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

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# CHAPTER 6: Witnesses Located at the Seat of the Court

## 6.1. Introduction

From the moment that individuals are identified as potential witnesses, the process of assessing their risk and protection needs begins. This makes sense, since the risk to a witness may arise from the moment they are seen to be talking to ICC staff, whether they represent prosecution or the defence. By the time a witness arrives at the seat of the ICC to give their testimony, measures for their protection are normally already arranged. As such, the need to protect witnesses at the seat of the Court is unusual, amounting to a handful of people, possibly as low as six.<sup>1</sup> Despite its rarity, the legal issues it gives rise to are many and complex.

If protection at the seat of the ICC were simply a matter of witnesses asking for more protective measures before being sent back home or to their relocation State, it would be relatively straightforward. The complexity arises when witnesses turn away from ICC protection and claim protection from the ICC's host State instead. There are many reasons why a witness might do this. It is possible that they no longer trust that the ICC can protect them. This distrust might arise if, for example, the ICC is having trouble finding a relocation State. As explored in the previous chapter, this is a real possibility. Perhaps witnesses are attracted to the higher standard of living in the Netherlands, and see a protection claim while at the ICC as a shortcut to a European residence permit.<sup>2</sup> Or it may be that the terms of the relocation are not as attractive, as they would have less rights and benefits than with a different protected status.<sup>3</sup> Any of these explanations, or a

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<sup>1</sup> Precise numbers are hard to ascertain. Information is available on four detained witnesses and two non-detained witness, because they were subject to judicial decisions. However, there may be more non-detained witnesses whose cases have remained confidential.

<sup>2</sup> Joris van Wijk, 'When International Criminal Justice Collides with Principles of International Protection: Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted, and Convicted Being Released' (2013) 26 *Leiden Journal of International Law* 173, 184.

<sup>3</sup> The difference in procedural and substantive rights under the ICCPP relocation scheme and under refugee law is explored in Emma Irving, 'Protecting Witnesses at the International Criminal Court from Refoulement' (2014b) 12 *Journal of International Criminal Justice* 1141, 1147.

combination, could lead a witness to apply for protection in the Netherlands rather than rely on the ICC protection system.

As this chapter deals with the instances in which witnesses turn away from the protection regime of the ICC, the type of State involvement we see is different than that addressed in Chapter 5. That chapter concerned sharedness involving the ICC and either the situation State or a relocation State, depending on the protective measure in question. The situation State becomes involved because it is obliged to, and the relocation State because it volunteers to. The situations that are the focus of this Chapter involve principally the ICC and the host State, with other State Parties playing a background role. The Netherlands becomes involved in these stages of ICC proceedings because it is obliged to assist the ICC in its capacity as host State, by transporting witnesses and by having witnesses on its territory. This assistance is a gateway for further involvement.

The sections below draw a distinction between witnesses that are detained at the seat of the Court, and witnesses that are not detained. If a witness is detained in a State, for example because they have been convicted of a crime by a domestic court and are serving a custodial sentence, they remain detained while present at the Court. This is a relatively small group, but important enough to merit separate consideration in the Rome Statute protection framework. As the issues raised by detained witnesses at the seat of the ICC are especially complex – one commentator has gone so far as to refer to them as forming a legal Gordian knot<sup>4</sup> - two sections of this chapter are dedicated to them. The last section deals with non-detained witnesses.

As in the previous chapters, not all of the human rights concerns of the witnesses can be addressed. Instead, the discussion will focus on a selection of rights. Unlike the other Chapters in this study, for the protection of witnesses at the seat of the Court there is a relatively large number of judicial decisions. The rights at the centre of those decisions have guided the selection of rights for consideration in this chapter.

To examine the range of issues, this chapter is divided into three sections. The first two sections concern detained witnesses, and consider the same group from the perspective of different rights: life, protection from inhuman treatment, and fair trial in Section 6.2, and the right to liberty in Section 6.3. The last section concerns non-detained witnesses, and deals only with the right to life and protection from inhuman treatment. As in the previous chapters, after the obligations to protect the rights have been discussed, the analysis turns to the issues in human rights protection that are connected to sharedness.

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<sup>4</sup> Van Wijk (*supra* note 2), 176.

## 6.2. Protecting Detained Witnesses at the Seat of the Court: Right to Life, Protection from Inhuman Treatment, and Fair Trial

### 6.2.1. Introduction

Detained witnesses may be a small group, but they are potentially very significant for criminal trials. The very reason for their detention could be that they were in some way involved in the same crimes for which the ICC accused is being tried. This makes them insider witnesses with crucial information. Because of this, they are a significant enough group that special arrangements are made for their appearance in court in the frameworks of international criminal tribunals.<sup>5</sup>

What the respective provisions in these frameworks have in common is that when a detained witness is transferred from a domestic prison facility to the Court or Tribunal, they must remain detained whilst there, and must be returned to the sending State once their presence at the Court is no longer required. The State in which the witness is detained, and which sends the witness to the ICC, will be termed the ‘sending State’. Before being transferred to the ICC, and after their return, the witness is protected on the territory of the sending State. This is done pursuant to the framework discussed in the section ‘Protection in the Sending State’ in Chapter 5.2, and will not be addressed here.

The three rights at the centre of this section are the right to life, protection from inhuman treatment, and fair trial, as these were the rights at stake in the detained Congolese witnesses case. The facts of that case are as follows. In 2011, the ICC requested and was granted the transfer of four witnesses who were in detention in the DRC. These witnesses, three attached to the Katanga case<sup>6</sup> and one to the Lubanga case,<sup>7</sup> had been arrested by DRC authorities some years earlier on suspicion of involvement in the death of UN peacekeepers and high treason, but had not been formally charged.<sup>8</sup> In May 2011, when the witnesses had finished giving testimony, they submitted an application for protection to the Dutch authorities to prevent their return to the DRC.

The witnesses’ application was based on the fear that they would be targeted on their return by members of the pro-government militias, that they would be subject to summary

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<sup>5</sup> Article 93(7) Rome Statute; Rule 90*bis* ICTR RPE; Rule 90*bis* ICTY RPE; Rule 151STL RPE.

<sup>6</sup> Floribert Ndjabu Ngabu, Sharif Manda Ndadza Dz’Na, and Pierre-Célestin Mbodina Iribi.

<sup>7</sup> Bède Djokaba Lambi Longa.

<sup>8</sup> Tom de Boer and Marjoleine Zieck, ‘ICC Witnesses and Acquitted Suspects Seeking Asylum in the Netherlands: An Overview of the Jurisdictional Battles between the ICC and Its Host State’ (2015) 27 *International Journal of Refugee Law* 573, 575-6.

execution or disappearance, or that their domestic trial would be nothing but a show trial followed by execution.<sup>9</sup> These risks correspond to the three rights. Counsel for the witnesses argued that the ICC was obliged to protect these rights by ensuring that the witnesses were not returned to the DRC. The argument was therefore one based on the prohibition on removal aspect of these rights.

But for the fact that the detained Congolese witnesses chose to involve the Netherlands, their case would have remained between the ICC and the sending State (or other State Parties), and so fallen entirely within the realm of Chapter 5. It is the Netherlands' involvement which sets the situation apart. The Dutch courts determined that, as the witnesses were on the territory of the Netherlands, they fell within Dutch jurisdiction, and could therefore ask for protection from removal based on the Netherlands' human rights law obligations.

To establish how the right to life, protection from inhuman treatment, and fair trial are protected in this shared situation, the subsequent section will discuss the obligations of the ICC and the host State in turn. This is followed by the identification of human rights problems that this sharedness gives rise to. For the period of time in which the detained witness is at the seat of the Court, the sending State does not have any obligations with respect to these rights, as the witness is not on its territory. As such, the sending State is not included in the analysis.

### 6.2.2. Obligations of the ICC

The starting point for discussing the obligations of the ICC, as with all witnesses, is the overarching protection obligation in Article 68(1). There are two issues at the heart of this discussion. First, if detained witnesses would be at risk of human rights violations in the sending State, is the ICC obliged to refrain from returning them there? And second, if the ICC does have such an obligation, how does this interact with the obligation that the ICC owes to the sending State to return detained witnesses?

#### Article 68(1)

If there is an obligation on the ICC to protect detained witnesses by not returning them to the sending State, this must be based on Article 68(1) Rome Statute. This provision obliges the ICC to take 'appropriate measures' to protect witnesses. There is nothing in

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<sup>9</sup> 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.

the provision itself that sets limits on what is deemed an appropriate measure. Commenting on the wording of the provision, one academic noted that the broad formulation of the article leaves judges free to propose measures of protection that are not specifically authorised.<sup>10</sup> If returning the witnesses to the sending State would endanger their right to life, to protection from inhuman treatment, and/or to fair trial, to refrain from sending them to that State seems to qualify as an ‘appropriate measure’ for their protection. There is further support for this interpretation in a decision of Trial Chamber II, in which the judges held that ‘as an international organisation with a legal personality, the Court cannot disregard the customary rule of non-refoulement’.<sup>11</sup> Where multiple interpretations of a provision are possible and a choice between them must be made, Article 21(3) requires that preference be given to the interpretation that best protects human rights. In this case, that means interpreting Article 68(1) as requiring the ICC to not return detained witnesses to a situation of risk.

The ICC has an obligation not to return at-risk witnesses, but according to Trial Chamber II in the detained Congolese witnesses case, not all types of risk will engage the protection obligations of the ICC. This pertains to Article 68(1)’s scope, and the question is this: is the ICC obliged to protect witnesses against all types of risk, or only those that are associated with their involvement with the Court? This has been examined already in the previous chapter, however, the situation of witnesses at the seat of the Court is different, and so the question must be considered again. In Chapter 5.2., when giving an overview of the ICC’s general witness protection obligations, the author proposed that the ICC’s obligation to protect witnesses applied to all forms of risk that the witness may face, as long as it was not *patently* unconnected to their involvement with the Court. The threshold for such a finding should be high, in effect creating a presumption in favour of protection.

When witnesses are located at the seat of the Court, the author argues that the scope of Article 68(1) is broader still. It is proposed that a witness cannot be transferred to a State where they would be at risk, even if the risk is patently unconnected with their involvement with the ICC. This is due to the fact that there is an important difference between witnesses located in a State, and witnesses located at the seat of the Court. When a witness is in a situation State and is facing a risk of human rights violations, the question is whether or not the ICC is obliged to step in and provide protection. When a

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<sup>10</sup> ‘Article 68’ in William Schabas, *The International Criminal Court: a commentary on the Rome Statute* (Oxford University Press 2010), 824.

<sup>11</sup> This should be read as referring to both the refugee law concept of non-refoulement, and the human rights law concept of prohibition on removal, as both as often referred to together under the same term; 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), §64.

witness is at the seat of the ICC, the question is whether or not the Court, through its own actions, is going to expose the individual to a risk of human rights violations by removing them to a certain State.

As discussed in Chapter 5.2, Trial Chamber II's approach to this question was much more restrictive. It explicitly rejected the broad formulation that the author proposes on the basis that the 'Statute does not place an obligation on the Court to ensure that States parties properly apply internationally recognised human rights in their domestic proceedings'.<sup>12</sup> The author agrees with Sluiter when he argues that Trial Chamber II misidentified the relevant obligation. It is not that the ICC is obliged to ensure that States respect human rights law domestically, but rather that the Court is obliged to not expose an individual to a risk of human rights violations.<sup>13</sup> In the State-State context, any time that a State makes a determination as to whether it can remove an individual on its territory to another State, it must assess the risk to which this could expose the individual. But, as the ECtHR held in *Soering*, in so doing 'there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise'.<sup>14</sup> The same applies to the ICC-State context.

Witnesses at the seat of the ICC, especially detained witnesses, are within the Court's control.<sup>15</sup> There is therefore a direct link between the ICC's decision to transfer them to a given State, and the risk to which that transfer will expose the witnesses. For this reason, Trial Chamber II's approach does not, in the author's opinion, satisfy the Article 21(3) test. In the context of witnesses at the seat of the Court, narrowing the scope of risk to those associated with involvement with the Court allows an individual to be exposed to human rights violations in another State. Such an interpretation and application of the law does not comply with internationally recognised human rights.

### The Relationship Between Articles 68(1) and 93(7)

Article 68(1) is not the only provision governing detained witnesses at the seat of the ICC. Contrary to witnesses at liberty, detained witnesses are subjects of domestic criminal justice, and so the sending State has a strong interest in them being returned.

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<sup>12</sup> *Katanga*, 9 June 2011 (*supra* note 11), §62.

<sup>13</sup> Göran Sluiter, 'Shared Responsibility in International Criminal Justice: The ICC and Asylum' (2012) 10 *Journal International Criminal Justice* 661, 670. Sluiter is not the only academic commentator to disagree with the Trial Chamber's position - De Boer and Zieck also argue that the ICC's obligation not to expose individuals to risk in another State is not limited to risks incurred through cooperation with the Court (*supra* note 8, 578).

<sup>14</sup> Application no. 14038/88 *Case of Soering v. The United Kingdom* (Judgment) 07 July 1989, §90.

<sup>15</sup> Sluiter (*supra* note 13), 670.

This interest is represented in the Rome Statute in Article 93(7), which sets out the following obligations for the ICC with respect to detained witnesses:

(a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent to the transfer; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, *the Court shall return the person without delay to the requested State.* (emphasis added)

This obligation to return detained witnesses can conflict with the obligation in Article 68(1) to not return witnesses to a situation of risk. Discussion must therefore turn to the relationship between these two articles, and in particular, which provision will prevail in case of conflict.

Before discussing this conflict, it is worth exploring how it might be avoided in the first place. If the risk to the detained witnesses in the sending State can be reduced, such that they would be able to return there safely, then the ICC would not need to choose between different obligations. This could be achieved using assurances. Assurances are used often in the extradition context, when the extradition from State A to State B would otherwise be blocked due to concerns about human rights protection in State B. To allay concerns, State B would provide State A with certain assurances, for example, that the individual to be extradited will not be subject to torture or the death penalty.

Assurances were used to this effect in the detained Congolese witnesses case. The ICC went about fulfilling its obligation under Article 68(1) by securing protective measures for the detained witnesses in order that they could return to the DRC safely. For the period between their return and the end of their domestic criminal trials, the following assurances were provided by the DRC:

- f) that the witnesses would be detained in a secure prison facility and protected from the aggression of other inmates,
- g) that 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
- h) that the VWU will maintain regular and direct contact with the guards in order to anticipate any change in the security situation of the witnesses
- i) that the VWU will regularly visit the detained witnesses to assess their security situation

j) that the VWU will monitor any legal proceedings against the detained witnesses.<sup>16</sup>

The measures were designed to be revisited once the trials of the detained witnesses concluded.<sup>17</sup> Trial Chamber II stipulated that assurances of this type are not a substitute for the independent risk analysis that must be conducted by the ICC in order to comply with Article 68(1). However, the Chamber considered that the DRC's assurances should be treated with the greatest respect, be presumed to be in good faith, and should be accorded great weight, as they committed the State to both the ICC and the ASP.<sup>18</sup> It was important that the assurances had been given under Part 9 of the Rome Statute, which the Chamber said was based on the principle of mutual trust. In light of this, the Chamber held that the assurances were sufficient to allow the detained witnesses to be returned to the DRC without the Court violating its obligation under Article 68(1).

Diplomatic assurances can be a controversial way of complying with human rights obligations. This can be seen from the fact that the ECtHR has developed in its case law a set of criteria to determine when they might be relied on and when not. The most recent ECtHR case to discuss the criteria for assurances was *Othman*.<sup>19</sup> For the most part, the assurances provided by the DRC in the detained Congolese witnesses case satisfy these criteria. For instance, the assurances are concrete rather than vague,<sup>20</sup> and compliance can be verified through reliable independent channels, namely the VWU.<sup>21</sup> One criterion which does not appear satisfied is the requirement that the individual had not been ill-treated in the State prior to the assurances being given.<sup>22</sup> The fact that the detained Congolese witnesses had been kept in detention without charge for a number of years certainly points to the existence of previous human rights violations. The ICC is not bound by the ECtHR's rulings, but considering that the Rome Statute protection framework does not mention assurances, and provides no direction for their use, the author suggests that the ECtHR's decisions should guide the practice of the Court and inform the interpretation of Article 68(1).

What happens if the assurances offered by the sending State are not sufficient to discharge the ICC's obligations under Article 68(1)? This possibility is not so far-fetched. If the Congolese detained witnesses situation arose again in the future, the ICC might not be as willing to rely on the sending State's assurances, given that a year and a half after

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<sup>16</sup> 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 (Trial Chamber II), §13.

<sup>17</sup> *Katanga*, 22 June 2011 (*supra* note 9), §41.

<sup>18</sup> *Katanga*, 22 June 2011 (*supra* note 9), §40.

<sup>19</sup> Application no. 8139/09 *Case of Othman (Abu Qatada) v the United Kingdom* (Judgment) 17 January 2012, §189.

<sup>20</sup> *Ibid*, §189, subpara (ii).

<sup>21</sup> *Ibid*, §189, subpara (viii).

<sup>22</sup> *Ibid*, §189, subpara (x).

their return to the DRC, three of the Congolese detained witnesses have still not been tried.<sup>23</sup> It is at this point that a conflict will arise between the ICC's obligations under Articles 68(1) and Article 93(7). The phrasing of both articles is compulsory, so a textual reading alone does not indicate whether the obligation in one is subjugated to the obligation in the other.

If to return a detained witness would violate Article 68(1), this gives rise to two questions. First, does the ICC's obligation to protect a detained witness prevail over its obligation to return that witness to the sending state pursuant to Article 93(7); and second, what type of protective measures is the ICC then obliged to provide for the witness?

The first question can be answered by referring to the 9<sup>th</sup> June 2011 decision of Trial Chamber II, with which, on this point, the author agrees. The detained Congolese witnesses submitted their applications for protection in the Netherlands once they had finished giving their testimony in the *Katanga* and *Lubanga* trials. That was the point at which they would otherwise have been returned to the DRC. Trial Chamber II therefore faced precisely the situation of deciding whether to go ahead with its obligation under Article 93(7)(b) or not.

The judges suspended the ICC's obligation to return the detained witnesses to the DRC under Article 93(7)(b), on the basis that to return them would violate the witnesses' human rights. At the time of the decision, the witnesses' applications for protection in the Netherlands were still pending, and it was found that to return them to the DRC before those claims were decided upon would violate the witnesses' right to seek asylum.<sup>24</sup> In this context, the right to seek asylum should be understood as the right to access a mechanism in which the merits of an application for protection, both under human rights law and under refugee law, can be heard (given that the detained Congolese witnesses' applications for protection were made under both of these bodies of law, the Trial Chamber sought to protect access to both). Interpreting Article 93(7) in light of Article 21(3), the Chamber determined that suspension of the witnesses' return was the only approach that conformed to human rights law.<sup>25</sup> Further support for this interpretation can be found in another decision of Trial Chamber II in the same case, in which it held that if the Netherlands granted the detained witnesses' application for protection, the ICC would

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<sup>23</sup> 'DR Congo: ICC Convict Faces Domestic Charges' (Human Rights Watch, 23 December 2015) <<https://www.hrw.org/news/2015/12/23/dr-congo-icc-convict-faces-domestic-charges>> visited 25 June 2016.

<sup>24</sup> *Katanga*, 9 June 2011 (*supra* note 11), §73.

<sup>25</sup> *Katanga*, 9 June 2011 (*supra* note 11), §73.

be unable to return them to the DRC. Instead, Article 21(3) required that the witnesses be handed over to the Netherlands.<sup>26</sup>

These two decisions of Trial Chamber II in the detained Congolese witnesses case demonstrate that, in the ICC's understanding, the rights of the witness prevail over the obligation of immediate return. Suspension of return was ordered so as to not interfere with the ability of the Netherlands to perform its own human rights law obligation of hearing the witnesses' application for protection. This interpretation has been met with academic approval.<sup>27</sup>

Towards the end of the 9<sup>th</sup> June decision, the Trial Chamber pronounced directly on the relationship between Articles 68(1) and 93(7). The judges held that another reason for the suspension of return was to allow the ICC time to decide whether 'the obligation under Article 93(7) to return the witnesses can be implemented without contravening the Court's other obligations under Article 68'.<sup>28</sup> This clearly subjugates Article 93(7) to 68(1) in case of conflict. The author further agrees with the Chamber that this is the only interpretation of those provisions that conforms to human rights law, and as such the only interpretation that would satisfy the Article 21(3) test.

Complying with Article 68(1) by refraining from returning detained witnesses to the sending State is only the first protective step. As with any other witness in need of protection outside of their own State, another place must be found for them to reside. In other words, they must be relocated.

Some commentators have argued against international relocation as an option for detained witnesses,<sup>29</sup> and others have argued in favour.<sup>30</sup> The legal framework under which relocation would be done has been covered in Chapter 5. The author agrees that relocation abroad is available for detained witnesses, as nothing in the Rome Statute protection framework precludes this. However, it does present a number of difficulties. If a witness has been properly tried and convicted on a criminal charge in the sending State, it seems counter-intuitive to simply release them and relocate them to a third State, if indeed any State could be found that would accept a witness under these circumstances.

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<sup>26</sup> 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), §21.

<sup>27</sup> It has been called 'an elegant way to permit the witnesses to apply for asylum in the Netherlands' - Dersim Yabasun and Mathias Holvoet, 'Seeking Asylum before the International Criminal Court. Another Challenge for a Court in Need of Credibility' (2013) 13 3 *International Criminal Law Review* 725, 727; Sluiter (*supra* note 13), 669; Irving (*supra* note 3).

<sup>28</sup> *Katanga*, 9 June 2011 (*supra* note 11), §81.

<sup>29</sup> Yabasun and Holvoet (*supra* note 27), 729.

<sup>30</sup> Sluiter (*supra* note 13), 670.

This course of action may be appropriate if the witness' detention at the domestic level was itself a violation of human rights, but making this determination would require the ICC to look in detail at the witness' domestic trial. The ICC has been clear that it is not its role to do this,<sup>31</sup> and one can appreciate the numerous difficulties this would entail. On a practical level, it would require the domestic authorities to turn over the documentation of the trial, which they will most likely be unwilling to do. On a principled level, it would constitute an undue interference by the ICC into the domestic sphere of the State. The legal framework offers no indication as to how to deal with this problem.

Other than internationally relocating detained witnesses using the ICCPP, another way for the ICC to comply with its obligations under Article 68(1) is to present the witnesses to the Dutch authorities in order for them to make an application for protection. In the detained Congolese witnesses case, this was the protective measure originally requested of the Court.<sup>32</sup> Naturally, this requires that the witnesses make an application to the Netherlands for protection. This course of action engages the obligations of the Netherlands, to which we now turn.

### 6.2.3. Obligations of the Host State

#### Obligations within the ICC protection framework

The Rome Statute and other ICC documents are silent on the issue of host State involvement in the protection of detained witnesses. Nor is there anything relevant in the Headquarters Agreement between the ICC and the Netherlands. Given the lack of a public record of the negotiations of the headquarters agreement, one can only guess at whether it was considered at all.<sup>33</sup>

Sluiter is one commentator who argues that the Netherlands may have obligations based on the Rome Statute protection framework that stem from its host State relationship with the ICC. He analogises from Article 103(4) Rome Statute, which stipulates that the Netherlands must enforce a sentence where no enforcement State is found, suggesting that the same approach could be taken in other instances where the ICC needs a territory and the law offers no solution. In support he draws on the 'residual responsibility' of host States for the human rights compliance of international organisations operating on their territory, citing ECtHR case law. However, the author would disagree with Sluiter's suggestion. Article 103(4) very specifically refers to the enforcement of sentences, and

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<sup>31</sup> *Katanga*, 1 October 2013 (*supra* note 26), §27.

<sup>32</sup> *Katanga*, 9 June 2011 (*supra* note 11), §27. Interestingly when the counsel for the witnesses before the ICC asked why he had not simply made an application directly to the Dutch authorities, he stated that it was beyond the scope of his mandate to represent the witnesses before the Court. Had the counsel gone ahead and done so, possibly there would not such rich material to analyse (§25).

<sup>33</sup> Sluiter (*supra* note 13), 667.

such a role should not be imposed on the host State by analogy where the host State is clearly opposed to it. Any obligations on the host State to protect detained witnesses must be found beyond the Rome Statute Protection Framework.

### Obligations beyond the ICC protection framework

The prohibition on removal and exposure to risk is an important part of the rights to life, protection from inhuman treatment, and fair trial. The Netherlands is obliged to protect these rights pursuant to Articles 2, 3, and 6 of the ECHR. There are two important elements to consider: the substantive right not to be removed to a country where there is a risk of human rights violations, and the procedural right of access to a mechanism for deciding on the application of this right. These rights correspond to obligations for States under whose jurisdiction the individual in question is located.

This issue of jurisdiction is central. If within Dutch jurisdiction, detained witnesses present at the seat of the ICC can apply for protection under human rights law. The Netherlands will be obliged to grant them access to the relevant procedures for determining such an application, and to grant them substantive protection from removal if the application is successful. As this point was substantially argued in the detained Congolese witnesses case, the relevant decision of the Dutch District Court will now be considered in detail.

When the detained Congolese witnesses made their application for protection, they sought protection from removal both under human rights law and refugee law. The Dutch authorities, while initially agreeing to hear their applications, subsequently informed the detained witnesses that the domestic procedures for requesting protection were not available to them because they were not within Dutch jurisdiction. The Dutch authorities stated that instead the applications would be considered using a *sui generis* procedure, the contents of which were unclear.<sup>34</sup>

In arguing that the Netherlands did not have jurisdiction over the detained witnesses, the Dutch government contended that Article 8 of the Headquarters Agreement between the Netherlands and the ICC created a ‘carve out’ of Dutch jurisdiction with respect to individuals in ICC detention.<sup>35</sup> Article 8 states that ‘The premises of the Court shall be under the control and authority of the Court’, and that ‘no laws or regulations of the host State which are inconsistent with the rules of the Court...shall be enforceable within the premises of the Court’. Furthermore, the Dutch government invoked Article 88 of the

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<sup>34</sup> ICC-01/04-01/06-2827 *The Prosecutor v Thomas Lubanga Dyilo, Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19* (Public Document) 23 November 2011, §7-8.

<sup>35</sup> ICC Transcript, ICC-01/04-01/07-T-258-ENG ET WT, 12 May 2011, 72.

Implementation Act. This is the domestic legislation that incorporates the Headquarters Agreement and the Rome Statute into Dutch law. According to Article 88, Dutch law applicable to the deprivation of liberty shall not apply to those detained at the ICC. As the witnesses were in ICC custody, and had never been detained by the Dutch authorities, the Netherlands contended that they were not under Dutch jurisdiction.<sup>36</sup>

The District Court of The Hague issued a decision on this question in December 2011 which rejected the government's proposed interpretation of Article 8.<sup>37</sup> It held that the non-applicability of Dutch law to the ICC should be read in a restrictive and functional manner. Dutch law should only *not* apply to the ICC premises where this would interfere with the proper functioning of the ICC. The ICC itself has confirmed that applying Dutch human rights and refugee law to the detained witness would not be an interference,<sup>38</sup> and as such the District Court held that this law applied.<sup>39</sup> As to the argument based on Article 88 of the Implementation Act, the District Court held that the provision concerned law related to the deprivation of liberty, such as habeas corpus proceedings, not to other proceedings that a person deprived of their liberty might bring, such as an application for protection.<sup>40</sup> There was nothing in either the law of the ICC or domestic law that would preclude the admissibility of the applications for protection from removal based on human rights law or refugee law.<sup>41</sup>

In addition, the District Court held that as the detained witnesses had nowhere else to turn, the Netherlands was obliged to admit them to the protection application procedure. It distinguished the situation from that of an individual requesting protection in an embassy abroad, stressing the fact that the witness could request protection from no other actor, since the ICC has no territory on which to grant the protection.<sup>42</sup> This argument is, from the author's point of view, particularly interesting. It has been described as an example of a 'symbiosis' between international criminal justice and a domestic justice system. The District Court acknowledged that the ICC does not operate on Dutch territory in isolation, and that it is appropriate for the Netherlands to step in and address flaws in the ICC protection system.<sup>43</sup>

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<sup>36</sup> *Ibid.*

<sup>37</sup> ECLI:NL:RBSGR:2011:BU9492, The Hague District Court (sitting in Amsterdam), 28 December 2011, §9.

<sup>38</sup> At §9, The Hague District Court (*Ibid*) made reference to 9 June 2011 decision (*Katanga*, 9 June 2011 (*supra* note 11)).

<sup>39</sup> The Hague District Court, 28<sup>th</sup> December 2011 (*supra* note 37), §9.

<sup>40</sup> The Hague District Court, 28<sup>th</sup> December 2011 (*supra* note 37), §9.5.

<sup>41</sup> The Hague District Court, 28<sup>th</sup> December 2011 (*supra* note 37), §9.9.

<sup>42</sup> The Hague District Court, 28<sup>th</sup> December 2011 (*supra* note 37), §9.8.

<sup>43</sup> Sluiter (*supra* note 13), 675.

The decision of the District Court was not appealed by the Dutch State, and so represents the law of the Netherlands on this point. It has been established that detained witnesses are within Dutch jurisdiction, and that therefore the Netherlands is obliged to protect both the procedural and substantive aspects of the prohibition on removal. This case establishes the ‘exception to the exception’ mentioned in Chapter 2: the *Longa* case before the ECtHR established that the premises of the ICC is an exception to the territoriality of jurisdiction principle, and the District Court case is an exception to *Longa*.

There are two remaining questions, both relating to the effect on the Netherlands’s obligations of the ICC’s involvement in the detained witness situation. First, does it alter the procedural obligations of the Netherlands, and second, does it impact the merits of the decision.

The first question pertains to the *procedure* for assessing the merits of an application for protection from a detained witness – can the Dutch decision maker rely on the ICC’s assessment of the witness’ security situation, or must it conduct an independent inquiry? In the beginning of the detained Congolese witnesses case, the Netherlands consistently stated that the manner in which it would proceed with the protection request would depend on decisions of the ICC.<sup>44</sup> The Netherlands contended that it would be inappropriate to revisit the witness risk assessment conducted by the ICC, and that therefore it would not conduct a risk assessment of its own.<sup>45</sup> This approach was opposed by the ICC in Trial Chamber II’s decision on the 9<sup>th</sup> June. The ICC judges determined that it was not for the ICC to conduct a risk assessment in lieu of the State; only the Netherlands could assess the extent of its own obligations.<sup>46</sup>

In practice, it appears from the Dutch decision on the merits of the detained Congolese witnesses’ applications that the Netherlands did in fact carry out its own risk assessment. The author considers that this is the correct interpretation of the Dutch obligation, as there is nothing to suggest that this procedural aspect of the right can be outsourced to another actor. The Dutch authorities may not have access to the same information that the ICC used to make its decision, or the Netherlands may have additional information that is relevant to the assessment and should not be overlooked. In order to comply with its obligations, the Netherlands must always conduct its own assessment. To do otherwise would be to unduly delegate its responsibilities under international law to an international organisation.

The second question pertains to the *substantive* decision on the merits. In the end, the detained Congolese witnesses were not permitted to remain in the Netherlands. The

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<sup>44</sup> Amicus brief (*supra* note 34), §5.

<sup>45</sup> De Boer and Zieck (*supra* note 8), 577-8, citing *Katanga*, 9 June 2011, §49 (*supra* note 11).

<sup>46</sup> *Katanga*, 9 June 2011 (*supra* note 11), §64.

Council of State, the highest court of appeal in the Netherlands on immigration law matters, held that there were no grounds that would preclude their removal. The assurances provided by the DRC to the ICC regarding the witnesses' safety were deemed to remove any risk to the rights protected by Articles 2<sup>47</sup> and 3 ECHR.<sup>48</sup> Just as the ICC had done, the Council of State deemed that the assurances were to be given great weight because they had been given under Part 9 of the Rome Statute.<sup>49</sup> As to Article 6, the Council held that there would be no flagrant denial of justice.<sup>50</sup>

The Council of State's decision demonstrates that, in the Netherlands' view, Dutch obligations under the ECHR can be satisfied by assurances, even if the assurances were given between the ICC and the sending State. Although the Council of State did review the assurances in light of the *Othman* criteria, and concluded that they were satisfied,<sup>51</sup> the Netherlands appears to have played no part in the negotiation of the assurances, and has no role in their monitoring. While this does not seem *per se* problematic, the author would suggest that the evaluation of the assurances in these circumstances should be done with even greater care and taking into account the relationship between the ICC and the sending State, which may differ from the Netherlands' relationship with that State. As one commentator points out, what must be avoided is that the Dutch authorities rely on the fact that the ICC is satisfied with assurances from a sending State, and fails to properly scrutinise them itself.<sup>52</sup>

The detained witness also sought to prevent their removal through refugee law. As will often be the case in these situations, there was ample evidence<sup>53</sup> to satisfy the threshold of Article 1 F of the Refugee Convention, which allows States to exclude individuals from refugee protection if there are serious reasons for considering that they have committed a war crime or crime against humanity. In this aspect of the case the Netherlands did not feel the need to be guided by the ICC, using evidence to exclude the witnesses that had been dismissed by the ICC.<sup>54</sup> Following the Council of State's decision on the 27<sup>th</sup> June 2014, the detained Congolese witnesses were returned to the DRC.

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<sup>47</sup> ECLI:NL:RVS:2014:2427, Council of State, 27 June 2014 §11.

<sup>48</sup> Council of State, 27 June 2014, *Ibid*, §8.6.

<sup>49</sup> Council of State, 27 June 2014, *Ibid*, §8.4.

<sup>50</sup> Council of State, 27 June 2014, *Ibid*, §9.3.

<sup>51</sup> Council of State, 27 June 2014, *Ibid*, §8.2.

<sup>52</sup> Sluiter (*supra* note 13), 671.

<sup>53</sup> Van Wijk provides details of the detained witnesses' alleged involvement in the conflict in the Ituri district of the DRC, and the atrocities involved (*supra* note 2), 180.

<sup>54</sup> De Boer and Zieck (*supra* note 8) in footnote 125.

#### 6.2.4. Problems in Human Rights Protection

Despite the issues that will be discussed in this section, the Congolese detained witnesses case is a positive departure from previous practice at the ad hoc tribunals. It is often assumed that the situation of detained witnesses applying for asylum in the host State of an international criminal tribunal is an entirely new phenomenon. However, there were two previous cases, one at the ICTR and one at the ICTY.

Agnes Ntamabyariro was the former Rwandan Justice Minister, and in 2006 she was awaiting trial for genocide in Rwanda when the ICTR ordered her transfer to the Tribunal to testify. During her testimony, she complained of her treatment by the Rwandan authorities, alleging torture and arbitrary detention. According to her lawyer, it was uncontested that she had been illegally kidnapped from Zambia some years earlier and rendered to Rwanda. Fearing to return to Rwanda, she had her counsel deliver a letter to the ICTR President requesting asylum. Disregarding this application, the ICTR transferred Ms. Ntamabyaliro back to Rwanda.<sup>55</sup> The only evidence that this application and return took place is a press release from the witness' lawyer, as no official decisions from the Tribunal appear to exist. Interestingly, it appears that the request was only submitted to the ICTR, and not to Tanzania (host State of the Tribunal).

Dragan Opačić was convicted to ten years imprisonment by a Bosnian court for war crimes in 1995. Two years later he was transferred to the ICTY to give testimony in the trial of Duško Tadić. During his testimony he said that he had been abused in Bosnia and pressured into falsely testifying against Tadić. He claimed that, in revealing this, he put himself at risk if returned to Bosnia, and so asked the ICTY that he be permitted to remain in its custody until the Bosnian authorities had revised the judgment against him. This request was rejected and he was returned to Bosnia, with the Tribunal expressing its 'full confidence' that he would not be mistreated. It does not appear that any form of protective measures, similar to those ordered in the detained Congolese witnesses case, were considered by the Tribunal. Following the ICTY's decision, Opačić started summary proceedings before the Dutch courts to block his removal on human rights grounds. The Dutch court held that it had no reason to review the ICTY decision, as the Tribunal had considered the case in light of the ICCPR, which was equivalent to the ECHR. As a last resort he applied for refugee status in the Netherlands, but as in Agnes Ntamabyariro's case, it was not considered and he was returned to Bosnia.<sup>56</sup>

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<sup>55</sup> 'United Nations Illegally Transfers Asylum Seeker' (Press Release of Philippe Laroche & Avi Singh, Arusha) 13 September 2006. See also 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), 1096.

<sup>56</sup> Cupido and van Wijk (*ibid*), 1096-7.

These cases are prime examples of the implementation problems, in particular buck passing, that can arise when multiple actors are involved in protecting a witness. Against this past practice, the extensive consideration of the detained Congolese witnesses case by both the ICC and the Netherlands is definitely a step in the right direction. Even though the ICC put forward a restrictive interpretation of Article 68(1), in terms of the scope of risk it covers, the Court did prioritise the rights of the detained Congolese witnesses over the obligation to return them under Article 93(7)(b). For the Netherlands' part, even though it fought the applications for protection every step of the way, at least the matter did come before the domestic courts and the applications were fully considered. That being said, there are still important problems that face detained witnesses at the seat of the Court that could compromise their human rights protection.

The ICC and the Netherlands are both obliged, by their respective obligations, to protect detained witnesses from violations of the right to life, protection from inhuman treatment, and fair trial, by refraining from sending them to a State where these rights would be at risk. The two sets of obligations exist in parallel; one does not cancel out the other. The fact that the obligations overlap in this way makes certain implementation problems more likely, in particular buck passing. Each actor may look to the other to protect the right rather than fulfilling its own obligations. Indeed, this can be seen from the conduct of the Netherlands when it sought to rely exclusively on the risk assessment conducted by the ICC instead of carrying out its own. Depending on how one sees the Netherlands' reliance on the assurances given by the DRC to the ICC, this could also be seen as an instance of buck passing. To fully comply with its obligations, it is possible that the Netherlands should have secured assurances itself.

Even though the Dutch domestic courts did assert the importance of the Netherlands complying with its obligations, the gap filling role played by the Netherlands in the detained Congolese witnesses case is not sustainable going forward. While the District Court is to be applauded for taking on this role and avoiding the formation of a legal vacuum, this places an inequitable burden on the Netherlands. The effective functioning of the Court requires a good working relationship between the ICC and its host State. The propensity of the Netherlands to pass the buck may increase if it is left with a disproportionately big role in witness protection.

#### **6.2.5. Concluding Observations**

When a detained witness arrives at the seat of the ICC, they may inform the Court that their current level of protection is insufficient, and on this basis claim that they are unable to safely return to the sending State, where their human rights would be at risk. If the witness distrusts the ICC's ability to provide this protection, he or she may turn to the host State. According to the Dutch courts, the circumstances of detained witnesses are such that they fall under Dutch jurisdiction, allowing them to request protection from

removal under the human rights law obligations of the Netherlands. By this action, the witness creates a shared situation involving the ICC and the Netherlands: both are involved in the detained witness' protection, and both have obligations to this effect.

As a result of the detained Congolese witnesses case, there is ample case law on this particular situation. The judicial decisions of both the ICC and the Dutch State have explored the relevant issues in some detail. In some instances the author agrees with the outcomes, and in others not. But these divergences relate to the detail of the obligations, and not to the question of whether the obligations exist in the first place. It is established in the case law that the ICC and the Netherlands have parallel obligations to protect detained witnesses. It is this that gives rise to potential implementation problems, mainly buck passing, which was present in the detained Congolese witnesses case. However, the instances of buck passing relating to protection from removal obligations are relatively minor compared to the buck passing in relation to the right to liberty obligations. To this we now turn.

## 6.3. Protecting Detained Witnesses at the Seat of the Court: Right to Liberty

### 6.3.1. Introduction

The relevance of the right to liberty to detained witnesses is clear, given that they are in detention, but why it should be relevant in a shared ICC-host State situation requires some explanation. In the detained Congolese witnesses case the right to liberty came to the fore because, while the various legal issues were ironed out with respect to the applications for protection in the Netherlands, the witnesses remained confined to the ICC detention centre. Three years elapsed between the detained Congolese witnesses applying for protection and the rejection of their claims and their return to the DRC. Such an extended period of imprisonment raised an important question: how is the right to liberty of detained witnesses protected at the seat of the ICC?

The actors involved are no different between this section and the previous one. The reason why the right to liberty is considered separately is because the focus of this section is on what takes place at the seat of the Court, and not what *could* take place in the sending State upon the witnesses' return. The previous section concerned the prohibition on removal aspect of the rights to life, protection from inhuman treatment, and fair trial; this section concerns respect for the right to liberty on the premises of the ICC itself.

The right to liberty has a number of components. It creates a negative obligation to not arbitrarily detain an individual, but also gives rise to positive obligations, including procedural obligations. The procedural element of the right proved to be the most crucial

in the detained Congolese witnesses case, as the matter of most debate was which actor had the power and the obligation to review the legality of the detention.

On 24<sup>th</sup> August 2011, the Trial Chamber II determined that, as far the ICC was concerned, there was no reason for the detained Congolese witnesses to remain at the Court. The ICC was satisfied with the assurances it had secured from the DRC, and did not consider the witnesses to be at risk. The only reason why they were not transferred back to the DRC was because the ongoing protection applications in the Netherlands made their transfer ‘impossible from a legal point of view’.<sup>57</sup> The Chamber requested the Registry to enter into consultations with the Netherlands to decide in whose custody the witnesses should remain while their protection claims were pending.<sup>58</sup> Lengthy consultations ensued, but no solution was reached, and the Netherlands refused to take over custody of the witnesses as the ICC often requested. The ICC stressed that the only reason for the detention was the protection applications, and that this detention could not go on indefinitely.<sup>59</sup> Meanwhile, not only the Dutch courts, but also the ECtHR, were issuing decisions on the right to liberty of the detained witnesses. In the end, albeit not pursuant to a judicial decision, the Netherlands did accept the transfer of the witnesses, and held them in immigration detention until they were removed from the country soon afterwards.<sup>60</sup>

In many ways, it is the right to liberty aspect of the detained Congolese witnesses case that remains the most problematic. The issues surrounding the prohibition on removal have been largely resolved (with some notable exceptions), but for the right to liberty, the matter may have been resolved in practice, but no resolution was found for the legal questions. The discussion below hopes to address this by using the detained Congolese witnesses case to examine which actor has an obligation to review the detention of detained witnesses at the seat of the Court, and when this obligation arises. The right to liberty aspect of the detained Congolese witnesses case had not arisen before in international criminal justice, and so information relating to the actors’ obligations stems principally from the decisions of different bodies in that case, and the commentary on these decisions. As before, the discussion of obligations is followed by consideration of the potential issues with human rights protection that can arise due to the sharedness of the situation.

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<sup>57</sup> *Katanga*, 24 August 2011 (*supra* note 16), §15.

<sup>58</sup> *Katanga*, 24 August 2011 (*supra* note 16), §17.

<sup>59</sup> ICC-01/04-01/07-3352 *The Prosecutor v Germain Katanga* (Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350) 8 February 2013 (Trial Chamber II), §22.

<sup>60</sup> ‘ICC Transfers Three Detained Witnesses to Dutch Custody’ (ICC Press Release, 4 June 2014) <[https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/pages/pr1010.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1010.aspx)> visited 26 June 2016.

### 6.3.2. Obligations of the ICC

The question of whether the ICC has the obligation to review the legality of the detention of witnesses on the ICC premises turns on the interpretation of Article 93(7). This provision, in addition to requiring the ICC to return detained witnesses, obliges the Court to keep such witnesses in ICC custody for the duration of their time at the Court. The provision itself says nothing on the power of any actor to review a witness' detention, and neither the drafting history nor the Rome Statute protection framework more broadly provide any guidance.

In two separate decisions in the detained Congolese witnesses case, the majorities at the ICC Trial and Appeals levels held that the ICC had no power, and thereby no obligation, to review the detention of the witnesses. In making this determination the judges employed multiple different arguments. These arguments do not seem to flow from one single underlying rationale, suggesting that the judges making up the majority had different ideas as to how the ICC's obligations should be interpreted. The majority opinions in the Trial and Appeals Chambers were countered by powerful dissents at both levels, which presented compelling alternative views. This section will set out the different elements of the majority opinions and the response of the dissenting judges to each element. This allows for a discussion of the arguments for and against interpreting the ICC's obligations as requiring it to review the detention.

The first majority argument hinged on the question of which actor the witnesses' detention was attributable to. The majority made a distinction between *detention* and *custody*.<sup>61</sup> The witnesses' *detention* was said to be based on an order from the DRC, with the ICC only maintaining *custody* of the witnesses on the DRC's behalf. The obligation to maintain custody was said to arise from Article 93(7)(b) and Rule 192 RPE. The fact that the ICC still had *custody* over the witnesses even once their testimony concluded was due to the fact that the Netherlands had refused to take over *custody* of them. Right to liberty issues were held to be linked to *detention*, not *custody*,<sup>62</sup> and since the *detention* remained attributable at all times to the DRC, this was the only actor with the capacity to review the

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<sup>61</sup> The italics are used to indicate the fact that the way these terms are used in this paragraph is not the same as in the rest of the chapter/thesis.

<sup>62</sup> The Majority's approach is summarised this way by Judge Song in ICC-01/04-01/07-3424-Anx *The Prosecutor v Germain Katanga* (Decision on the admissibility of the appeal against the "Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC- D02-P0228 and DRC-D02-P0350", Dissenting Opinion Judge Sang-Hyun Song) 20 January 2014 (Appeals Chamber), §4, and by van den Wyngaert in ICC-01/04-01/07-3405Anx *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, Dissenting opinion of Judge Christine Van den Wyngaert) 1 October 2013 (Trial Chamber II), §4.

witnesses' status.<sup>63</sup> Responding to the argument that reading Article 93(7) in light of Article 21(3) would lead to a different conclusion, the Chamber held that for the ICC to examine the basis of the detention and order release would place the ICC in the position of a human rights court, which it was not intended to be.<sup>64</sup> The majority stressed that nothing the ICC had done amounted to an ICC order for the witnesses' continued *detention*.<sup>65</sup> The ICC's only obligations related to the conditions in its detention centre.<sup>66</sup>

Judges Song and van den Wyngaert disagreed with this analysis in their individual dissents, made at the Appeals and Trial levels respectively. Both dismissed the *custody-detention* distinction as artificial. The distinction they drew was a different one: they differentiated between the period of detention before Trial Chamber II's 9<sup>th</sup> June decision, and the period of detention after. It was in the decision of the 9<sup>th</sup> June 2011 that the Trial Chamber decided to suspend the return of the witnesses pending the outcome of their applications for protection in the Netherlands.<sup>67</sup> This decision was important, because the dissenting judges agree that prior to this the ICC was indeed detaining the witnesses on behalf of the DRC. Once their return was suspended on the 9<sup>th</sup> of June, the situation 'fundamentally changed'.<sup>68</sup> Judge Van de Wyngaert argued that following that decision, the ICC became co-responsible for what happened to the detained witnesses while awaiting the outcome of their protection applications.<sup>69</sup> She held that despite the fact that Article 93(7) continued to provide a legal basis for the detention, this did not mean that it had not become arbitrary.<sup>70</sup>

Judge Song's reasoning in his dissent at the Appeals level is largely similar. He considered the 9<sup>th</sup> June decision to suspend the witnesses' return to the DRC effectively suspended the Article 93(7) cooperation agreement between the ICC and the DRC.<sup>71</sup> The Trial Chamber's independent determination that the witnesses should remain in detention during the asylum process, and during consultations between the ICC and the host State, constituted in his opinion, an order for detention.<sup>72</sup> From that point on, the detention became attributable to the ICC, and so the ICC had the obligation to review it.

The second majority argument appears more policy based, focusing on State cooperation and the need to respect State sovereignty. The majority held that to review the detention

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<sup>63</sup> If the Congolese authorities had decided 'to end the pre-trial detention, the Court would be duty-bound to execute such an order for release' *Katanga*, 1 October 2013 (*supra* note 26), §31.

<sup>64</sup> *Katanga*, 1 October 2013 (*supra* note 26), §27.

<sup>65</sup> Dissent van den Wyngaert (*supra* note 62), §4.

<sup>66</sup> *Katanga*, 1 October 2013 (*supra* note 26), §28.

<sup>67</sup> See section 6.2.2 above, and *Katanga*, 9 June 2011 (*supra* note 11), §73.

<sup>68</sup> Dissent van den Wyngaert (*supra* note 62), §5.

<sup>69</sup> Dissent van den Wyngaert (*supra* note 62), §5.

<sup>70</sup> Dissent van den Wyngaert (*supra* note 62), §15.

<sup>71</sup> Dissent Song (*supra* note 62), §11.

<sup>72</sup> Dissent Song (*supra* note 62), §13.

of the witnesses would be detrimental to cooperation, and would erode sovereignty. This was said to overrule other considerations, such as the fact that the ICC had *de facto* control over the witnesses.<sup>73</sup> Judge van den Wyngaert counters this in her dissent by stating that State cooperation is not an adequate reason for depriving an individual of their liberty. She considered that maintaining the detention of the witnesses was disproportionate and privileged the DRC's rights over those of the witnesses.<sup>74</sup>

The majority's third argument concerned the existence and relevance of a legal vacuum in protection. In addressing this argument, the majority of Trial Chamber II stressed that the ICC was not the only avenue for review. The detained Congolese witnesses had an alternative forum for their claim, as they could bring review proceedings in the DRC and so would not be left without recourse.<sup>75</sup> This too met with a strong response from Judge van den Wyngaert. She pointed out that it is precisely the DRC authorities that the detained witnesses were requesting protection from.<sup>76</sup> Detail of the alleged violations by the DRC were set out in a complaint by the witnesses to the Human Rights Committee.<sup>77</sup> Furthermore, Judge van den Wyngaert pointed out that forcing the detained witnesses to seek protection from the DRC would place them in an impossible position, as it would compromise their applications for protection in the Netherlands.<sup>78</sup>

The majorities in both Chambers rejected arguments that used Article 21(3) as a basis for an ICC having an obligation to review the detention. There was little consistency in how the Article was understood, both as between the Appeals and Trial chambers, and even within the same Chamber. The inconsistency was pointed out by Judge van den Wyngaert in her dissent when she questioned why Article 93(7) could be set aside in the interests of protecting some rights but not others. The obligation in Article 93(7) to return the witnesses was suspended in order to allow the detained Congolese witnesses to complete their applications for protection in the Netherlands, but the obligation to keep them detained could not be suspended in order to protect their right to liberty. Both Judges van den Wyngaert and Song described the difference as illogical, given that the provision in question was the same.<sup>79</sup> The Trial Chamber's justification that the prohibition on removal (in particular with regards to torture and inhuman treatment) is *jus cogens* and the right to liberty is not, is rejected in the dissent as unconvincing and unsupported by

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<sup>73</sup> *Katanga*, 1 October 2013 (*supra* note 26), §28 and ICC-01/04-02/12-158 *The Prosecutor v Mathieu Ngudjolo Chui* (Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute) 20 January 2014 (Appeals Chamber), §26.

<sup>74</sup> Dissent van den Wyngaert (*supra* note 62), §17.

<sup>75</sup> *Katanga*, 1 October 2013 (*supra* note 26), §33.

<sup>76</sup> Dissent van den Wyngaert (*supra* note 62), §8.

<sup>77</sup> 'Complaint under the Optional Protocol to the International Covenant on Civil and Political Rights' (22 November 2011) ICC-01/04-01/06-2827-Anx5.

<sup>78</sup> Dissent van den Wyngaert (*supra* note 62), §8.

<sup>79</sup> Dissent van den Wyngaert (*supra* note 62), §6-7, Dissent Judge Song (*supra* note 62), §11.

the text of Article 21(3).<sup>80</sup> Judge van den Wyngaert criticised the majority for hiding behind the ICC's obligation to another actor to justify violating human rights. Even if the detention was indeed attributable to the DRC at all times, the ICC cannot justify violating human rights on the basis that the violation is being carried out on behalf of another actor. To do so ignored Article 21(3) and unduly deferred to State sovereignty.<sup>81</sup>

The author agrees with Judges van den Wyngaert and Song's interpretation of the ICC's obligations much more so than with the majorities' in the Trial and Appeals Chambers. In addition to their arguments, the author would add another that supports their position, based on Article 21(3). The arguments made in both the majority opinions and the dissents regarding Article 21(3) were quite broad and general, only sometimes addressing the question of whether the ICC can or must review the detention of detained witnesses on its premises. What was not done in the discussed decisions was to apply Article 21(3) in the way that it has been used in this thesis, namely as a test that the interpretation of a provision must satisfy. The Article 21(3) test requires interpreters to ask the following question: if the majority's approach to Article 93(7) is correct, is this interpretation and application consistent with internationally recognised human rights? Judge van den Wyngaert's points out that the Trial Chamber majority's approach to human rights and Article 93(7) is inconsistent, subjugates the right to liberty to the interests of the DRC and State sovereignty, and forces detained witnesses to turn to the sending State for protection, thereby jeopardising their ability to seek protection in the Netherlands. The author argues that, in light of this, the majority's approach to Article 93(7) fails the Article 21(3) test.

To say that the ICC is obliged to review the lawfulness of a witness' detention says nothing of the precise nature of this review. There are two alternative shapes that this review could take. The first is that the ICC is obliged to review a detained witness' detention in its entirety, including whether the sending State was violating the right to liberty even before the witness came to the ICC. If the sending State was detaining the witness unlawfully, and the ICC continued to enforce this detention on the sending State's behalf, the ICC could be violating its right to liberty obligations.

Such an approach would be very far reaching, however it does have some support in a decision of the Human Rights Committee concerning a former Guantanamo Bay detainee.<sup>82</sup> Pursuant to a prison transfer agreement, David Hicks was transferred from Guantanamo to his native Australia, where he served the remainder of a sentence imposed on him by a US military tribunal. He spent 7 months in Australian detention and upon

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<sup>80</sup> Dissent van den Wyngaert (*supra* note 62), §6-7.

<sup>81</sup> Dissent van den Wyngaert (*supra* note 62), §7.

<sup>82</sup> CCPR/C/115/D/2005/2010 *David Hicks v Australia* (Communication No. 2005/2010) 16 February 2016.

release brought a case before the Committee alleging that Australia had violated his right to liberty. The Committee held that there was ample evidence that Hicks' US trial had been a flagrant denial of justice, and as such, it was a 'disproportionate restriction of the right to liberty' for Australia to have enforced the sentence.<sup>83</sup> What this interpretation could mean for the ICC is that it would be obliged to review the detention of a detained witness any time such an individual came to the Court and requested this.

The second alternative is the one proposed in the dissenting opinions, and would mean that the ICC is only obliged to examine the lawfulness of the detention from the point at which the detained witnesses' return to the sending State is suspended. The suspension can be due to an application for protection being transmitted to the Netherlands, or because the ICC is assessing whether it can return the witnesses without violating Article 68(1). In deciding to suspend the return of the detained witnesses to the sending State, the ICC is seen as taking on responsibility for the witnesses. If the detention is maintained, from that point on it is attributable to the ICC. This imposes on the ICC an obligation to ensure that the right to liberty of those witnesses is not violated while they are present on the Court premises.

The standard of review should be arbitrariness, as right to liberty prohibits arbitrary detention. This is supported by Judge van den Wyngaert, who sets out some indicators of arbitrariness in her dissenting opinion, including whether there is a foreseen end to the detention, whether the detention is contingent on the decision of another jurisdiction, and whether the detention is proportionate.<sup>84</sup> Finding the detained Congolese witnesses' detention to be arbitrary, Judge van den Wyngaert would have ordered their release.

The author would argue in favour of the second alternative. The first alternative would be very much against the interpretation of both the majority and the dissents in the decisions discussed, and is, in the author's opinion, unnecessary. In the Guantanamo Bay case, Australia was taking over detention of the individual on a permanent basis; when the ICC hosts detained witnesses in its detention centre it is doing so on a temporary basis, and on behalf of the sending State. It makes sense to say that, if the ICC delays sending the witness back to the sending State or refuses to do so altogether, the situation is then altered. The ICC's action creates an obligation to ensure the right to liberty, given that the individuals would not otherwise be in the ICC's custody.

If the ICC found that the detention had become arbitrary, and that therefore the right to liberty was violated, it would be necessary to release the witnesses. Precisely how this is to be implemented is problematic, and we are faced with many of the same concerns that arise with respect to detained witnesses in need of relocation.

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<sup>83</sup> *Ibid*, §4.9.

<sup>84</sup> Dissent van den Wyngaert (*supra* note 62), §16.

### 6.3.3. Obligations of the Host State

When discussing the obligations of the host State, it must first be ascertained whether the Netherlands has any type of obligations at all with regard to the right to liberty of witnesses detained on ICC premises. Given that they are located on the ICC premises, Dutch jurisdiction over which is generally suspended, and given that they are detained pursuant to arrangements between the ICC and the sending State, it is not obvious that the Netherlands would indeed have any obligations.

Nothing relevant to this discussion can be found in the Rome Statute protection framework, including in the Headquarters Agreement. As such, the Netherlands' obligations are found only under human rights law beyond the protection framework. As the most important human rights instrument under Dutch law, the Netherlands' right to liberty obligations stem from the ECHR, in particular Article 5. For the Netherlands to have an obligation to review the detention of witnesses on ICC premises, which was the main issue of contention in the detained Congolese witnesses case, it must have jurisdiction over them under the ECHR. This is the question that this section will address. As with the discussion of the ICC's obligations above, the main source of information concerning the Netherlands' obligations is the decisions of various courts in the detained Congolese witnesses case.

From early on the ICC attempted to consult with the Netherlands with the aim of transferring the detained Congolese witnesses to the latter's custody.<sup>85</sup> This was also the course preferred by the witnesses themselves (the reason being that under Dutch law detention for individuals seeking protection from removal under human rights or refugee law is limited to 18 months, and then only in exceptional circumstances. As such, the witnesses stood a chance of being released while their claims were being decided).<sup>86</sup> The Dutch authorities did not want this, and were adamant that the witnesses were to remain detained at the ICC detention centre: 'the position of the Netherlands has consistently been that the witness is to remain in the custody of the Court during the asylum procedure'.<sup>87</sup> The Netherlands even conducted the immigration interviews in the ICC detention centre. It was not until the very end, once the applications for protection had been rejected and the removal of the witnesses was imminent, that they were transferred to Dutch custody. Following a final failed attempt to prevent removal, the detained witnesses were returned by the Netherlands to the DRC. The removal was done pursuant

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<sup>85</sup> *Katanga*, 24 August 2011 (*supra* note 16), §17; *Katanga*, 8 February 2013 (*supra* note 59), §§9-15 and 22; *Ngudjolo*, 20 January 2014 (*supra* note 73), 3.

<sup>86</sup> *Katanga*, 9 June 2011 (*supra* note 11), §27.

<sup>87</sup> Note verbale from the NL Ministry of Foreign Affairs to the ICC. See Application no. 33917/12 *Djokaba Lambi Longa v The Netherlands* (Decision) 9 October 2012, §22.

to Dutch law, and not as a request of the ICC for transport under the Headquarters Agreement.

The detained Congolese witnesses case went all the way from the District Court of The Hague, to the Dutch Supreme Court, to the ECtHR (although not in that order). These cases were the result of a summary procedure before Dutch courts in which the refusal of the Dutch authorities to take over custody of the witnesses was presented as a tort against those witnesses.<sup>88</sup> The reasoning in these decisions will be analysed in this section.

The District Court of The Hague, on 26<sup>th</sup> September 2012, was the only judicial institution to rule in favour of the detained Congolese witnesses being transferred to Dutch custody. This was the same court that, one year earlier, held that the witnesses were entitled to apply for protection from removal under Dutch law (the case that established the jurisdiction ‘exception to the exception’).<sup>89</sup> The court once again used the argument that it was necessary to prevent the formation of a legal vacuum. It was held that the detention situation of the witnesses had become unlawful because there was no prospect of a speedy end to the protection proceedings. As the ICC had stated that it could not review the detention, and the DRC was seen as equally unable to do so, the District Court found it to be the responsibility of the Netherlands. The presence of the ICC on Dutch territory was sufficient, in those circumstances, to establish jurisdiction over the witnesses’ right to liberty, especially since it was the Dutch proceedings that stood in the way of the witnesses being returned to the DRC. In light of this, the District Court held that the Netherlands was obliged to take over custody of the witnesses from the ICC.<sup>90</sup> Unlike the decision on protection from removal described in the previous section of this Chapter, which was not challenged, the Dutch government appealed to the Court of Appeal. Before the appeal could be decided, the ECtHR produced its own decision on the matter.

The ECtHR decision was the result of an application by one of the detained witnesses, Djokaba Lambi Longa, who testified in the *Lubanga* case. The three other witnesses were attached to the *Katanga* case, and it was in respect of these three that the summary tort proceedings for release were brought. The fourth witness, Mr Longa, was not addressed by the District Court decision described in the paragraph above. The application to the ECtHR alleged that the Netherlands had violated Article 5, the right to liberty, and Article 13, the right to a remedy, because Mr. Longa was detained unlawfully on Dutch soil and had been denied the opportunity to seek release. By the time the case was heard by the ECtHR, Mr Longa had withdrawn his application for protection and returned voluntarily

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<sup>88</sup> De Boer and Zieck (*supra* note 8), 586.

<sup>89</sup> The Hague District Court, 28 December 2011 (*supra* note 37).

<sup>90</sup> The Hague District Court, 26 September 2012, decision set out in §38 of the *Longa* decision (*supra* note 87).

to the DRC. Despite this, the ECtHR decided to pronounce on the application anyway. Part of the reason for this was that the ECtHR was aware of the ongoing domestic proceedings regarding the three *Katanga* witnesses, and it deemed it important to set out its assessment of the matter.<sup>91</sup>

The ECtHR held in the *Longa* case that the Netherlands did not have jurisdiction over the detained witnesses as far as Article 5 ECHR was concerned. While acknowledging that jurisdiction is primarily territorial, the ECtHR cited exceptions established in previous case law and practice to hold that the mere presence of the ICC on Dutch territory was not sufficient to engage Dutch jurisdiction.<sup>92</sup> These arguments were set out in Chapter 2. With the *Longa* decision in hand, the path was paved for the Dutch Court of Appeal and Supreme Court to simply follow the ECtHR without question. Both of these courts held that the Netherlands did not have jurisdiction over the detention of the witnesses, that no legal vacuum existed, and that the Dutch authorities were not obliged to accept the transfer of the witnesses.<sup>93</sup>

To conclude, the current state of the law according to the ECtHR in *Longa*, and the Dutch Supreme Court applying *Longa*, is that the Netherlands has no jurisdiction over the detention of witnesses at the ICC detention centre, regardless of whether or not they have made an application for protection. However the author considers that the ECtHR in *Longa* erred in its decision on jurisdiction because it overlooked the fact that the Netherlands' involvement in the detained Congolese witnesses' deprivation of liberty. The idea that State involvement engages jurisdiction where international organisations are concerned stems from the case law of the ECtHR itself. The *Kokkelvisserij* case concerned the granting of licenses for cockle collecting in the Wadden Sea in the Netherlands.<sup>94</sup> As the case touched on an issue of EU law, the Dutch court hearing the case made a preliminary reference to the ECJ (as it then was). The applicant requested that he be allowed to submit a written response to the opinion of the Advocate General of the ECJ, but this was denied. The Dutch court then followed the instructions of the ECJ and found against the applicant. The applicant brought a claim to the ECtHR against the Netherlands, claiming that his inability to submit his written opinion to the Advocate General violated his Article 6 ECHR right to adversarial proceedings. The Netherlands disputed the possibility of responsibility on the basis that it was an act of the EU, and not of the Netherlands. The ECtHR held that the fact that the Dutch court had made the preliminary reference meant that it was involved in the situation, and so did have jurisdiction. Support can also be found in cases that have reached the opposite conclusion.

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<sup>91</sup> *Longa* decision (*supra* note 87), §57-8.

<sup>92</sup> See also Emma Irving, 'The Relationship Between the International Criminal Court and its Host State: The Impact on Human Rights' (2014) 27 2 *Leiden Journal of International Law* 479, 483.

<sup>93</sup> ECLI:NL:GHSGR:2012:BY6075, Court of Appeal, 18 December 2012 and ECLI:NL:HR:2014:828, Supreme Court, 4 April 2014.

<sup>94</sup> Application No. 13645/05 *Kokkelvisserij v the Netherlands* (Admissibility Decision) 20 January 2009.

In *Berić*, the key to the ECtHR finding that there was no jurisdiction on the part of Bosnia Herzegovina was the fact that the applicants had been removed from their public office by a UN administration, which was following a Security Council resolution that required no domestic implementation.<sup>95</sup> Applied to the ICC context, if the Netherlands became involved in the situation of a person detained on the ICC premises, this involvement would engage its jurisdiction.

If the Netherlands had not been hearing the witnesses' applications for protection, they would not have been in detention at the Court. When deciding that the Netherlands should take over custody of the witnesses, the District Court back in September 2012 held that there was jurisdiction due to the fact that 'it is because of the Netherlands asylum proceedings that the [witnesses] cannot be returned to the DRC'.<sup>96</sup> When compared to the ECtHR jurisprudence on what constitutes 'involvement' by a State, this causality between the application for protection proceedings in the Netherlands and the ongoing detention clearly meets the threshold. Relevant precedent on this point, including the *Kokkelvisserij* case,<sup>97</sup> was not considered by the ECtHR in the *Longa* case. Instead, the argument of Mr. Longa that acceptance of jurisdiction to hear the protection claim gave rise to jurisdiction under the ECHR was rejected on the basis that States are not obliged to allow foreign nationals to await the outcome of protection from removal proceedings on their territory, and that the Convention does not guarantee the right to enter a State of which one is not a national.<sup>98</sup>

The notion that the Netherlands was not involved in the detention of the Congolese witnesses has been described by a commentator as having 'no foothold in reality'.<sup>99</sup> The matter of jurisdiction under the ECHR and the acceptance of the Netherlands to hear the protection claims are necessarily linked: the acceptance set in motion a chain of events 'which had an undeniable impact on the position of the applicant in the ICC's detention facility'.<sup>100</sup> If it were not for the protection claim, the witnesses would not have been so long detained at the ICC. This clearly implicates the Netherlands in their situation. This finding is not confined to the detained Congolese witnesses case, but rather in the author's opinion, represents the correct interpretation of the Netherlands' obligations in future situations of the same type.

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<sup>95</sup> Application nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 *Dušan Berić and Others v Bosnia and Herzegovina* (Admissibility Decision) 16 October 2007.

<sup>96</sup> The Hague District Court, 26 September 2012 (*supra* note 90).

<sup>97</sup> *Kokkelvisserij*, 20 January 2009 (*supra* note 94).

<sup>98</sup> *Longa* decision (*supra* note 87), §81-3.

<sup>99</sup> Cedric Ryngaert, 'Oscillating Between Embracing and Avoiding Bosphorus: the European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the EU' (2014) 39 2 *European Law Review* 176.

<sup>100</sup> Ryngaert, *ibid.*

#### 6.3.4. Problems in Human Rights Protection

The problem facing detained witnesses with respect to the right to liberty is a structural one. Neither the ICC nor the Netherlands accept having an obligation to protect this right, leaving a gap in protection. With respect to the ICC, the author put forward the dissenting opinions of Judges Van den Wyngaert and Song as reflecting the correct interpretation of the law, and explored how their approach would operate. However, the majority opinions at both the Trial and Appeal levels oppose this view, and they represent the law as it currently stands.

Indeed, the gap in protection at this stage is more pronounced than it is at other stages of proceedings with structural problems. At the interim release, acquittal, and witness protection through relocation stages, at least the ICC did have an obligation to protect human rights, even if it wasn't able to carry it out without assistance. For this stage in proceedings, the only actor acknowledged by all sides as having an obligation was the sending State, which is the State from which the detained witnesses were seeking protection. The complaint submitted by the detained Congolese witnesses to the Human Rights Committee details the alleged unlawful detention that had been going on for years before their transfer to the ICC to give evidence.<sup>101</sup> As one commentator pointed out, the fact that the extended period of detention at the seat of the Court was due to attempts to secure the witnesses' protection from other human rights abuses strongly suggests that the matter should not be left to the DRC.<sup>102</sup> And yet it has been.

The decisions covered in this section have had a decidedly negative effect on the adequacy of human rights protection at this shared stage. They epitomise the legal grey area that can be left when the involvement of multiple actors in human rights protection is not properly managed.

#### 6.3.5. Conclusion

The right to liberty issues that arose in the detained Congolese witnesses case were a result of the extended period of time that it took to resolve the questions surrounding the protection of their rights to life, protection from inhuman treatment, and fair trial. One might assume therefore, that as the legal issues that caused that delay have been resolved, that if a similar case arose again, the detained witnesses would not face the same right to liberty concerns. However, this seems unlikely. In the detained Congolese witnesses case, neither the ICC nor the Netherlands accepted that they had an obligation to review the detention, and so if future cases arise (which seems somewhat unlikely) witnesses are still

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<sup>101</sup> ICCPR complaint (*supra* note 77), 5-7.

<sup>102</sup> De Boer and Zieck (*supra* note 8), 587.

likely to remain detained while their applications for protection from removal under Dutch law are decided.

Many commentators have predicted that the chance of detained witnesses being brought to the premises of the ICC again is unlikely. It is foreseen that the ICC, the Netherlands, and any potential sending State will want to avoid a situation similar to the detained Congolese witnesses from ever arising again. Reliance may be had on video link testimony instead. Given that detained witnesses are a relatively small group, this is feasible. However, attempting to avoid protection claims from all witnesses by not bringing them to the seat of the Court is not possible. In the future therefore, questions surrounding the protection of non-detained witnesses at the seat of the Court will continue to be highly relevant.

## 6.4. Protecting Non-Detained Witnesses at the Seat of the Court

### 6.4.1. Introduction

The phenomenon of witnesses arriving at the seat of the ICC and requesting protection in the Netherlands is not limited to detained witnesses. Non-detained witnesses may also turn away from the protection on offer by the ICC, and look to the Netherlands for protection instead. Just such an eventuality occurred in January 2011, when two ICC witnesses filed an application for protection in the Netherlands. Their names and country of origin remain confidential.<sup>103</sup> The success of these applications has paved the way for more witnesses to apply to protection in the Netherlands.

Unlike for the detained witness, the risks to their safety that lead the two witnesses to apply for protection in January 2011 have not been made public. As such, as with all the other witnesses dealt with in this thesis, the primary human rights concerns are deemed to relate to the right to life and to protection from inhuman treatment.

The two witnesses who applied for protection in the Netherlands in January 2011 placed their claim under both refugee law and human rights law. Refugee law, and in particular refugee status, is conceptualised in this thesis as a way to protect human rights. Thus far, refugee status has not been particularly relevant to the discussion of how to protect human rights because the individuals in question would not qualify for it. Generally speaking, this is due to their links with criminal activity, which would exclude them from refugee status because of Article 1F. For the category of non-detained witnesses however, there is a much stronger chance of success.

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<sup>103</sup> De Boer and Zieck (*supra* note 8), 596.

Refugee status has a significant advantage as a way of protecting human rights. If an individual is applying for, and is granted, the status of a refugee under the Refugee Convention, this is accompanied by a series of substantive and procedural rights. As human rights law did not originally contain a prohibition on removal, but rather has evolved over time to contain one, there is no regime regulating the status of individuals who cannot be removed. As such, if possible, it is preferable for an individual to acquire refugee status.

The advantages that refugee law can have over human rights law were an important part of why the witnesses chose to turn away from the ICC and look for protection elsewhere. They had been accepted into the ICCPP and were awaiting relocation to a third State when they made their applications in the Netherlands. The ICC had made it clear before they arrived at the Court that they would not be returned to their country of origin.<sup>104</sup> Despite this, the witnesses sought protection in the Netherlands, and they cited three reasons for doing so. First, they argued that it was not clear that they would receive the same procedural and substantive rights if relocated through the ICCPP that they would otherwise be entitled to under international refugee law. For example, they did not know whether they would have access to legal assistance when seeking relocation, or access to review of decisions made about their protective measures, as they would have under the Refugee Convention. Second, they pointed to the restrictive scope of protection under the ICCPP, which following the Trial Chamber's approach to the types of risk,<sup>105</sup> is more limited than refugee law. And finally, they raised concerns about the ICCPP's dependence on State cooperation, rendering protection under it always temporary in nature.<sup>106</sup>

For these reasons, the discussion of obligations in the following section looks principally at obligations relating to the granting of refugee status as a way of protecting human rights. Human rights law is, of course, still relevant. However, the human rights law obligations of the Netherlands have been covered extensively already, and this situation requires no significant additions.

#### 6.4.2. Obligations of the ICC

The ICC's obligations are straightforward. Pursuant to Article 68(1), the ICC must protect the witnesses, including from removal to a State where they would be at risk. The ICC made clear that it considered its obligations under Article 68(1) to continue whether

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<sup>104</sup> ECLI:NL:RBDHA:2013:BZ7942, The Hague District Court, 8 March 2013 §3.

<sup>105</sup> *Katanga*, 9 June 2011 (*supra* note 11), §59.

<sup>106</sup> These reasons are listed in The Hague District Court, 8 March 2013 (*supra* note 104) §5; See also Irving, (*supra* note 3).

or not the witnesses make an application for protection in the Netherlands, and that the witnesses remains the ICC's responsibility wherever they are located.<sup>107</sup> Beyond this, the relevant obligations of the ICC towards witnesses have been covered elsewhere in this thesis.

### 6.4.3. Obligations of the Host State

When an ICC witness applies for protection in the Netherlands, the relevant obligations stem from the human rights and refugee law obligations of the Netherlands beyond the Rome Statute protection framework. The human rights law obligations need not be considered in detail here, as they have been covered elsewhere in this Chapter and this thesis. It suffices to say that the Netherlands does have jurisdiction over the witnesses under human rights law, and must therefore allow them access to a mechanism to determine their claim and to provide the necessary protection if their claim is proven. When 'normal' witnesses come to the Court, they are hosted in accommodation in The Hague and are free to move around freely when they are not needed in proceedings. The fact that they are not held on the ICC premises makes their presence in the Netherlands more straightforward, and as such the question of whether they fall under Dutch jurisdiction is much easier to answer. The existence of jurisdiction has been accepted by the Dutch authorities. In 2002, the Minister of Justice had foreseen the possibility of witnesses applying for asylum in the Netherlands, and had stated that ICC witnesses should be treated as any other alien on Dutch territory.<sup>108</sup>

As far as refugee law is concerned, the Netherlands has not contested that this law applies to non-detained ICC witnesses, and has not contested the access of these individuals to the procedure for requesting refugee status. What the Dutch government has contested is whether ICC witnesses *qualify* for refugee status under the Refugee Convention. The Dutch government made a number of arguments to this effect when the two witnesses applied for asylum in January 2011. The arguments were not based on the existence or otherwise of risk to the witnesses, but rather on their involvement with the ICC disqualifying them *in principle*.

In arguing that the witnesses did not qualify for refugee status, the Dutch government's first argument was based on Article 1A of the Refugee Convention. The Secretary of State argued that the witnesses were in no danger of being returned to a country where they would be at risk because the ICC was already providing them with protection. As such, they did not have a well-founded fear of persecution within the meaning of the

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<sup>107</sup> The Hague District Court, 8 March 2013 (*supra* note 104) §3.

<sup>108</sup> Letter from the Minister of Justice to the Speaker of the Lower House of Parliament, the Hague, 3 July 2002, 28 098 (R 1704), 28 099, No. 13.

Article 1A.<sup>109</sup> The Dutch Council of State disagreed. It held that what determines whether a person is entitled to refugee status is not whether there is a danger that they will be returned to their country or origin, but whether, if returned, there would be a risk of persecution.<sup>110</sup> Therefore it did not matter that the ICC was involved and was offering an alternative form of protection, what mattered was that there would be a risk if the witnesses were returned. The Council of State stated that the only exceptions to this principle were exhaustively set out in Article 1C to F, none of which applied.<sup>111</sup> It was not open to the Council to create a new exception based on the involvement of an international organisation.

The next argument for exclusion hinged on Article 1D of the Refugee Convention. This provision excludes an individual from refugee status if they are receiving protection from organs or agencies of the UN. The Dutch authorities argued that the ICC is an organisation comparable to the UN, and witnesses protected by the ICC should be excluded under Article 1D by analogy. The Council of State cited the *travaux préparatoires* of the Refugee Convention to reject this argument, stating that the purpose of Article 1D was limited and could not be extended by analogy.<sup>112</sup>

Finally the Secretary of State argued that the witnesses did not qualify as refugees because of the ‘safe third country’ argument, contained within Dutch and EU law. It was acknowledged that it was not *stricto sensu* satisfied, as it normally applied where a person was in a safe country before arriving in the Netherlands, all the same the Dutch authorities argued that the spirit of the exception applied. Once again the Council of State dismissed this argument, among other reasons because the protection enjoyed by the alien must be from a known country, which was not the case here as a relocation State had not yet been identified.<sup>113</sup>

The Council of State’s interpretation of the Refugee Convention has been met with support from commentators. The arguments of the Secretary of State have been described as elastic and analogous interpretations of the law.<sup>114</sup> What the arguments are said to have in common is their contention that protection by the ICC or by an unknown future relocation State serves to release the Netherlands from its obligation to grant refugee status. As the rejection of each argument by the Council of State shows, the current legal framework does not allow for the Netherlands to be released from its obligations this way.<sup>115</sup> Thanks to the application for protection by the two witnesses in January 2011, the

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<sup>109</sup> ECLI:NL:RVS:2014:627, Council of State, 18 February 2014, §6.1.

<sup>110</sup> Council of State, 18 February 2014 (*supra* note 109), §6.2.

<sup>111</sup> Council of State, 18 February 2014 (*supra* note 109), §6.2.

<sup>112</sup> Council of State, 18 February 2014 (*supra* note 109), §11.1.

<sup>113</sup> Council of State, 18 February 2014 (*supra* note 109), §10.2.

<sup>114</sup> De Boer and Zieck (*supra* note 8), 598 and 560.

<sup>115</sup> De Boer and Zieck (*supra* note 8), 598 and 560.

obligations of the Netherlands to protect ICC witnesses from removal by granting refugee status have been well-established.

#### 6.4.4. Problems in Human Rights Protection

In some ways this is an unproblematic area; in the case discussed neither the ICC nor the Netherlands contested the fact that it has obligations to protect the witnesses, and neither is shying away from those obligations. However, there are still two types of implementation problems that may arise at this stage in ICC proceedings.

The obligations of the ICC and the Netherlands overlap, in the sense that they both apply to the same individual at the same time. This can result in one interfering with the implementation of the other. While the protection applications of the witnesses in the case discussed were pending, the ICC pointed out that the existence of these applications in the Netherlands was making it much more difficult to find a willing relocation State within the framework of the ICCPP. Negotiations with one potential relocation State had to be put on hold because the State considered the Netherlands to be a safe country.<sup>116</sup> This means that, in effect, the burden of protecting witnesses who are unhappy with their ICC protection falls on the Netherlands unless there is some legitimate reason to exclude them.

Whenever there are overlapping obligations there will be a danger of buck passing, and this is the second potential problem. The efforts of the Dutch government to release itself from responsibility by citing the ICC's involvement are evidence of buck passing attempts. The overlapping nature of the witness protection obligations means that they exist in parallel; the operation of one does not cancel out the other. A consequence of this that has not yet been resolved is the question of when one system of protection takes priority over the other. It is clear that a person cannot be both protected under the ICCPP through relocation *and* protected as a refugee in the Netherlands. The law itself does not offer a solution as to which actor's obligations are primary. It would be detrimental to a witness if each actor ceased their protection efforts in the expectation that the other would continue with theirs.

One sure way to prevent the problems identified above is to remove the incentive for witnesses to apply for asylum in the Netherlands. If the protection offered by the ICC were made more certain and transparent, witnesses may not feel the need to turn to the Netherlands. That being said, for some individuals the opportunity to acquire a residence permit in a European country may be an attractive prospect, that no degree of ICC protection could overcome.<sup>117</sup>

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<sup>116</sup> The Hague District Court, 8 March 2013 (*supra* note 104), §3.

<sup>117</sup> Van Wijk (*supra* note 2), 184.

#### 6.4.5. Conclusion

Of the different shared situations covered in this chapter, protecting non-detained witnesses is the least complex. After permitting detained witnesses to apply for asylum in the Netherlands, it was highly unlikely that the possibility would be refused to non-detained witnesses. The earlier case of the detained Congolese witnesses paved the way for non-detained witnesses. That being said, the sharedness of the situation, with both the ICC and the Netherlands having obligations to protect the witnesses, can give rise to implementation problems. Either the implementation of one set of obligations interferes with the ability of the other actor to implement their obligations, or the circumstances allow for attempts at buck passing. Overcoming these issues with respect to non-detained witnesses is in some ways more important than addressing the issues facing detained witnesses. As alluded to above, it may be that the situation of detained witnesses never arises again. Non-detained witnesses however, will continue to come to the Court, and so problems affecting the protection of their rights must be addressed.

### 6.5. Conclusion

When a witness arrives at the seat of the ICC, whether detained or at liberty, they may raise concerns about their protection. Article 68(1) obliges the Court to prioritise their safety over other concerns, and so refrain from transferring them to a State where they might be at risk. This protection obligation subordinates other obligations that the ICC has, including the obligation owed to sending States to return detained witnesses. On the Netherlands' part, the Dutch courts have determined that both detained and non-detained witnesses are within the Netherlands' jurisdiction under human rights law as far as Article 3 ECHR is concerned, and are eligible to apply for protection from removal under both regimes. Matters are not so well settled when it comes to the right to liberty concerns that detained witnesses may have for the duration of their time on the ICC premises. Neither the ICC nor the Netherlands accepts that they owe the witnesses any obligations in this respect, leaving a substantial problem for the adequacy of human rights protection.

It was the cases addressed in this Chapter that catalysed this research. They brought to light a range of issues that are particular to the shared nature of international criminal justice, and that illustrate clearly the implementation and structural problems that arise when multiple actors are involved in situations where individual rights are at stake. It seems fitting therefore that they should conclude the substantive chapters of the thesis, and close the discussion on how human rights are protected in the shared stages of ICC proceedings.