thereby establishing an obligation on the Court.

Information on the ICCPP has been compiled from ICC sources, reports on the ICC, and academic commentators. Below is the available detail on the factors for inclusion in the ICCPP and some of the tasks conducted by the ICC in this context. The precise procedures and measures connected with the programme are confidential.²⁴

Regulation 96(3) contains two sets of factors to be taken into account when deciding whether to include witnesses in the ICCPP. For the first set the provision refers back to the factors listed in Article 68(1): age, gender, health, and the nature of the crime. The second set of factors are listed in Regulation 96(3) itself, and are: a) the involvement of the person before the Court; b) whether the person and/or their close relatives are endangered because of their involvement with the Court; and c) whether the person agrees to enter the programme. In addition, a decision of Trial Chamber I tells us that there must be a "high likelihood that the witness will be harmed or killed unless action is taken."²⁵

The assessment process for inclusion in the ICCPP can take up to 3 months, during which time interim measures may be used, such as temporary resettlement or relocation.²⁶ The need for a witness' continued involvement in the programme is reassessed every 12

²³ The figure of 66 is from the 2016 Proposed Budget (*supra* note 18), §191; the figure of over 300 is from International Bar Association, 'Witnesses before the International Criminal Court: An international Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses' (July 2013)(IBA report), 35.

²⁴ Regulation 96(7) Regulations of Registry.

²⁵ ICC-01/04-01/06-1311-Anx2 *The Prosecutor v Thomas Lubanga Dyilo* (Annex 2, Decision on Disclosure Issues, Responsibilities for Protective Measures and Other Procedural Matters) 24 April 2008 (Trial Chamber I), §43.

²⁶ HRW Courting History (*supra* note 14), 154.

months,²⁷ and can be concluded when the protection is no longer warranted or the person breaches the terms of the confidentiality agreement.²⁸ This agreement requires the witness to keep details of the ICCPP secret, and avoid communication with family and friends except through VWU staff.²⁹ Once the witness and their family are resettled, the VWU will monitor them for as long as necessary. This may be on a long term basis, depending on the security situation and threat level. At the ad hoc tribunals, provision for the long term exceeds the closure of the tribunals, as the residual mechanisms will take over witness protection functions.³⁰

Running the ICCPP is resource intensive for the ICC. Participants are subject to psychological assessments,³¹ and medical, psycho-social, and educational support.³² The aim of this support is for the participants to become self-sufficient in their new location, which the Court can assist with by finding witnesses jobs and accommodation.³³ The intensive nature of internal resettlement through the ICCPP, in particular the costs involved, means that alternatives will be used where the risk is not as acute. The alternative to resettlement through the ICCPP is resettlement under ‘assisted move’.

According to Regulation 95 of the Regulations of the Registry, assisted move may be used where ‘a person at risk cannot be managed in the geographical area where the person is staying and said person has initiated a move to another area’. Where this move is necessary for that person's security, the Registry may provide ‘limited financial or logistical support’ for the move, but the move shall remain the decision and responsibility of that person. The more limited involvement of the ICC stems from the lower level of risk faced by the witness. Namely, the witness will not have been exposed to an imminent, life-threatening incident.³⁴ As with resettlement through the ICCPP, the ICC provides assistance with a view to helping the witness settle in their new location and eventually become self-sufficient.

Unlike the wording of Regulation 96 concerning the ICCPP, the wording of Regulation 95 on assisted move gives the ICC discretion on whether to provide the assistance: "the Registry *may* assist". This is the only element of the IRS and internal resettlement obligations that is problematic for the Article 21(3) test. It is proposed that, while the ICC

²⁷ Regulation 96(6) Regulations of Registry.

²⁸ Regulation 96*bis* Regulations of Registry.

²⁹ HRW Courting History (*supra* note 14), 154.

³⁰ 2010 Summary Report (*supra* note 3), §6-9.

³¹ 2013 Report on Activities (*supra* note 15), §172.

³² 'Report on activities and programme performance of the International Criminal Court for the year 2012' Assembly of State Parties (The Hague, 20-28 November 2013) Twelfth session ICC-ASP/12/9 (2012 Report on Activities), §158.

³³ HRW Courting History (*supra* note 14), 154.

³⁴ Eikel (*supra* note 4), 1126.

is not obliged to provide assistance to a witness in moving to another part of the situation State, the Court is obliged to consider and decide upon the witness' application. Regulation 95 therefore does not grant unfettered discretion.

Protective Measures in Detention

Detained witnesses can make a very valuable contribution to an ICC trial, especially if they are insider witnesses whose imprisonment is linked to the crimes for which the ICC accused is being tried. However, as they are detained, most of the usual protective measures such as an IRS or internal resettlement are unavailable. The fact of detention places the witnesses entirely within the control of the State, making the ICC's role necessarily more limited.

There is no specific provision in the Rome Statute protection framework that deals with protecting detained witnesses in the situation State, but the practice of the ICC confirms the existence of an obligation to this effect arising under Article 68(1) of the Statute. In the detained Congolese witnesses case, the ICC determined that its protection obligations under this provision were fulfilled after it secured from the DRC a number of assurances as to how the detained witnesses would be protected while in prison:

- a) the witnesses would be detained in a secure prison facility and protected from the aggression of other inmates,
- b) the guards who would be guarding the witnesses were trained according to international standards and selected in consultation between the VWU and the DRC authorities
- c) the VWU will maintain regular and direct contact with the guards in order to anticipate any change in the security situation of the witnesses
- d) the VWU will regularly visit the detained witnesses to assess their security situation
- e) the VWU will monitor any legal proceedings against the detained witnesses.³⁵

These measures bring together elements of ICC monitoring of detention conditions, and participation in the protection regime. According to the ICC's interpretation of Article 68(1), in the case in question these protective measures are sufficient to fulfil its obligation to protect witnesses. Whether this interpretation satisfies the Article 21(3) test depends on the corollary obligations of the situation State.

5.2.3. Obligations of the Situation State

Assisting the ICC with witness protection is not optional for the situation State. Part 9 of the Rome Statute contains a number of provisions that oblige States to assist the Court in protecting witnesses. As with the section above, this section will first set out the

³⁵ ICC-01/04-01/07 *The Prosecutor v Katanga and Ngudjolo* (Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350) 24 August 2011 (ICC, Trial Chamber II), §13.

obligations of a general nature, and will then discuss the IRS and internal resettlement measures, and measures to protect detained witnesses.

Article 86 Rome Statute contains an overarching obligation: ‘States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’. Article 87 provides that the ICC ‘shall have the authority to make requests to States Parties for cooperation’. If a State fails to comply with a request for cooperation, the ICC may make a finding of non-compliance under Article 87(7) and refer the matter to the ASP.³⁶ Taken together, these provisions make clear that a request for cooperation issued by the ICC creates a binding obligation on the State Party whose assistance is requested.

In relation to witnesses, Part 9 contains some more specific provisions. Articles 93(1)(j) and 87(4) deal with cooperation requests in witness protection matters. They are broadly formulated, and so provide the flexibility necessary for the ICC to adapt to changing circumstances and tailor solutions to a given situation:

Article 93(1)(j): States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: The protection of victims and witnesses

Article 87(4): In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families.

The Rome Statute protection framework does not contain provisions equivalent to Regulations 93, 95, and 96 of the Regulations of the Registry that are aimed at States rather than at the ICC. The obligations of the situation State within this framework, as regards an IRS and internal resettlement, derive from cooperation requests made by the ICC under Part 9 of the Statute. It is possible that alongside cooperation requests there are agreements between the ICC and the State, setting out the respective tasks of each actor.³⁷ Where this is the case, these agreements could also be a source of obligations, although no agreements are publicly available.

³⁶ Or where the situation was referred to the ICC by the UN Security Council, the non-compliance is referred to the Security Council also.

³⁷ In a decision during the *Lubanga* case, Pre-Trial Chamber I ordered the Registrar to ‘treat as a matter of urgency the negotiation of cooperation agreements and *ad hoc* arrangements on matters related to the protection of witnesses’, ICC-01/04-01/06-447 *The Prosecutor v Thomas Lubanga Dyilo* (Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses) 19 September 2006 (Pre-Trial Chamber I), 5.

A concrete discussion of the obligations of the situation State suffers from a lack of available information. Based on different sources, the author describes in limited detail below the role played by the State with respect to the IRS and internal resettlement. It is not suggested that every action carried by a State is done pursuant to an obligation; that is not supported by the sources. It is possible that the situation State is cooperating with the Court on a more informal voluntary basis. However, if it considered it necessary, the ICC could use the cooperation provisions in Part 9 to create obligations for the situation State.

In terms of the IRS, it seems that the situation State's principal role is to cooperate with the ICC in arranging local partners to carry out the extractions. Who exactly make up this staff appears to differ between situation countries. In Uganda, the police force was trained to assist with the IRS.³⁸ In other places, the staff are made up of local personnel from the security sector, or individuals with previous security sector experience.³⁹ Much will depend on the realities in the situation State, such as whether State infrastructures like a police force have survived the conflict and unrest.

As to the situation State's role with regards to internal resettlement, these will likely differ in the long and short term. In the short term, the role is probably to support the ICC in its efforts to internally resettle witnesses or to support the assisted moves. This could be by, for example, providing information on the availability of property for safe houses or new homes, or even in providing accommodation to the witnesses. In the long term, the situation State could cooperate with the Court in setting up a national witness programme and take over many (or all) of the witness protection tasks from the ICC.⁴⁰

In addition to the IRS and internal resettlement, there is a plethora of other ways that the situation State can assist and work with the ICC in protecting witnesses. For example, the State could provide information that forms the basis for the witness risk assessments. This was common at the ICTR, where Rwandan intelligence reports formed the basis for internal relocation decisions on the part of the ICTR witnesses unit.⁴¹ This could be purely voluntary, or it could be an obligation on the State if a cooperation request was issued to that effect.

For measures protecting detained witnesses inside prison facilities, the question is whether the situation State is obliged to honour the assurances that it makes to the ICC, of the type set out above. It is not entirely clear whether the assurances are binding undertakings or non-binding diplomatic assurances. In the detained Congolese witnesses case, the ICC did not go as far as to say that the assurances created legal obligations for

³⁸ Report of Kampala Field Office (*supra* note 17), §10.

³⁹ Chris Mahony, 'The Justice Sector Afterthought: Witness Protection in Africa' Institute for Security Studies (2010) ISBN 978-1-920422-07-3, 41.

⁴⁰ Lubanga (*supra* note 37), 5.

⁴¹ Mahony (*supra* note 39), 73.

the DRC, but they were said to carry ‘great weight’.⁴² It was deemed essential that the assurances were made within the general framework for cooperation under Part 9 of the Rome Statute, which is based on mutual trust and good faith.⁴³ They were said to ‘commit’ the DRC to both the ICC and the ASP.⁴⁴ It is here that the Article 21(3) test becomes important. If the assurances are not binding, the author proposes that this would not be an interpretation of Article 68(1) that is consistent with human rights, as it leaves the witnesses vulnerable to the whims of the State. Instead, if Part 9 can be used by the ICC to create obligations for States, it is proposed that a State can create obligations for itself under the same Part. As such, the assurances given by the DRC should be seen as creating legal obligations.

Beyond the obligations that a situation State might have under the Rome Statute protection framework, the State will have obligations to protect both detained and non-detained witnesses that derive from sources outside this framework, principally under international human rights law. As stated by the UN High Commissioner for Human Rights: ‘the protection of the life, physical and psychological integrity, privacy and reputation of those who agree to testify before courts is more generally required under relevant ICCPR provisions protecting the right to life, prohibiting torture and inhuman or degrading treatment, etc.’⁴⁵ These obligations will be engaged by the fact that the witness is on the State's territory and subject to its jurisdiction; they arise independently of the individual's status as an ICC witness. The right to be protected from inhuman treatment is found in a number of human rights provisions, such as Article 7 ICCPR, Article 3 ECHR, and Article 5 ACHPR.

5.2.4. Problems in Human Rights Protection

Implementation problems are the primary issue affecting the protection of ICC witnesses’ rights in the situation State. These are intimately connected to the shared nature of this protection, and can be distinguished into three types: 1) dependence on unstable and/or uncooperative States; 2) lack of transparency and clarity as to the precise nature of obligations, and 3) competition between a State’s obligations within and beyond the Rome Statute protection framework.

Situation States are often rendered unstable by years of conflict and political turmoil, meaning that they can be unsafe for both witnesses and ICC protection teams. A 2013 report recounted how the IRS in the CAR had to be scaled down because of a

⁴² *Katanga and Ngudjolo*, 22 June 2011 (*supra* note 11), §40.

⁴³ *Katanga and Ngudjolo*, 22 June 2011 (*supra* note 11), §40.

⁴⁴ *Katanga and Ngudjolo*, 22 June 2011 (*supra* note 11), §40.

⁴⁵ 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General; Right to Truth' Human Rights Council (21 August 2009) Twelfth session A/HRC/12/19, §34.

deterioration in the security situation following the conflict and the change in government,⁴⁶ although fortunately it appears to still be operating.⁴⁷ In the *Lubanga* case, the Pre-Trial Chamber noted that a deterioration in the security situation in some parts of the DRC meant that the range of measures available to protect witnesses was limited.⁴⁸ The ICC depends on the situation State to have control over its territory, as this control is important to creating an environment in which witnesses can be properly protected.

Aside from general political instability, ICC witness protection structures are vulnerable to obstacles created by uncooperative governments. This is likely to be an increasing problem given the growing unpopularity of the ICC among African countries, and Kenya is a pertinent example. In the words of the ICC Prosecutor:

The Office's independent and impartial investigations and prosecutions in the Kenya situation have been methodically undermined by a relentless campaign that has targeted individuals who are perceived to be Prosecution witnesses, with threats or offers of bribes, to dissuade them from testifying or persuade witnesses to recant their prior testimony.⁴⁹

While the Prosecutor did not go so far as to explicitly accuse the Kenyan government of witness interference, the high level of organisation and financing of the campaign certainly points in that direction.⁵⁰ That being said, violence has taken place on both sides, with defence witnesses also being targeted.⁵¹ Even where a government is cooperative, the next election might bring a change in attitude towards the ICC, which is problematic given the long term nature of witness protection. In these circumstances, the fact that the ICC must rely on the cooperation and assistance of the situation State in order to implement its own protection obligations is a major weakness in its ability to protect witnesses.

⁴⁶ 2013 Report on Activities (*supra* note 15), §171.

⁴⁷ It is mentioned in the 2014 Report on Activities as still being operational (*supra* note 16), §274.

⁴⁸ *Lubanga*, 19 September 2006 (*supra* note 37), 4.

⁴⁹ ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda regarding the unsealing of Arrest Warrants in the Kenya situation (ICC Press Release, 10 September 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>> visited 6 June 2016. See also ICC-01/09-01/11-446 *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Prosecution Motion Regarding the Scope of Witness Preparation) 13 August 2012 (Trial Chamber V), §17.

⁵⁰ ICC-01/09-01/15-1-Red *The Prosecutor v Paul Gicheru and Philip Kipkoech Bett* (Decision on the “Prosecution’s Application under Article 58(1) of the Rome Statute”) 10 March 2015 (Pre-Trial Chamber II); See also: ‘Reporters, witnesses silenced ‘one by one’ with ICC link deadly in Kenya’ (AlJazeera America, 24 August 2015) <<http://america.aljazeera.com/articles/2015/8/24/kenyas-dark-path-to-justice.html>> visited 13 June 2016.

⁵¹ ‘Kenyan ‘ICC defence witness’ in Ruto’s trial killed’ (BBC News, 6 January 2015) <<http://www.bbc.com/news/world-africa-30703876>> visited 13 June 2016. The ICC Prosecutor has vehemently denied any ICC involvement, ‘Statement of the Office of the Prosecutor regarding the reported abduction and murder of Mr. Meshak Yebei’ (ICC Press Release, 9 January 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-09-01-2015>> visited 25 September 2016.

One could describe these problems as political, which is in many ways true. If the ICC cannot implement its obligations because of instability or lack of cooperation, this leaves witnesses vulnerable. Possibly it could mean that a trial cannot proceed. Where cooperation is the issue, the Rome Statute allows the ICC to make a finding of non-compliance, with the option of referring the matter to the ASP (or where the situation was referred by the UN Security Council, to the Security Council).⁵² In addition, the ICC could bring criminal charges of witness intimidation and interference under Article 70 Rome Statute, as it has done in the Bemba case⁵³ and the Kenya situation.⁵⁴ Where instability is the issue, there is no quick fix.

The second type of implementation problem arising in witness protection is linked to the ambiguity surrounding the actors' obligations. Generally speaking, the purpose of discussing obligations in this thesis is to provide clarity on the question of which actor must do what. However, for the protection of witnesses in the situation State, there is still much that remains unknown. The confidential nature of witness protection measures, while understandable and necessary, renders it difficult to know how the generally-worded provisions of the Rome Statute protection framework operate in practice.

It is possible that this ambiguity exists for outside observers only, and that between the ICC and the situation State the respective roles, tasks, and obligations have been clearly arranged (confidentially). However, in the interests of covering all potential issues with human rights protection, it is necessary to contemplate situations where this is not the case. If the actors are not clear on their role in witness protection, obligations may not be properly implemented, placing the rights of the witness at risk. The Rome Statute protection framework provides a tool to help prevent this potential problem. Rule 16(4) RPE allows the Registrar to make agreements for the 'provision of support services on the territory of a State' for witnesses at risk. Such an agreement could explicitly set out the actors' respective obligations and tasks. A model agreement of this type could be produced by the ICC and modified to fit the particular circumstances of the situation State and the witness protection needs. Pre-Trial Chamber I has promoted the use of such agreements,⁵⁵ acknowledging their value in protecting witnesses.

⁵² Article 87(7) Rome Statute.

⁵³ 'Bemba, Kilolo et al. trial opens at the International Criminal Court' (ICC Press Release, 29 September 2015) < <https://www.icc-cpi.int/Pages/item.aspx?name=pr1155> > visited 7 June 2016; ICC-01/05-01/13-1-Red2-tENG *The Prosecutor v Jean-Pierre Bemba, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Warrant of arrest for Jean-Pierre Bemba, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido) 20 November 2013 (Pre-Trial Chamber II).

⁵⁴ 'Situation in Kenya: ICC Judges unseal an arrest warrant against Paul Gicheru and Philip Kipkoerch Bett' (ICC Press Release, 10 September 2015) < <https://www.icc-cpi.int/Pages/item.aspx?name=pr1149> > visited 7 June 2016; *Gicheru and Bett*, 10 March 2015 (*supra* note 50).

⁵⁵ Lubanga, 19 September 2006 (*supra* note 37), 5.

The third problem concerns the interaction between the situation State's obligations within the Rome Statute protection framework, and beyond it. Under the witness protection regime within the framework, the situation State must comply with cooperation requests from the ICC. As far as the author has been able to ascertain, with respect to an IRS and internal resettlement, the role of the situation State is a supportive one. For example, it might provide the staff for an IRS and accommodation for internal resettlement. The ICC takes the lead in these measures, and the State provides assistance. Beyond the Rome Statute protection framework, human rights law creates positive obligations for States that may require a more pro-active approach to protection. In other words, under human rights law it is the State that must take the lead in protection measures.

This distinction becomes important in cases where the risk to a witness cannot be clearly understood as either connected to their involvement with the ICC or not. The current approach of the ICC is to protect only against those risks linked with the witness' association with the Court. This is problematic in terms of the adequacy of human rights protection for the reasons set out above, namely that the three-way distinction is unrealistic and difficult to implement. The author's proposal of interpreting 68(1) broadly goes some way to remedying this issue, but problems remain. Each may assume that the risk facing the witnesses places them within the realm of the other actor, leaving the witness vulnerable to not being protected at all. This is a serious concern, and an important way in which the shared nature of witness protection is detrimental.

5.2.5. Concluding Observations

Witnesses remaining in their homes, or if that is not possible, at least within their home country, is the ICC's preferred form of witness protection. It minimises disruption to witnesses' lives and reduces costs for the ICC. Making this happen is an important ICC function, and one that it shares with the situation State. Establishing and maintaining witness protection measures such as the Initial Response System and internal resettlement is required of the ICC by the Rome Statute protection framework. Through cooperation requests issued by the Court, States are required to assist the ICC with those protection measures. Together, these form the obligations by which the two actors protect ICC witnesses on the territory of situation State.

The highly confidential nature of witness protection at the ICC has meant that this section must inevitably be left somewhat incomplete. Particularly with respect to the situation State, there is some information with regard to IRS and internal resettlement, but little is available about the specific nature of obligations beyond the general provisions in Part 9 of the Statute. Consequently, when identifying possible problems associated with the sharedness of the situation, some speculation was required. The potential deficiencies in the protection of witnesses from inhuman treatment can be linked to implementation

problems. There is no absence of legal provision, but rather circumstances that could prevent their full implementation. This leaves witnesses vulnerable.

Not all witnesses can be protected within the situation State even if they are moved to a different part of the country, such is the danger they face because of their testimony. This leads up to the more dramatic way of protecting ICC witnesses: relocating them to another country entirely.

5.3. Protecting a Witness Through Relocation to a Third State

5.3.1. Introduction

Where the threat to a witness is so severe that it cannot be managed within the situation State, even by internal resettlement, the remaining option is to move the witness abroad. Reports abounded in relation to the Kenya situation, with stories of witnesses being moved to Europe and given lifelong protection, even completely new identities.⁵⁶ This individual type of relocation is the most commonly practiced, but relocation can also take place on a large collective scale. As the ICC Prosecutor prepared to announce the first arrest warrants in the Darfur situation, the Court simultaneously evacuated 150 refugees from eastern Chad to a more secure location at a new camp.⁵⁷

Relocation abroad is relatively unusual compared to the use of protective measures within the situation State. In 2016 the ICC foresees that only 23 witnesses will be located abroad.⁵⁸ This is a reflection of the fact that relocation is a “serious measure” of last resort, which can have a “dramatic impact” on the life of the witness.⁵⁹ Removing the witness from their normal surroundings and family ties can have a significant

⁵⁶ ‘80 Kenyan ICC Witnesses in Safe Houses Abroad’ (Mwakilishi, 23 January 2013) <<http://www.mwakilishi.com/content/articles/2013/01/23/80-kenyan-icc-witnesses-in-safe-houses-abroad.html>> visited 13 June 2016; ‘Ocampo Witnesses Now Sent to Europe’ (Property Kenya, 10 March 2011) <<http://www.propertykenya.com/news/1439775-ocampo-witnesses-now-sent-to-europe>> visited 13 June 2016.

⁵⁷ There is no indication of where this new camp was. “Article 86” in William Schabas, *The International Criminal Court: a commentary on the Rome Statute* (Oxford University Press 2010), 825. For more on this, see ‘Report on programme performance of the International Criminal Court for the year 2007, Addendum’ Assembly of States Parties (1 August 2008) 14-22 November 2008, The Hague ICC-ASP/7/8/Add.1, §9 and 2008 Proposed Budget (*supra* note 21), §42.

⁵⁸ 2016 Proposed Budget (*supra* note 18), 191.

⁵⁹ ICC-01/04-01/07-776 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Judgment on the appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I) 26 November 2008 (The Appeals Chamber), §§66 and 67.

psychological effect.⁶⁰ To minimise this, the ICC strives to relocate witnesses to a region with similar cultural, linguistic, and geographic characteristics.⁶¹ Relocation is also undesirable because it may actually highlight an individual's involvement with the ICC, making it harder for them to return home at a later point. For these reasons, relocation must involve careful and long term planning for the safety and well-being of the witness.⁶²

In order to protect a witness through relocation abroad, it is necessary that the ICC has the cooperation and assistance of States willing to host these witnesses and allow them to make new lives on their territory. These States will be termed 'relocation States'. To carry out the function of protecting witnesses through relocation, the ICC needs the assistance of States. However, the type of sharedness we see in this situation is different from when the witness is protected within the situation State. If the witness needs to be relocated abroad, it will be shown below that there is no corresponding obligation on States to assist the Court by hosting the witness.

Just as for a witness who remains in their home country, when a witness is relocated abroad the primary concern threats will be threats to their physical safety. The right to life and to protection from inhuman treatment create obligations for addressing such threats. The discussion below will also include the prohibition on removal aspect of protection from inhuman treatment and the right to life. This will be relevant once the witness has already been relocated, as it prevents the relocation State from returning them to a country where they would be at risk. The discussion of obligations in the following section is done in relation to these two rights and covers the ICC and the relocation State in turn.

Detained witness, while often crucial to ICC trials, are not considered in this section. Unless they were reaching the end of their sentences, it is very unlikely that the situation State, which is also the detaining State, would be willing to release a witness from custody and allow them to be relocated to a third State to live in freedom. The limited situation in which this might happen is discussed in Chapter 6.

5.3.2. Obligations of the ICC

The obligations of the ICC can be discussed under two categories: those that relate to protecting a witness from inhuman treatment before they arrive in the relocation State, and those that protect the witness after. As to before, the obligations involve including a

⁶⁰ The VWU discourages relocation because of the psychological harm: 2010 Summary Report (*supra* note 3), §17.

⁶¹ 2010 Summary Report (*supra* note 3), §26.

⁶² *Katanga*, 26 November 2008 (*supra* note 59), §§66 and 67.

witness in the ICCPP and finding a relocation State to which they can be transferred. Regarding after arrival, the obligations are aimed at ensuring that once the witness is settled in the relocation State, they are not subjected to inhuman treatment.

Protecting a witness from inhuman treatment through relocation abroad is done within the ICCPP. The source of the ICC's obligations is the same as that discussed in relation to the ICCPP and internal resettlement: Article 68(1) imposes an overarching duty to protect witnesses, and Regulation 96(1) requires that the ICC set up a witness protection programme. Article 68(1) states that the ICC must take 'all appropriate measures' to protect witnesses, and what these measures are will depend on the circumstances. In the context of relocating witnesses abroad, an essential measure that the ICC must carry out is to seek the cooperation of States Parties and request that they act as relocation States. When searching for a relocation State, it goes without saying that this must be a State which does not itself present a threat to the witness' safety.

The way in which the ICC goes about requesting assistance from States is through diplomatic channels. This can be done in an *ad hoc* way, without any formal arrangements between the two actors, but the Rome Statute protection framework also provides for a more structured way through relocation agreements. The ICC has the power, pursuant to Rule 16(4) RPE, to "negotiate agreements on relocation and provision of support services on the territory of a State to witnesses". This provision is not phrased as an obligation, but rather leaves the choice on whether to conclude such an agreement to the discretion of the Registry. Relocation agreements are framework agreements between the ICC and a potential relocation State that indicate a willingness on the part of a State to host witnesses, and which streamline the relocation process. For instance, instead of the ICC dealing with a range of government agencies, a relocation agreement allocates the task to just one. This significantly speeds up the process of identifying a relocation State.⁶³ Importantly however, relocation agreements as currently formulated do not require States to accept a particular witness in any given instance (more on this below).

Once the ICC secures a State's cooperation, the witness can be transferred to that State. It is then possible to discuss the obligations of the ICC to protect witnesses after their relocation. The ICC's obligation under Article 68(1) to protect a witness from inhuman treatment, and to protect other rights affected by their involvement with the Court, does not end when the witness arrives in the relocation State. Rather, the ICC has stated that the VWU must monitor relocated witnesses for as long as necessary.⁶⁴ If this monitoring

⁶³ IBA Report (*supra* note 23), 36.

⁶⁴ 'the situation of relocated witnesses can be monitored by the Court as long as is needed'. This too is the case for the witnesses of the non-permanent tribunals. Witnesses participating in the ICTR protection programme will remain under the supervision of the tribunal until the protection ends with the consent of the witness and awareness of the chamber. At the SCSL there is a residual monitoring

revealed threats to the witness that were not being addressed by the relocation State, the author proposes that included in the term ‘all appropriate measures’ in Article 68(1) is an obligation on the Court to contact the relocation State and attempt to prevent any violations of a witness’ rights. The intervention by the ICC could be done, for instance, through mediation or appropriate forms of pressure, including issuing a cooperation request.⁶⁵

There is one type of measure, aimed at protecting a witness once they arrive in the relocation State, that the ICC can take pre-emptively using the relocation agreements. In addition to streamlining the relocation process, relocation agreements regulate the conditions of stay of a protected person and the respective obligations of the Court and the State.⁶⁶ In this sense they play an important function in providing detail to the otherwise very general obligations in the Rome Statute. When drafting relocation agreements, the Court could seek to prevent certain types of problems. For example, it is proposed that one of the ‘appropriate measures’ referred to in Article 68(1) is the inclusion of protection from removal provisions in relocation agreements. This is designed to preclude the relocation State from removing the witness and their family to a country where they would be at risk, such as the country from which they were relocated in the first place.

One way for the ICC to do this would be to include a provision in the relocation agreement explicitly stating that the witness cannot be removed to a situation of risk. However, the drafting and signing of these agreements requires a cooperative and conducive atmosphere, which may be hampered by such a provision if the relocation State resents the implication it entails. There is a subtler option, inspired by the agreements on enforcement of sentences. These agreements between ICC and States set out the terms under which a State enforces a sentence handed down by the Court. They always contain a provision on the transfer of the convicted person on completion of sentence. If the enforcement State does not permit a released person to remain on its territory, as is often the case, it may transfer them elsewhere. Such a transfer must be done ‘in accordance with the law of’ the enforcement State. It has been argued elsewhere in this thesis that such phrases in the Rome Statute protection framework should be interpreted as including both the State’s domestic law obligations, and its international law obligations. These would include the prohibition on removal, given its customary law nature. When concluding relocation agreements, the ICC could push for the inclusion of a

mechanism that will continue to undertake security assessments at periodic interviews beyond the closure of the Court. 2010 Summary Report, (*supra* note 3), §§6-9.

⁶⁵ When discussing the obligations of the relocation State, it will be argued that the ICC cannot use a cooperation request issued under Part 9 of the Rome Statute to compel a State to act as a relocation State. However, once the State has agreed to this role, the ICC could issue a cooperation request if the actions of the State were placing a witness at risk.

⁶⁶ ECLI:NL:RBDHA:2013:BZ7942, District Court of The Hague, 8 March 2013, §3.

similar provision, stating that the witness cannot be removed except in accordance with the law of the relocation State.

Part of this section has concerned actions that the ICC is *obliged* to take: it is obliged to seek the cooperation of potential relocation States, it is obliged to monitor witnesses after their transfer to those States and step in where necessary. However, this section has also discussed actions that the ICC *may* take: it may conclude relocation agreements, and it may include in these agreements provisions seeking to pre-empt certain problems. This set of actions are, according to the Rome Statute protection framework, discretionary. However, they play an important role in protecting witnesses. The existence of agreements helps to relocate a witness quickly, limiting their exposure to risk in the situation State. Tailoring the agreements in the way suggested would help prevent exposure to risk once the relocation has happened. For this reason, the author proposes that these measures should not be interpreted as entirely discretionary. If Article 86 and Rule 16(4) are to be interpreted and applied consistently with human rights law, as the Article 21(3) test requires, there must be a degree of compulsion to these actions. It would not be appropriate to make the conclusion of agreements compulsory, as the ICC is dependent on States to agree to them voluntarily. However, the provisions should be interpreted as obliging the ICC to use its best efforts to conclude relocation agreements, and its best effort to ensure that, in terms of substance, they provide as much protection to witnesses as possible.

5.3.3. Obligations of the Relocation State

The obligations of the relocation State must also be distinguished into two stages, but in this case between those applicable before the State agrees to be a relocation State, and those applicable once the witness has arrived. This distinction is largely similar to the one made in the context of enforcement States in Chapter 4: States are not under an obligation to be an enforcement State, but once they agree to be and accept the convicted person, a number of obligations become applicable. The same is true here: States are not obliged to be relocation States, but where they agree to be so, it comes with obligations.

Obligations Before Agreeing to be a Relocation State

There is an important difference between situation States and relocation States. For situation States, the witness is already present on the territory, and is often a national or resident. For relocation States, the witness is outside the territory and has yet to enter it. As was the case for the stages of interim release and acquitted persons, there is nothing in the Rome Statute protection framework that deals explicitly with whether States are obliged to act as relocation States for at-risk witnesses. Potential sources for such an obligation are found in Part 9 of the Rome Statute, namely Article 86, which creates a

general obligation for State Parties to cooperate with the ICC, and Article 93(1)(j), which requires States to cooperate with requests relating to the protection of witnesses.

These provisions could be interpreted in such a way as to allow the ICC to issue a binding cooperation request to a State, thereby obliging it to accept a witness on its territory. In support of such an interpretation is the wording of the provisions themselves. They empower the ICC to ask for cooperation from States 'in relation to investigations or prosecutions'.⁶⁷ Relocating witnesses is an intrinsic part of investigations and prosecutions in so far as neither of these would be possible without witnesses, and so witnesses must be adequately protected.

Opposing this interpretation of Article 86 and Article 93(1)(j) are a number of arguments which are, in the author's opinion, convincing. The first argument is based on practice. There has been no cooperation request issued by the ICC in its 14 years of operation obliging a State to host a relocated witness. Where ICC reports refer to witness relocation, it is clear that it is considered to be a voluntary measure.⁶⁸ This is supported by the practice of some States Parties, whose national legislation implementing the Rome Statute, including Part 9, explicitly leaves the decision on whether to admit a witness to the national authorities.⁶⁹ At the ad hoc tribunals, relocation was also done on voluntary basis. In the context of relocating an acquitted person, the ICTR considered that a State's obligation to cooperate on such matters extended to consulting with the Tribunal only; the State was not required to grant residence or extend special treatment to the acquitted individual.⁷⁰ This was the same when it came to relocating witnesses.⁷¹ The ICTR's

⁶⁷ Article 93(1) Rome Statute.

⁶⁸ 'Report of the Court on cooperation' Assembly of State Parties (The Hague, 18-26 November 2015) Fourteenth session ICC-ASP/14/27, §41.

⁶⁹ In Canada, the Minister of Citizenship and Immigration must give consent for the admittance of an ICC witness into the country. In the UK, admittance of a witness depends on a court decision. See Valerie Oosterveld, Mike Perry and John McManus, 'Cooperation of States with the International Criminal Court, The Twenty-Fifth Memorial Issue: The Eve of the International Criminal Court: Preparations and Commentary - How the World Will Relate to the Court' (2001-2002) 25 Fordham International Law Journal 767, 814-816.

⁷⁰ 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

⁷¹ For an interesting case on this, see the case law surrounding refugee witnesses at the ICTR. A number of defence witnesses were living unlawfully in Kenya. The defence counsel argued that if Kenya deported them back to Rwanda, they would disappear and so not be available to testify. To remedy this, the defence asked the ICTR to order Kenya to grant the witnesses refugee status. The ICTR held that it did not have the power to compel a State to grant such status, but it did ask the Registrar to seek the cooperation of Kenya in ensuring that the witnesses would be available for trial. See Mohamed Othman, 'The 'Protection' of Refugee Witnesses by the International Criminal Tribunal for Rwanda' (2002) 14 International Journal of Refugee Law 495.

approach reflects the idea that being free to control who enters territory is an important element of State sovereignty.

The second argument looks to the drafting history. The whole of Part 9 was subject to great debate during the drafting of the Rome Statute, with some States not convinced that cooperation should be an obligation at all. The entire State cooperation regime was carefully negotiated in order to take into account State concerns about sovereignty.⁷² In light of this history of delicate compromise, it would not be appropriate to interpret the Statute so as to create onerous obligations on States that are not explicitly set out in the Rome Statute protection framework. Thirdly and finally, academic opinion favours the view that, in the long term, an approach based on requests and not orders will provide a more sustainable way of protecting witnesses through relocation.⁷³

A corollary of the proposed interpretation is that States are under no obligation to conclude relocation agreements with the Court. Indeed, in the practice so far, relocation agreements have been drafted in such a way that even if a State does conclude one with the Court, it does not create an obligation to accept a witness in any given instance. Instead, relocation will only take place if the State has accepted a proposal from the ICC regarding a specific witness.⁷⁴

The proposed interpretation of Articles 86 and 93(1)(j) means that States are under no obligation to act as a relocation State for an at-risk witness, and the ICC may not use those provisions to create obligations to that effect. The remaining question is whether this interpretation satisfies the Article 21(3) test; in the opinion of the author, it does. Article 21(3) has its limits in what it can require from the interpretation and application of the Rome Statute protection framework. One such limit is that it cannot require the creation of entirely new obligations for the States Parties, which is what a broad reading of Articles 86 and 93(1)(j) would entail.

Obligations After Agreeing to be a Relocation State

Once a State volunteers to host a relocated witness, it is then possible to speak of legal obligations for the State. The obligations relevant for this discussion are those that require the State to keep the witness safe from inhuman treatment, including by not expelling the witness to another State where they would be at risk.

A discussion of the obligations arising under the Rome Statute protection framework begins with Part 9 of the Rome Statute. Once the State has agreed to act as a relocation

⁷² Schabas (*supra* note 57), 973.

⁷³ Othman (*supra* note 71), 502-3.

⁷⁴ IBA report (*supra* note 23), 36.

State and has accepted a witness, Articles 86 and 93(1)(j) can properly be used to issue cooperation requests in relation to those witnesses. For example, the ICC may request that a State refrain from certain behaviour with respect to a witness, or provide increased protection to a witness. Because of the compulsory nature of these requests, the relocation State is obliged to comply. In addition to this, a relocation State may have obligations arising from a relocation agreement if one was signed, although given their confidential nature, this is hard to know for sure. It is possible that these agreements do not contain new obligations, but rather add detail to existing obligations or, as the author suggests, refer to other obligations the State has beyond the Rome Statute protection framework.

Under human rights law and refugee law, the relocation State is bound to safeguard witnesses' rights. Provisions including Article 7 ICCPR, Article 3 ECHR, and Article 5 ACHPR (depending on the region) all provide for the right to life and against inhuman treatment. Intrinsic to this right is protection from exposure to a risk of inhuman treatment in another State, and obligation codified in Article 3 CAT. Where relocation agreements make reference to the law of the relocation State, the line between obligations within and beyond the Rome Statute protection framework will become somewhat blurred: in effect, the State's obligations beyond the ICC protection framework will be incorporated within it. However, even if the relocation agreements make no such reference, the human rights law obligations of the relocation State will apply to witnesses. Being on the territory of the State, the witnesses would undeniably be within the relocation State's jurisdiction.

5.3.4. Problems in Human Rights Protection

The discussion of the obligations of the ICC and the relocation State highlights a significant structural problem in the ICCPP relocation regime. There is a function that needs to be shared - witness protection through relocation - but the actor with the obligation to carry it out lacks the capacity to do so, and the actor with the capacity to carry it out lacks the obligation to do so.

The lack of obligations on the part of State Parties to host at-risk witnesses makes the ICC entirely dependent on the voluntary assistance of States. This can create a gap in protection where a witness faces the possibility that no State will be willing to host them. Given the level of threat against them, without a relocation State witnesses will be exposed to harm. Even if the witness is withdrawn from ICC proceedings, this will not always neutralise the risk the witness faces. For instance, it may be known in the witness' community that they have been in intensive contact with ICC staff, even if they have not yet testified. In the words of one commentator: 'Out of all the protective tools available to the Court, the ICCPP serves as a prime example to show how the limitations of external support significantly weaken the Court's protection capabilities'.⁷⁵

⁷⁵ Eikel (*supra* note 4), 1123.

The ICC's current approach to dealing with this structural problem utilises four related measures. Each is designed to encourage States Parties to provide voluntary assistance in relocating witnesses, albeit in different ways. They will be discussed in turn, and the author will comment on their advantages and disadvantages.

Relocation agreements have been mentioned already, and are at the forefront of the ICC's efforts to encourage States to volunteer as relocation States. The Court regularly calls on States to conclude relocation agreements if they have not already done so.⁷⁶ Increasing the number of agreements is an ongoing aim for the ICC, with one of its strategic goals for 2013-2017 being to 'encourage States to conclude further voluntary agreements with the court on...relocation of witnesses'.⁷⁷

Concluding relocation agreements and using these as the basis for relocating witnesses is an alternative to relocating witnesses on an *ad hoc* basis. The clearest advantage of this is that, in signing such an agreement, the State demonstrates its willingness to act as a relocation State. This means that when the ICC has a witness in need of relocation, there is a pool of States which it can contact, and it can rely on the expedited procedures provided for in these agreements to relocate the witness quickly. This can be key, especially when there is an urgent need for protection. If there is an existing group of willing States, this reduces the chance that no relocation State can be found for a witness.

There are further advantages to using relocation agreements over *ad hoc* arrangements. First, in terms of the quality of life of the witness and their family, relying on *ad hoc* arrangements can leave them in a state of constant anxiety over their uncertain situation. This in itself is problematic from the perspective of protecting them from inhuman treatment. Second, in terms of financial costs, *ad hoc* solutions entail increased management costs for the Court. For example, witnesses who are in an uncertain situation will not be able to integrate into their new society and find a job, their health care costs will be higher as they will not be covered by domestic insurance policies, and children will need to be educated in private international schools until a permanent situation is found.⁷⁸ Because witnesses relocated pursuant to a relocation agreement are in a more certain situation, these additional costs will be less, meaning that the costs of relocating witnesses pursuant to an agreement is 45-75% lower than without an agreement.⁷⁹

Despite these clear advantages, signing a relocation agreement and indicating to the ICC a willingness to accept at-risk witnesses appears to be a significant commitment for States. One of the disadvantages of relocation agreements is therefore the persistent

⁷⁶ 2012 Report on Activities (*supra* note 32), §172; 2013 Report on Activities (*supra* note 15), §188; 2015 Report on Activities (*supra* note 68), §42.

⁷⁷ 2016 Proposed Budget (*supra* note 18), 193.

⁷⁸ 2015 Report on Activities (*supra* note 68), §41.

⁷⁹ 2015 Report on Activities (*supra* note 68), §41.

reluctance of States to conclude them. As of 2015, only 15 are in existence, and no new agreements had been signed since January 2012.⁸⁰ In 2009, 210 *notes verbales* were sent to States Parties requesting cooperation on relocation, and the ICC only received 31 responses, the majority of which did not result in agreements being signed.⁸¹ As the activities of the ICC continue to expand, this will grow increasingly problematic. A report presented by the Court to the Assembly of State Parties highlighted an urgent need for new agreements to be concluded.⁸² In particular there need to be more agreements with African States, so that witnesses can be relocated to States with similar cultural and linguistic characteristics, to aid integration.⁸³ A greater number of agreements would also better protect witnesses, as there will be more places they could potentially be, making them harder to find.⁸⁴

There are further limits on how well relocation agreements can fill the structural gap in protection created by the sharedness of witness relocation. As currently drafted, relocation agreements are only framework agreements, couched in general terms; they do not impose an obligation on States to accept a witness in any given instance. This means that there are some States that have signed relocation agreements but have never accepted a witness.⁸⁵ Once again relocation agreements are comparable to enforcement agreements, which require the separate consent of a State to the hosting of each convicted person. There is a justified reluctance to write these agreements in such a way as to create an obligation on States to accept an individual, as it might well make States even more reluctant to sign them.⁸⁶

While the signing of relocation agreements is certainly positive, their lack of specific obligations means that they are of less assistance in protecting the types of witness who are hardest to relocate in the first place. States will generally not raise an objection to receiving a witness who was a peaceful farmer or school teacher. They are less likely to welcome witnesses who are themselves accused of participation in criminal activity, especially in war crimes or crimes against humanity allegedly committed in the same

⁸⁰ 2015 Report on Activities (*supra* note 68), §42. However, recent reports indicate the Ireland could be about to conclude a relocation agreement with the Court, ‘Ireland could become home to witnesses under an international protection programme’ (thejournal.ie, 1 June 2016) <<http://www.thejournal.ie/relocation-witness-protection-ireland-2798226-Jun2016/>> visited 8 June 2016.

⁸¹ Eikel (*supra* note 4), 1125.

⁸² 2015 Report on Activities (*supra* note 68), §42.

⁸³ ‘With regard to the country to be chosen to relocate the witnesses it was stated that protected persons from African countries should preferably be relocated within the African continent and in a region where cultural, linguistic and geographic particularities are close to the person’s region of origin, thus avoiding any abrupt uprooting’ 2010 Summary Report (*supra* note 3), §36.

⁸⁴ IBA report (*supra* note 23), 36.

⁸⁵ IBA report (*supra* note 23), 36.

⁸⁶ IBA report (*supra* note 23), 36.

conflict as the accused. Consider a former child soldier or a low to mid ranking soldier. And yet it is these types of insider witnesses who are often key in ICC prosecutions, and who also have the right to protection from inhuman treatment. In relation to individuals such as these, Western States have been accused of employing a double standard.⁸⁷ In at least one case, there is the suggestion that a potential suspect was given training in a European military academy, and yet protection was refused to prosecution witnesses.

A further disadvantage of relying on relocation agreements to overcome structural problems in witness protection is that they are ill equipped to deal with emergency situations. While relocating witnesses pursuant to a relocation agreement is faster than without, the process can still take months. At the beginning of 2011, the ICC was faced with an urgent and unforeseen situation, and requested States Parties to temporarily accept witnesses on their territory. Nine requests of this type were made, none of which received a positive reply. In February 2016, the ICC Prosecutor accidentally released the names of a number of protected witnesses in the *Gbagbo and Blé Goudé* trial.⁸⁸ This mistake could have placed these witnesses in imminent danger, and possibly it was necessary to relocate them (information is naturally very limited). These types of events, although hopefully rare, illustrate that relocation might be necessary on very short notice, and the current system struggles to cope. It is essential that the ICC be able to urgently evacuate a witness to a safe country when a life threatening situation arises, and where it cannot, there is a serious risk to that witness.⁸⁹

The ICC acknowledges the shortcomings of relying on relocation agreements alone, and so continues to look for further solutions to be taken alongside these agreements.⁹⁰ States may be unwilling to conclude a relocation agreement because hosting a witness is, either politically or economically, too onerous. To enable States to provide voluntary assistance short of acting as a relocation State, the ICC has devised three alternative ways in which States can assist the ICC with its witness protection functions. The first is to contribute to the 'Special Fund'; the second is to sponsor a particular witness; and the third is to act as a platform State.

The Special Fund was set up to make hosting relocated witnesses more attractive. In the classic relocation model, the relocation State financially contributes to the relocation. It is not clear what the particular distribution between the ICC and the relocation State is, in terms of financing housing, schooling, healthcare etc., but it is clear that the State must

⁸⁷ Mahony (*supra* note 39), 54.

⁸⁸ 'Gbagbo Trial: ICC 'mistakenly' discloses names of witnesses' (Africa News, 6 February 2016) <<http://www.africanews.com/2016/02/06/gbagbo-trial-icc-mistakenly-discloses-names-of-witnesses/>> visited 13 June 2016.

⁸⁹ 'Report of the Bureau on cooperation' Assembly of States Parties (The Hague, 20-28 November 2013) Twelfth session ICC-ASP/12/36, §§45-6.

⁹⁰ 2015 Report on Activities (*supra* note 68), §41.

bear at least part of the burden. While this works for some States, particularly developed States, it may not be as viable for developing countries. If the ICC wants to encourage States with similar linguistic, cultural, and geographic attributes to volunteer as relocation States, then the question of financing is important. To that end, the Special Fund distinguishes between relocation States and donor States. A State that lacks resources but is willing to host a witness can do so, while a State that is unable to host a witness but can afford to do so can contribute to the Fund. Money is then sent to the relocation State to provide for the witness' welfare and sustainability,⁹¹ allowing that State to host the witness in a cost neutral arrangement.⁹² By September 2011 the Fund was fully operational and stood at €866,000, suggesting that the idea is popular among States.

The second type of voluntary measure for addressing structural gaps in protection also involves the Special Fund: specific sponsorship.⁹³ A State that is contributing to the Special Fund can choose to direct the money to a specific State or witness. For example, when the United Kingdom gave £200,000 to the Fund in 2010, the money was specially earmarked for relocating persons at risk in the Kenya situation.⁹⁴ This flexibility is aimed at promoting contributions to the fund.

The advantage of the Special Fund is clear: it enables States that are willing to host witnesses to do so without the financial burden, and it allows States to provide assistance without actually having to host. However, the idea of the Special Fund has not been without criticism. When the idea was developed, representatives from Belgium opposed the idea on the basis that relocation States would be discouraged from taking over responsibility for the witness. The fear was that relocation States would not be committed to effectively integrating the person into their society because there is no financial consequence of not doing so. As an alternative, the Belgian representatives suggested that Special Fund relocations be restricted to pre-established time frames, after which the relocation State would take over responsibility for the costs.⁹⁵ It does not seem from the information available that this approach was adopted, nor is there information on whether Belgium's fears have been substantiated in practice.

The third type of voluntary measure available to States is to agree to act as a 'platform State'. In this capacity a State would issue a witness with an emergency visa and host them on a temporary basis. This would be appropriate in situations where a witness needs

⁹¹ 2010 Summary Report (*supra* note 3), §32.

⁹² Arbia (*supra* note 14), 523; Emma Irving, 'Protecting Witnesses at the International Criminal Court from Refoulement' (2014) 12 Journal of International Criminal Justice 1141, 1150.

⁹³ Arbia (*supra* note 14), 523; 2010 Summary Report (*supra* note 3), §32.

⁹⁴ 'ICC welcomes UK contribution for relocating at-risk persons in Kenya' (ICC Weekly Update, 30 November 2010) <<https://www.icc-cpi.int/NR/rdonlyres/8A612C2C-4377-42C0-9A7C-8C35021072B0/282720/Ed57Eng.pdf>> visited 20 June 2014.

⁹⁵ 2010 Summary Report (*supra* note 3), §34.

relocating urgently and it is essential to extract them from their current situation immediately. Having bought some time, a permanent solution could then be found for the witness. While this approach would provide flexibility in difficult situations, it does have an important drawback about which States have expressed concern: the possibility of the witness applying for protection/asylum in the platform State.⁹⁶

When the VWU of the ICC set out the three types of voluntary measures for the relocation of witnesses, it specified relocation agreements, contributions to the Special Fund, and directing funds to a particular State or witness. This section has so far discussed those three options, plus the possibility of acting as a platform State. These types of voluntary measure bring more actors into the shared situation, so that three actors share in the protection of the witnesses' rights: the ICC, the relocation State, and the State contributing money to the Special Fund or acting as a platform State. While these solutions are certainly movement in the right direction, and are to be applauded, they only go so far in remedying the inadequacy of human rights protection caused by the structural gap in protection. Having different types of measure available to accommodate the different forms of assistance that States are able to provide, helps to bridge the protection gap. Ultimately however, the essentially voluntary nature of these measures that this bridge can only ever be a fragile solution.

5.3.5. Concluding Observations

Relocating a witness to another State is a drastic measure that the ICC does not consider lightly. The degree of disruption it can cause to a witness' life should be avoided if possible. Where relocation is the only option, the ICC faces challenges. If a witness is to be relocated, they must be relocated onto the territory of State, meaning that the ICC is dependent on State assistance. Unlike when a witness is protected in the situation State, the type of sharedness we see in witness relocation is such that States are under no obligation to assist the Court. This creates a structural problem: if no State volunteers to host a witness, a gap in protection will exist and the witness' rights will be at risk.

There are a number of ways in which the structural problems of witness relocation have been addressed by the Court. Relocation agreements are the most prominent way in which the ICC has sought to encourage voluntary assistance from States, but they are not very numerous and offer an incomplete solution. To complement relocation agreements, measures such as the Special Fund have been put in place. While these are all moves in the right direction, their voluntary nature means that any amelioration of the inadequacy of human rights protection is insufficient.

⁹⁶ IBA report (*supra* note 23), 36.

5.4. Conclusion

Confidentiality is inherent in all witness protection schemes. The less information there is available, the easier it is to protect witnesses through anonymity. The general witness protection framework, and the obligations it creates for the ICC and for States, can be ascertained from the Rome Statute protection framework. However, because of the confidentiality, it has proven difficult to acquire a detailed understanding of how particular tasks are distributed between the actors. For this reason, answering the question of how human rights are protected in these situations has been difficult. That being said, from the available sources it has been possible to construct a general picture of witness protection at the ICC, both in the situation State and in third States.

The first section of this chapter concerned the protection of witnesses on the territory of the situation State. In this situation, the ICC has assistance in protecting witnesses thanks to the fact that the Rome Statute protection framework contains obligations on States to cooperate with the Court. In implementing the witnesses' rights of to life and to protection from inhuman treatment, the shared nature of the protection can give rise to some issues. These are linked to the line that must be drawn between witnesses under the protection of the ICC, and those under the protection of the situation State.

The second section of this chapter examined the protection of witnesses for whom the risk is severe enough to require their relocation abroad. As with the stages of interim release and acquittal, this situation is one in which the ICC has a function that it cannot carry out alone, but States are not obliged to provide assistance. The structural problem that arises as a result of this is the same as in those other factual stages, namely that a gap in protection can leave witnesses who need to be relocated with no relocation State. That being said, there is a difference between witnesses on the one hand, and accused given interim release or acquitted on the other. The importance of witness protection for the actual conduct of the trials, and the fact that it involves more individuals than the few accused affected by interim release/acquittal, means that it has been given more attention. This is evidenced by the success of the ICC to date in relocating witnesses. While the relocation regime still faces many difficulties, the ICC keeps the issue on the agenda of State's through its repeated calls for assistance.

The general picture of witness protection painted in this Chapter reveals an assortment of implementation and structural problems that plague witness protection and persist despite ICC attempts at a solution. These problems mean that the research question must be answered in the negative for these two stages: human rights are not adequately protected.