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The shared protection of human rights at the International Criminal Court

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CHAPTER 7: Evaluation, Proposals for Change, and Conclusion

7.1. Introduction

The outcome of the analysis in the previous Chapters points to a clear answer to the research question: on the whole, human rights are *not* adequately protected in the shared stages of ICC proceedings. With the exception of the arrest and surrender stage, all stages of proceedings presented problems, either implementation problems or structural ones. As explained in Chapter 1, the presence of such problems renders protection inadequate. While the problems were more pronounced and challenging in some stages than in others, the research question is phrased in yes or no terms, and the answer is no.

Ending on this negative note however, would not prove a fitting conclusion to the study, nor would it tie in with the author's announced normative agenda of promoting human rights. As such, this Chapter suggests possible solutions that could mitigate the identified deficiencies in protection. Some issues can be addressed with tailored solutions, applicable to specific circumstances; other challenges may benefit from a more systematic approach. There is no one-size-fits-all solution, and putting in place some solutions may cancel out the need for others. What follows are a series of suggestions, some complementary, some alternatives, some supported by the law, and some pushing the boundaries of what is currently accepted.

Before exploring these potential solutions, the Chapter will summarise the problems identified at the different shared stages of ICC proceedings. As the arrest stage presented no problems, it has not been included. Following on from this, the first type of solution to be examined will be changes to the law. This is accorded first place because it is the solution that most easily comes to mind when the law is found to be inadequate. This is followed by practical suggestions tailored to specific situations: improving communication, increasing transparency, and considering domestic prosecutions. Thirdly, a proposal is made that sits somewhere between accepted law and not accepted law, possibly leaning towards the latter. The proposal is designed to address implementation problems, and involves a way of choosing between multiple actors with an obligation to protect a right at the same time. Fourthly, and pushing the boundaries even further, the

author proposes a mechanism to bridge the gaps in protection that arise because of structural problems. This involves a mechanism that would encourage States to voluntarily assist the Court. To bolster this, the fifth section sets out reasons that can be put to States to further motivate them to volunteer. The Chapter ends with the conclusion of the thesis.

7.2. Summary of the Problems Identified at the Shared Stages of ICC Proceedings

Starting at the beginning, this summary opens with the first shared stage of ICC proceedings. The human rights protection vulnerability at the investigation stage, or more particularly, the interrogation stage, is implementation. The author has proposed that the actor leading the interrogation is the one that must provide the fair trial protections contained in Article 55 Rome Statute (such as the right to an interpreter and to remain silent), but the law as it stands does not offer a way to determine which actor is the leading actor. In cases of doubt, it is possible that each actor will assume that the other will provide the protections, with the result that neither does. More cynically, it could be alleged that actors may seek to deliberately obscure which of them is in charge, to enable them to pass the buck more easily.

The stage of proceedings at which an accused is entitled, under certain circumstances, to interim release, is the first instance of a structural problem. The ICC is under an obligation to uphold the right to liberty, as protected by the entitlement to interim release, but cannot do so without State assistance; States for their part are not obliged to provide this assistance. This produces a gap in protection that can leave an accused in unnecessary pre-trial detention.

If an accused is convicted, they are sent to an enforcement State to serve their sentence. As between the ICC and the enforcement State, the shared protection of the convicted person during the sentence is not problematic. The respective roles and obligations of the ICC and the State are clear, and implementation problems are unlikely given the legal framework. The same cannot be said for the situation as between the ICC and the host State. The obligations that the Netherlands has under the ECHR allocate it a safety-net role, such that the Netherlands is precluded from transferring a convicted person to an enforcement State where they would be at risk of harm. However, the Netherlands has demonstrated in its actions to date a predisposition to try to avoid complying with these obligations, or in other words, to pass the buck. For instance, it may defer to the ICC's risk assessment rather than carry out one of its own, thereby watering down its safety net role. In situations where the ICC's choice of enforcement State poses a risk to the convicted person, this implementation problem leaves the convicted person vulnerable.

Facing accused that have been acquitted are both structural problems *and* implementation problems. Some acquitted cannot return to their home State following their acquittal for security concerns. The ICC must uphold their right to liberty by releasing them immediately, but must also protect them from being sent to an unsafe country. The Court's ability to do this depends on States coming forward and agreeing to allow acquitted persons to reside on their territory. States however, are under no obligation to do so. In the practice of the Court to date, namely in the Ngudjolo case, the Netherlands stepped in to fill the gap in protection that resulted from this structural problem. In the long term though, this is not a sustainable solution. As mentioned already, implementation problems can arise because of the Netherlands' reluctance to play this role, and it is an undue burden on the host State to expect it to.

Turning to the witness stages of proceedings, different problems affect the adequacy of protection here too. For witnesses being protected within the situation State, the confidentiality surrounding protection measures means that the discussion of obligations was inevitably incomplete. That being said, one assumes that as between the ICC and the situation State there is knowledge of the respective tasks and obligations of each actor, even if the information is not made public. If not, this leaves witnesses vulnerable to deficiencies in the implementation of protection. But there is another implementation problem in addition to this. The way in which the ICC's protection obligation in Article 68(1) Rome Statute is currently interpreted makes it difficult to ascertain when a witness will qualify for ICC protection and when they will not. If they do fall under this protection, then the situation State need only play a secondary role, supporting the ICC; if they do not then the situation State must take up the primary protective role. According to Trial Chamber II, the risk facing a witness must be connected to their association with the Court, but as the discussion in Chapter 5 showed, this test is difficult to apply in practice. The result of this may be difficulties in establishing, in any given instance, whether the actor in charge of protecting the witness is the ICC or the situation State, with the possible consequence that neither will protect the witness.

Witnesses who are at such a degree of risk that they cannot remain in the situation State, but who instead must be relocated abroad, face structural problems in acquiring and maintaining protection. Witnesses can only be relocated if a State agrees to host them, but States are under no obligation to agree to this. The fact that the ICC is the only actor with an obligation to protect the witnesses, but is unable to do so without assistance, leaves a gap in protection. The severity of the risk facing these witnesses means that the consequences of this structural problem are correspondingly severe.

When a witness arrives at the seat of the ICC to give their testimony, they may inform the Court that the protection measures currently provided are insufficient, whether these involve protection in the situation State or relocation abroad. Once at the Court, the witness may seek additional or alternative arrangements. The most controversial

situations of this type involve detained witnesses, and as the discussion in Chapter 6 showed, different rights are at stake. First, detained witnesses have may have concerns about being returned to the State which sent them to the Court (the sending State). If witnesses distrust the ICC's ability to protect them, these concerns may be such as to found an application to the Dutch authorities for protection from removal pursuant to the Netherlands' ECHR obligations. In such a case, the obligations of the ICC remain in effect, and so both the Netherlands and the ICC are obliged to protect the detained witnesses. This overlap can lead to buck passing, which can leave detained witness vulnerable to slipping through the cracks in protection. Second, the lengthy process of making arrangements for their protection can cause detained witnesses to remain detained at the ICC detention centre for unduly extended periods, raising right to liberty concerns. In this situation, the law as it stands leaves a substantial gap in protection: neither the ICC nor the Netherlands accepts that they have an obligation to protect the right to liberty of the witnesses. The result is that detention in the ICC detention centre can continue, unchallenged, for extended periods.

Not all witnesses who seek protection measures while at the seat of the Court are detained. The final shared stage of ICC proceedings considered in this study was that of non-detained witnesses at the seat of the Court. These witnesses can also turn to the Netherlands for protection, rather than rely on the ICC. If they would be at risk if returned to their home State, then the Netherlands is under an obligation not to remove them from the territory. As this creates a situation where, once again, both the ICC and the Netherlands have an obligation to protect the witnesses, it can lead to implementation problems. The ICC may rely on the Netherlands to provide protection, and the Netherlands may rely on the ICC. The witness is left vulnerable by this, with the possibility that they will not receive protection from either side.

This summary of the implementation and structural problems that face accused and witnesses at the ICC demonstrates the inadequacy of human rights protection at the different shared stages of proceedings. While some of the problems may be unlikely to occur in practice, or affect only a small number of individuals, the fact is that the law as it presently stands is ill equipped to deal with these problems when they do arise. For an institution that was established to address mass violations of human rights, action must be taken if the ICC itself becomes a source of human rights violations. Below are a series of possible solutions that may contribute to this end.

7.3. Changes to the Law

7.3.1. Statutory Changes

When the law is unsatisfactory, the first solution to consider is whether it can be changed. This study has identified a number of instances in which the way the law is structured is itself the problem. Structural problems leading to gaps in protection are present at the shared stages of interim release, acquittal, and witness relocation. If States were obliged to assist the ICC at these stages, as opposed to the ICC having to rely on voluntary assistance, the gaps in protection could be closed.

Despite appearing to be the simplest solution, such an approach would be difficult bordering on impossible in the current climate. Broadening the scope of State Party obligations by compelling them to accept non-nationals on their territory would require an amendment to the Rome Statute. This requires a two-thirds majority, and the amendment would only come into force when seven-eighths of State Parties ratify it.¹ It seems unlikely that 83 States out of 124 will agree to an amendment compelling them to take the action that they are reluctant to take voluntarily. This is especially so given the crisis currently affecting the Court, particularly among African countries, who far from wishing to give the ICC more powers, would instead see the powers of the Court reduced.

7.3.2. Interpretation Changes

The structural problems we see at the interim release, acquittal, and witness relocation stages would need a statutory amendment to resolve, but other problems could be addressed by ICC judges adopting a different approach to the existing provisions. This is not amendment by another name, but rather is based on plausible alternative interpretations of the law. The study has identified two instances of this, both concerning witnesses. The details of the arguments were presented in the relevant parts of the substantive chapters, and below is merely a summary.

The first instance of when an alternative interpretation of the law would ameliorate inadequacies in human rights protection concerns the scope of witness protection. Trial Chamber II in the *Katanga* case held that, in order to trigger the ICC's witness protection obligations under Article 68(1) Rome Statute, the risk facing a witness must be connected to their involvement with the Court. In setting out what involvement with the Court means, the Chamber adopted a restrictive approach based on a distinction between three

¹ Article 121 Rome Statute. This is in fact a deviation from the general practice for multilateral treaties, whereby a State Party will not be bound by an amendment unless they have consented to it, see "Article 121" in William Schabas, *The International Criminal Court: a commentary on the Rome Statute* (Oxford University Press 2010).

types of risk: 1) risk incurred on account of cooperation with the Court, 2) risk arising from the broader human rights situation in the situation State, and 3) risk of treatment that would amount to persecution such as would found an asylum claim under the Refugee Convention.² As discussed, this approach is difficult to apply, especially in borderline cases, with the result that witnesses may be excluded from the protection they need.

The narrow scope of protection would not present such a problem if the State apparatus was able to provide a satisfactory level of protection instead. However, in the case of situation States, the very reason why the ICC needs a witness protection regime is because the State apparatus is lacking. That being said, even where the State does have the capacity, the fact that the current interpretation of Article 68(1) is difficult to apply in practice will leave some witnesses in a grey area, with the ICC assuming that it is the State's role to protect them, and the State assuming that it is the ICC's role.

In Chapter 5 the author proposed an alternative interpretation of Article 68(1), namely that any risk a witness faces should trigger the ICC's obligations, as long as the risk is not *patently* unconnected with their involvement with the Court. As has already been argued, this is the only approach that properly complies with the Article 21(3) test. Adopting this interpretation instead of the interpretation of Trial Chamber II would make witness protection more inclusive and would reduce the number of witnesses falling into the grey area. By making it clear when the ICC must act to protect a witness, and when the State must act, this implementation problem for witness protection could be addressed.

The second instance that calls for an alternative interpretation of the law concerns detained witnesses at the seat of the ICC, and involves the obligations of both the ICC and the Netherlands. Chapter 6.3 discussed the obligations and problems surrounding the right to liberty of detained witnesses for the time that they are detained on ICC premises awaiting the outcome of a protection claim, whether submitted to the ICC, or to the Netherlands, or both. The discussion concluded that, following the majority decisions of the Trial and Appeals Chambers in the detained Congolese witnesses case, there was a gap in protection. Neither the ICC nor the Netherlands was deemed to have any obligations to protect the right to liberty of detained witnesses in those circumstances, effectively leaving the witnesses in a legal limbo and unable to challenge their detention. However unsatisfactory this outcome, it is the current state of the law.

With respect to the ICC's obligations, in Chapter 6 the author took up the dissenting opinions in those same ICC decisions, and argued that they represent a sounder

² 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 (ICC, Trial Chamber II) §§59-62.

interpretation of the law. Under this alternative view, the ICC would have an obligation to review the detention of detained witnesses whose time on ICC premises had been extended due to an application for protection (toward whichever actor). In the author's opinion, this is the interpretation that complies with the Article 21(3) test. With respect to the Netherlands' obligations, the author argued that the decision of the ECtHR in *Longa* was incorrect as a matter of law, because it overlooked the fact that the Netherlands was involved in the detained witnesses' situation. This would have been enough to bring them within Dutch jurisdiction, and so activate the Netherlands' right to liberty obligations.

7.3.3. Changes by Analogy

If the *Longa* case were revisited, this would improve human rights protection at the seat of the Court, but the protection would be limited to the particular facts of that case. Taking an entirely different approach to the question of when Dutch jurisdiction covers individuals on the ICC premises could expand the protective potential of the Netherlands still further. The author proposes an approach in which the *Bosphorus* principles are applied by analogy to the host State context, something which has not been done before.

Before setting out this proposed approach, it should be noted that the author does not propose that the Netherlands should always have jurisdiction over individuals on the ICC's premises. There are both legal and pragmatic reasons to suspend the host State's jurisdiction over the portion of its territory where the ICC premises are located. Legally speaking, the terms of the Headquarters Agreement place the ICC premises outside of the Netherlands' *de jure* control: the Dutch authorities cannot enter the premises without permission, carry arms on the premises, and so on. Pragmatically speaking, if the Netherlands always had jurisdiction, and could be potentially responsible for the treatment of individuals located on the premises of the ICC, it would be motivated to interfere in the operations of the Court. This would be counter to the distinct legal personality of such institutions. In addition, States would be reluctant to host international tribunals at all for fear of the potential consequences. That being said, there is a way of balancing the competing concerns of protecting human rights and maintaining the independence of international organisations.

Chapter 2 set out the *Bosphorus* principles, and explained how they could be used to understand the human rights obligations of State Parties when they are assisting the ICC. Here it is proposed that they could also be used to identify situations in which the Netherlands will have jurisdiction over individuals on ICC premises. Just as the principles balance the competing concerns of human rights protection and the independence of organisations in the member State context, so can they in the host State context. When the *Bosphorus* principles are translated to the host State context, the argument is essentially as follows: as the ICC is on Dutch territory, the Netherlands *prima facie* has jurisdiction over individuals held on the Court's premises. Due to the fact that the ICC is an

international organisation, Dutch jurisdiction is suspended because competence on these matters has been transferred to the Court. However, that transfer is premised on the assumption that the ICC guarantees comparable or equivalent protection to that which the Netherlands is obliged to provide under human rights law. If that assumption is rebutted, then the Netherlands will once again have jurisdiction over individuals on the ICC premises. The assumption would be rebutted if it is found that, in a particular instance, the protection is manifestly deficient.

This approach could improve the human rights protection of individuals located at the seat of the Court, including detained witnesses, convicted persons, acquitted persons, and accused entitled to interim release. It would no longer be necessary to be outside the ICC premises to make a claim for protection. The last stage listed, that of an accused entitled to interim release, is the stage that would show particular improvement.³ If an accused cannot find a State willing to host them on an interim basis, the law as it currently stands provides no recourse. Being on the ICC premises means the accused is outside Dutch jurisdiction, and so the fact that the ICC is unable to protect their right to liberty is not the Netherlands' concern.⁴ However, under the author's suggested approach, this would not be the end of the story. If an accused in this predicament sought to protect their right to liberty by seeking release onto the territory of the Netherlands, the latter could not outright refuse. It would have to go through the steps dictated by the *Bosphorus* principles. First, by asking whether the ICC provides equivalent protection to that which the Netherlands is required to provide under the ECHR. The answer in this case would be no: the ICC cannot guarantee that an accused entitled to interim release will be granted it. Even if the protection were deemed to be equivalent, the next question would be whether protection is manifestly deficient in the circumstances of that particular case. The answer would be yes: the ICC is unable to secure the assistance of a State to host the accused on an interim basis, which compromises the accused's right to liberty.

The result of applying the *Bosphorus* principles by analogy to the host State context can be better protection of human rights at the seat of the Court. However, there is a

³ Other stages will also benefit, but for them there comes a point in time when the individual can apply for Dutch protection, which is not the case for the interim release stage. Detained witnesses and acquitted persons fall within the 'exception to the exception' established by the District Court of The Hague, and so can apply for protection from removal from the ICC premises. Convicted persons can apply for protection at the point when the Dutch authorities begin their transport to the point of departure from the Netherlands.

⁴ With respect to ICC convicted and acquitted persons, Chapter 4 discussed how at the point at which they leave the ICC detention centre and are transported to the airport by the Dutch authorities, they enter Dutch jurisdiction. Once this occurs, they can apply for protection from removal. This is not the case for accused at the interim release stage. These individuals must remain in the ICC detention centre until a State agrees to host them. Interim release will in nearly every instance be dependent on the accused residing and remaining in the designated country. As such, if they sought to remain in the Netherlands, this would breach the terms of their release.

downside. Situations that now have a structural problem, such as interim release, may instead acquire an implementation problem. If both the ICC *and* the Netherlands have obligations to protect human rights, an ensuing lack of clarity or a propensity to buck pass may cancel out the positive effect that the solution proposed in this section seeks to achieve. For this reason, broadening the protective obligations of the Netherlands would ideally be combined with the solution proposed in section 7.5 below.

7.4. Practical Solutions for Particular Problems

7.4.1. Improved Communication

We leave to one side now proposals for changes in the law, and look to more pragmatic solutions that can be put into effect without changes to the legal framework. Some of the implementation problems identified at different stages could be addressed by means of a relatively simple solution: improved communication between the actors.

As just set out, adopting a different interpretation of the scope of risk under Article 68(1) would reduce the number of witnesses falling into the grey area between ICC and State protection. In the absence of this, improved communication could help prevent witnesses from being caught in this way. When an ICC witness appeals to the Court for protection, but the ICC considers that the risk they face is not connected to their involvement with the Court, it should communicate the risk reported to the situation State. The situation State then knows that the witness is not being protected by the ICC, and that it falls to the State to step in. Such communication could be done in practice through, for example, standard channels of communication that are to be used whenever the circumstances described present themselves. It is more than possible that this is already done, but the confidentiality surrounding witness protection means that it is not made public. Even if the broader interpretation of Article 68(1) were adopted, communication of this type would still be helpful to further protect witnesses.

Effective communication could also improve the protection of accused. During interrogations, safeguarding the right to a fair trial is dependent on it being clear which actor is leading the interrogation, as this actor must provide the safeguards. There are a number of ways to achieve this. One is for the parties to confer before the interrogation takes place and specifically agree on the issue. This could be put in writing, so that if problems arise there is no dispute as to which actor was responsible for the suspect. Another option is for the actors to agree that when certain, previously agreed, circumstances are present, one actor is automatically considered to be in charge. For example, whenever a member of the ICC Prosecutor's office is present, the ICC is presumed to be leading the investigation, regardless of whether it is an ICC staff member asking the questions.

These two stages illustrate the value of more formal communication mechanisms, such as could be set out in written agreements between the parties. Informal, and even behind the scenes communication, also has its benefits. Indeed, it is very likely that this is precisely how much of the business between States and the ICC is conducted, but naturally not discussed in the public sphere. One instance where informal communication will be of value is for convicted persons who have not yet been transferred to an enforcement State. If the convicted person believes they will be at risk of harm in the enforcement State designated by the ICC, they may seek protection from removal from the Netherlands. This places the Netherlands in the difficult situation of having to choose between its human rights obligations and its obligations as ICC host State. If the Netherlands informs the ICC of its apprehensions concerning the designated enforcement State, this gives the Court the chance to change the designation before matters come to a head, and so avoid the problem all together.

7.4.2. Greater Transparency in Witness Protection

Witnesses that arrive at the seat of the ICC and request protection, whether detained or non-detained, tend to do so because they lack faith in the ICC's ability to effectively protect them.⁵ The ensuing implementation problems, including buck passing, can result in witnesses not getting the protection they need. For this problem there is a particular solution: address the reasons why detained witnesses turn to the Netherlands for protection in the first place. Reducing the Netherlands' involvement in the situation reduces the chance of buck passing.

There are several reasons why a witness turns away from ICC protection. Overall, the lack of transparency surrounding witness protection through the ICCPP can make protection in the Netherlands, with its known guarantees and safeguards, preferable to a system that is largely unknown. As explained in Chapter 6, the non-detained witnesses who applied for protection in the Netherlands cited among their reasons the fact that it was unclear whether they would have the same procedural and substantive rights if relocated through the ICCPP that they would otherwise be entitled to under international human rights and refugee law. The uncertainties they highlighted concerned access to legal assistance during the ICCPP relocation process and access to review of decisions made about their protective measures.⁶ If details about the procedures and rights available for witnesses within the ICCPP were available and properly communicated to the witnesses, this may go some way to increasing trust in the ICC protection regime. If the

⁵ The author acknowledges that this may be a simplification of witness motives.

⁶ These reasons are listed in ECLI:NL:RBDHA:2013:BZ7942, The Hague District Court, 8 March 2013 §5. See also Emma Irving, 'Protecting Witnesses at the International Criminal Court from Refoulement' (2014) 12 *Journal of International Criminal Justice* 1141.

ICCPP does not provide the same level of protection as otherwise available under human rights law, the ICC should consider making changes to it.

7.4.3. Domestic Prosecutions

Detained witnesses have a more particular reason for seeking protection from the Netherlands as an alternative to protection from the ICC. If the ICC decides that the risk the detained witness faces in the sending State is severe, and cannot be resolved through the use of assurances, the ICC would be precluded from returning that witness. The question then is, where is the witness to go? They are now in the same position as any other witness seeking relocation, and suffer from the same gap in protection, as States are not obliged to receive them and host them. This problem is difficult enough for witnesses with no criminal history; for detained witnesses, relocating them may be almost impossible. Potential relocation States will be particularly unwilling to host detained witnesses if the crime for which they were convicted in the sending State was a violent one, or a crime that would otherwise indicate that the witness would be a threat to public safety.

A way to lessen a relocation State's concerns could be to arrange for the detained witness to remain detained once he/she reaches the relocation State. If the individual is not at liberty, this lessens the danger that they may pose to society, as well as the political undesirability of hosting the witness. Detention however, requires a lawful basis. One option could be to cooperate with the sending State, in the sense that the relocation State would be enforcing the sending State's sentence on its behalf. This may not be feasible if the sending State is unhappy with the detained witness not being returned, as will likely be the case. It will also be problematic if the circumstances surrounding the detention in the sending State are alleged to not be human rights compliant, for example if it is alleged that the trial was not fair. The other option is for the relocation State to prosecute the witness itself, where a valid basis for jurisdiction exists. This approach is analogous to that taken by countries that find themselves with alleged international criminals on their territory that they cannot extradite. Germany prosecuted a Rwandan man for involvement in the 1994 genocide because it could not extradite him to Rwanda due to human rights concerns. Rather than allow him to live freely in Germany, charges were brought.⁷

While such prosecutions can be a complicated and expensive endeavour, they are, in the author's opinion, a viable option. The ICC could provide logistical support, cooperating with the domestic judicial system in matters of evidence and testimony. Financial support could be supplied through the Special Fund. Admittedly, this was not the original idea for

⁷ 'Germany gives life sentence to Rwandan for genocide' (DW, 29 December 2015) <<http://www.dw.com/en/germany-gives-life-sentence-to-rwanda-for-genocide/a-18950040>> visited 1 September 2016.

the money in the Special Fund, but the principle of States being able to host witnesses in a cost neutral arrangement is maintained. In this set up, witnesses can be protected without compromising the fight against impunity.

7.5. Mechanism for Choosing Between Actors

The Chapter up until now has, for the most part, dealt with particular issues that can be addressed with particular solutions, whether this involves a change in the law or the use of practical measures. Attention now turns to more general solutions. This section will explore a solution potentially applicable to all situations in which both the ICC *and* State(s) have an obligation to protect an individual at the same time. For instance, the situation when both the ICC and the Netherlands have an obligation to ensure that acquitted persons are not sent to a State where they would be at risk. It is in these situations that implementation problems arise, either because of a lack of clarity as to which actor must act, or because of deliberate buck passing.

To combat these issues, the author proposes a way of prioritising the obligations of one actor over those of the other. Rather than multiple actors being required to act at the same time, the actors are placed in an ordinal arrangement: one actor becomes the primary duty bearer, the other the secondary duty bearer, and so on. The primary duty bearer will have first responsibility for protecting the individual in a given situation, while the secondary duty bearer need only act where the primary duty bearer fails to do so.

Prioritising obligations and creating an ordinal arrangement of duty bearers removes ambiguity and makes it harder to ‘pass the buck’; the primary duty bearer knows it must act, and the other actors know this also. The question then becomes: on what basis is this prioritisation to be done? What criteria determine one actor to be the primary duty bearer and the other the secondary one? No hierarchy is provided by the obligations themselves, as is the case in international law generally, and so it is necessary to look to other principles that may assist. Of the different options, two seem the most plausible: the notion of control and individual choice.

As an option for organising the ordinal arrangement of obligations, control benefits from both an intuitive appeal and a broad acceptance in international law. It is intuitively appealing that the actor with most control over an individual should be the first to act on an obligation to protect his or her rights. For example, the State on whose territory an individual is located has more control over the protection of their rights than a different State. This intuitive value is recognised in many areas of international law, in which the criterion of control plays a major role. In human rights law, the exercise of extra-

territorial jurisdiction is intrinsically linked to control.⁸ In peacekeeping missions and collaborative military action, it has been argued that control is central to allocating responsibility.⁹ In the law of occupation, the obligations of the occupying State are engaged when a certain degree of control over territory is exercised.¹⁰ In environmental law, responsibility for transboundary harm is tied to the State of origin's control over the territory from which the harm originates.¹¹ In State responsibility law generally, control can be a deciding factor for the attribution of conduct to a State.¹²

In the context of shared stages of ICC proceedings, the question of which actor has control, or the most control, over an individual will depend on the facts. Detained witnesses seeking protection at the seat of the Court triggers the obligations of both the ICC and the Netherlands. Both actors have protection obligations at the same time to ensure that the witness is not returned to a country where they would be at risk. So which actor is the primary duty bearer that must provide protection in place of the other actor? In the detained Congolese witnesses case, the control criterion would have indicated the ICC: the witnesses were on ICC premises, the ICC had control over their movement and detention conditions, and the Netherlands could not access the detained witnesses without the permission of the Court.

Even with respect to the same individuals at the same stage of proceedings, the control criterion can point in different directions depending on the circumstances. Remaining with the detained witnesses, the author concluded in Chapter 6 that, as matters stand, neither the ICC nor the Netherlands accepts the existence of obligations to protect the right to liberty in those circumstances. However, in the above sections of this Chapter, the author argued for an opposite interpretation of the law in which both actors would have such an obligation. While this would remedy the gap in protection, it may produce its own difficulties: if both actors must act, it is possible that neither will. In that case, the author's earlier proposals would fix the structural problem but create an implementation problem. This is where the ordinal arrangement of duty bearers comes in.

With respect to the right to liberty aspects of the detained Congolese witnesses' case, the Netherlands may have lacked physical control over the witnesses but it did have control over the length of the detention. It was due to the lengthy period of time taken to decide

⁸ For an overview, see Joseph, Sarah and Fletcher, Adam, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2014), 129-138.

⁹ Boutin, Bérénice, *The Role of Control in Allocating International Responsibility in Collaborative Military Operations* (Academisch Proefschrift, 2015).

¹⁰ ICRC Resource Centre, accessible at <https://www.icrc.org/eng/resources/documents/misc/634kfc.htm> (last visited 28-10-2015).

¹¹ 'Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries' (2001) vol. II Part Two Yearbook of the International Law Commission at 149-150.

¹² Article 8, *ibid.*

on the protection claims, which involved the Netherlands missing several court imposed deadlines, that the period of detention was so long. The ICC had made clear that the witnesses were only held in the ICC detention centre because of the ongoing protection applications. This placed the Netherlands in a position of control, and so would make it the primary duty bearer according to the control criterion.

Non-detained witnesses seeking protection are in the same position as detained witnesses *vis-à-vis* the Netherlands and the ICC, but in their case the notion of control is less helpful for identifying a primary duty bearer. The witnesses are at the seat of the ICC, and the ICC is in the process of finding them a safe place to relocate to, or perhaps has already done so. This would point to the ICC as being the actor with more control over the situation. However, one could equally say that as the witnesses are free on Dutch territory, and the Dutch legal system is already dealing with their protection requests, the Netherlands has a greater degree of control. In cases such as these, it may be more helpful to use a different criterion to compose the ordinal arrangement.

It is not always appropriate to rely on control to determine how an individual's rights will be protected and by which actor. In some situations, this choice is better left to the right holder. His or her preference will dictate the primary duty bearer, and the other duty bearer will automatically assume the role of secondary duty bearer.

Returning to non-detained witnesses, if their protection application is granted *and* a relocation State is found, deferring to their individual choice would mean allowing the witness to decide where they want to live and which protection system to reside under. But this solution is not unproblematic. The fact that the witness has chosen to make an application to remain in the Netherlands makes it likely that this will be their choice. This will place an undue burden on the Netherlands if the relocation State is not as 'attractive' in terms of living standards. Then again the problem may not be as pronounced as one might think. It should not be taken for granted that witnesses would choose to remain in the Netherlands if they are offered a reasonable alternative that was more familiar in terms of language, culture, and tradition. In any case, for individual choice to be meaningful the witness must be presented with a real choice.

Deciding between control and individual choice is ultimately a policy decision, affected by the values that the decision maker considers most important. It may be appropriate to compose the ordinal arrangement differently for different categories of individual, or use both criteria to come up with a solution that reflects the range of concerns involved. This raises the question of who decides what criteria are relevant, and how they are applied in individual instances. Strong among the contenders for the decision making body is the ASP, which could establish a decision making mechanism along the same lines as that proposed for pinpointing a volunteer State.

7.6. Mechanism to Pinpoint a Volunteer State

Turning from a general solution for implementation problems, to a general solution for structural problems, this section examines how to encourage States to assist the ICC voluntarily.

As noted above, amending the Rome Statute so that States are obliged to assist the ICC in situations where now they need only volunteer would not be feasible. And yet, this means that in the shared stages of ICC proceedings that suffer from structural gaps in protection, human rights protection will continue to be inadequate. If the author's proposals regarding broadening the jurisdiction of the host State were accepted, then this would go some way to remedying these gaps; but it is not sustainable in the long term, nor is it equitable, to place this disproportionate burden on the Netherlands.

Voluntary assistance can take different forms with different degrees of formality and bindingness. Some of these have been discussed in the substantive chapters. For instance, when a State agrees host to a relocated witness, it may sign a relocation agreement with the Court or the hosting may be done under less formal *ad hoc* arrangements. The same is true for hosting accused granted interim release, and for taking in at-risk acquitted persons. Flexibility is important when encouraging States to assist the Court. It is for this reason that different options exist for States willing to help with witness relocation: they may act as relocation State, contribute to the Special Fund, or act as a platform State.

A significant problem with voluntary measures is that they suffer from their own version of buck-passing. It is relatively easy to hide among 124 States Parties, and each potential volunteer State may question why it should be their responsibility to volunteer, when there are so many other States who could also do so. Because of this obstacle, it is helpful to think of criteria to pinpoint which State would be the most appropriate volunteer in any given instance. In this way, the proposal is similar to the mechanism for choosing between multiple duty bearers discussed in the previous section. While the pinpointed State could always still refuse, there would arguably be more pressure on it to act.

The idea here is not to provide a list of definitive criteria for identifying the most appropriate volunteer State, but to put forward some suggestions. Anything more ambitious than this would be outside the scope of the project. Inspiration for these suggestions has been found in refugee law. The problem of how to allocate refugees among different countries is an ongoing issue of a similar nature to the one that faces the ICC. Kritzman-Amir looks at this area of law and distils a number of considerations to

guide which State(s) should take more refugees, and which less.¹³ The author proposes that these are translatable to the context of voluntary measures at the ICC.

The first consideration is absorption capacity, a socio economic criterion which looks at State GNP, life expectancy, land reserves, employment, etc. to determine whether a State could absorb refugees without it having a significant impact on the economy and the State. The second consideration is the existence of special solidarity bonds. These are bonds that might exist between allied countries or between former colonies and colonial powers, which would make a State suitable to take in refugees from that country. The third consideration is whether a State bears responsibility for the immigration, for example because of the exploitation of the mineral, natural, and/or work resources of the other State. In the ICC context, this might be relevant where one State has aggravated the conflict in which the crimes took place. Finally, there are cultural and ethnic considerations. This works two ways. On the one hand, a country may claim that it is too culturally distinct from the refugee to be able to reasonably accommodate them. On the other hand, there may be significant similarities in culture that makes a State or group of States particularly suitable to take an individual in.

In addition to these general factors that might be taken into account, there are particular factors that will be relevant for specific stages of ICC proceedings. For individuals who have been granted interim release and need a place to await their trial, it may be appropriate to focus on the State that surrendered the accused to the Court. This is particularly so if the accused was residing there when he/she was arrested and surrendered, but less so if the accused was just passing through. For accused that have been acquitted and witnesses in need of relocation, an emphasis may be placed on pinpointing a country with a similar culture and language. This is because these categories of individuals have concluded their involvement with the Court, and must be able to integrate into their new home on a more permanent basis.

The next matter to resolve is identifying a decision maker. It is proposed that this role would fall most appropriately to the ASP. In its position as the representative organ of the ICC, the ASP could create a mechanism for deciding, following a hearing of the views of the relevant actors, which State is best placed to volunteer to protect the human rights of an individual witness or accused. Creating such a mechanism has the distinct advantage that, instead of each State being addressed in a bilateral manner by either the ICC or the affected individual, and declining to assist based on the State's individual concerns, States could come together to seek a multilateral solution. This mechanism could also determine which factors are to be taken into account when making a decision, and put forward solutions that fit the specific circumstances of a case. In this sense, the political

¹³ Tally Kriztzman-Amir, 'Not in My Backyard: On the Morality of Responsibility-Sharing in Refugee Law' (2008-2009) 34 *Brooklyn Journal of International Law* 355, from 372.

nature of the ASP is helpful, as the question being dealt with intrinsically concerns matters of politics and policy. Furthermore, it is already established as a forum for States to express their views.

There are numerous options as to the form that the ASP mechanism could take. At one end of the spectrum would be an informal, cooperative forum for the exchange of views, akin to a roundtable discussion. This has the benefit of creating a cooperative atmosphere of seeking solutions backed by consensus. At the other side of the spectrum the ASP could set up a more formal mechanism, akin to an adversarial proceeding, in which different States would communicate their views to a decision maker who makes the final determination. While this option would increase the likelihood of pinpointing one particular State, it may alienate States with its forcefulness. Possibly the mechanism used will depend on the particular stage being dealt with.

Creating a mechanism like the one described is one step, but getting States to participate in it is another. For this reason, the next section is dedicated to arguments that can be put to States, including the State identified by the ASP mechanism, to encourage and motivate voluntary assistance.

7.7. Reasons for States to Volunteer

Voluntary measures may be a tool to prevent problems with human rights protection, but their utility is limited by the very fact that they are voluntary. Ultimately, there is nothing that can compel a State to agree to them. To really address problems with human rights protection, this section will set out arguments that can be used to push States into action. These arguments stem from the principle of equity. Equity, meaning ‘what is fair and reasonable in the administration of justice’,¹⁴ provides two concepts relevant to the ICC context: the principle of estoppel and the duty of care. While these two are related, they will be dealt with separately.

The general principle of estoppel is used to support the following argument: when States came together in Rome to establish the ICC, they announced themselves to be in favour of human rights and against the ‘unimaginable atrocities that deeply shock the conscience of mankind’.¹⁵ These States established an international criminal justice institution to be the heart of a project aimed at fighting impunity and punishing those who commit gross human rights violations. They are therefore *estopped* from permitting this same project from being the means by which human rights are violated or otherwise compromised.

¹⁴ Francesco Francioni, 'Equity in International Law' (2013) Max Planck Encyclopedia of Public International Law §1.

¹⁵ Preambular paragraph 2, Rome Statute.

Estoppel is a concept well known in both common and civil law jurisdictions,¹⁶ though in the latter it is more often termed good faith. Estoppel in the context of judicial proceedings has a narrow application,¹⁷ but such constraint is not called for here. Indeed, a broad notion of estoppel has been used as an argument in a number of contexts. Relating to the ICC, it has been argued that in cases of self-referral under Article 14 of the Rome Statute, the referring State is estopped from challenging the admissibility of the case once the ICC has begun its investigation.¹⁸ Even more interesting, given its similarity to the argument proposed in this section, is the argument with respect to the UN Security Council: through its practice, the UN has created the expectation that its organs will act in compliance with the human rights that the organisation promotes. It should therefore be estopped from permitting the UN Security Council to set up a sanctions regime, such as that in Resolution 1267,¹⁹ that violates individual rights.

Intimately related to this argument, but conceptually distinct, is the idea that States, in creating the ICC, undertook duties of care towards those the project touches. When a company opens a theme park for public enjoyment, they owe a duty of care to those visiting the park to ensure that it is a safe place for said enjoyment. When States set up an international criminal court to pursue justice, they owe a duty of care to those involved in its processes to ensure that it is a safe place for the pursuit of said justice. Another way of conceptualising it is to say that actors have special duties to those entrusted to their care.²⁰ Parents owe obligations to their children because they brought them into the world. States owe obligations to accused and witnesses because they placed them in the position of being accused and witnesses. The notion of a duty of care is not widely discussed in international law, and it is not argued here that it is an accepted part of general international law. However, it is starting to be used in some areas, such as in the

¹⁶ In the international arena, the circumstances in which estoppel has been invoked are numerous, and in the 1950s arguments were already being made about its status as a general principle of international law within the meaning of Article 38 of the ICJ Statute. That being said, Cottier and Müller would argue that estoppel does not fit well in the 'straightjacket' of Article 38, but instead it should be seen as 'a rule of judge-made public international law, as confirmed and developed by the ICJ on the basis of good faith and equity', Cottier, Thomas and Müller, Jörg Paul, 'Estoppel' (2007) Max Planck Encyclopedia of Public International Law.

¹⁷ 'The principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself', ICJ Reports 1962 *Case concerning the Temple of Preah Vihear [Cambodia v Thailand]* (Merits) 15 June 1962 [Dissenting Opinion of Sir Percy Spender], 143–44.

¹⁸ William Burke-White and Scott Kaplan, 'Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation' (2009) 7 *Journal of International Criminal Justice* 257.

¹⁹ Resolution 1267 (1999) c1 S/RES/1267.

²⁰ Phillip Pettit and Robert Goodin, 'The Possibility of Special Duties' (1986) 16 4 *Canadian Journal of Philosophy* 651.

responsibility to protect and protection of the environment,²¹ and it is a compelling argument for why States should adopt voluntary measures in the ICC context.

7.8. Conclusion

This study began with a story about Joe, Louise, and Ted, citizens of Ivory Coast whose rights were negatively affected by the shared nature of international criminal justice. Their situations exemplified the problems that catalysed this project, and epitomised the challenges faced by the shared protection of human rights. After the discussion of obligations in the previous chapters, we can now set out what should have happened in Joe, Louise, and Ted's cases, and assess whether their situations are as bad as they originally seemed.

Joe would be covered by the framework discussed in Chapter 6. The danger he would have faced upon return to Ivory Coast was severe enough that the ICC sought to relocate him, and the Court succeeded in finding him a new home in Belgium. Joe however, mistrusted this, and feared retaliation from the Ivorian nationals residing in Belgium. To avoid being sent there, he asked the Netherlands for protection. The introduction painted a picture in which the ICC, the Netherlands, and Belgium all abandoned Joe, pointing to each other as the appropriate actor to protect him and pointing away from themselves. In reality, the only actor entitled to do this, from a legal perspective, was Belgium. It agreed to assist the ICC voluntarily, and could withdraw this assistance just as easily. For the ICC and the Netherlands, it is a different story. Nothing can release the ICC from its obligation to protect a witness, not even the possibility of protection from another actor. In turn, nothing can release the Netherlands from its obligation under the ECHR not to remove any individual to a situation of risk, regardless of how they came to be in the country.

Where the problem really lies is in whether the ICC and the Netherlands will be able to comply with their obligations, given the involvement of the other. As we saw in Joe's situation, it was because the Netherlands became involved that Belgium withdrew its assistance. The ICC was thereby impeded from implementing its obligations. More cynically, the problem may be that the ICC and the Netherlands will seek to pass the buck to each other. This present Chapter has proposed ways to deal with this problem. One is for the ICC to be transparent towards Joe about the witness protection scheme it is running and what Joe's rights will be within it. If he knows what measures he will be covered by in Belgium, and whether he will have access to a forum in which to communicate concerns and to review his placement, he may be more trusting of the ICC,

²¹ Louise Arbour, 'The responsibility to protect as a duty of care in international law and practice' (2008) 34 *Int Stud* 445; Mark Allan Gray, 'International Crime of Ecocide, The' (1995-1996) 26 *California Western International Law Journal* 215.

and remain within the ICCPP. Alternatively, organising the ICC and the Netherlands into an ordinal arrangement where one is the primary and the other the secondary duty bearer can prevent buck passing. This could be done on the basis of Joe's individual choice, or on the basis of control, or both.

Joe's situation may be better than it was first described, but Louise's predicament is as bad as the Introduction painted it. Upon delving into the obligations of the relevant actors, it was discovered that indeed there is no obligation on any State to come forward and offer Louise a place to reside while she is released pending trial. The ICC has no territory onto which she could be released, State Parties are not obliged to assist, and the Netherlands does not have jurisdiction over her and so owes her no obligations. As such, she faces a long period of pre-trial detention that is not justified by her conduct or threat level. A number of options were presented in this Chapter that could help Louise. First, if the *Bosphorus* principles were applied by analogy to the matter of establishing Dutch jurisdiction over individuals on the ICC premises, she may be successful in engaging the obligations of the Netherlands. If this were the case, the Netherlands may be obliged to host her for the duration of her interim release. Second, if States agreed to participate in an ASP mechanism designed to pinpoint a volunteer State, the chances of a State assisting the Court may be higher, especially when confronted with the equity arguments. Apart from this, there is not much that can be done beyond the ICC asking for assistance via diplomatic channels. Not only is Louise's situation detrimental to her, but it is blemish on the reputation of the ICC that the Court cannot guarantee such an important corollary of the presumption of innocence.

Out of the three of them, Ted is the actor whose rights are, on reflection, best protected. While getting a convicted person to an enforcement State can produce thorny issues connected to the sharedness of protection, once the individual is in the enforcement State the issues lessen dramatically. Contrary to what Mali originally claimed, Ted is entitled to certain minimum standards of treatment for the duration of his sentence. Just because Mali treats its domestic prisoners a certain way, does not mean that human rights standards do not need to be respected for Ted. In fact, according to the Rome Statute, Ted should not be treated any worse or any better than domestic prisoners, meaning that minimum standards should be respected across the board.

As for the ICC, it was wrong to tell Ted that he could only take his complaint to the Malian authorities and not the Court. The ICC has an obligation to supervise the conditions in the prisons holding those it convicts. At the very least it must inspect the conditions regularly, and communicate with Mali about any problems. If the problems persist, the ICC is obliged to move Ted elsewhere. In Ted's case therefore, the shared nature of the protection works in his favour, with the ICC being in the position to catch any mistakes that Mali makes.

The picture we end with is more optimistic than that with which we began. Even though Louise's situation regarding interim release is still problematic, Joe and Ted are better protected than was originally painted. That being said, the moments at which we joined Joe, Louise, and Ted's stories are only part of the tale. Problems exist at each shared stage of ICC proceedings analysed in this study, with the exception of arrest and surrender. The answer to the research question must therefore remain a negative one: human rights are not adequately protected in the shared stages of ICC proceedings. This final Chapter has put forward potential solutions, different ways of approaching the variety of issues that have been encountered in this thesis. Some of these are 'in-the-box', such as the proposed alternative interpretations of the law, and some are 'out-of-the-box', such as the different approach to the Netherlands' human rights jurisdiction and the mechanisms for choosing between actors and pinpointing volunteer States. Adopting any of these would be a much needed step on a path that still extends far in front of us.