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Protecting Witnesses at the International Criminal Court from Refoulement

Emma Irving*

Abstract

International criminal trials are often contentious in the countries where the alleged crimes took place, and participation in them can place witnesses at risk. Where the risk to a witness is particularly severe, it may not be possible for that person to return home after testifying. In that case, they must be relocated to a safe third country. Many of the witnesses who testify before the International Criminal Court (ICC) can be adequately protected through the court's witness protection programme. However, the ICC's witness protection suffers from certain shortfalls that have left some witnesses unwilling to rely on it for their protection. These have turned instead to the ICC's host state, The Netherlands, to claim protection against refoulement. This article argues that many of the shortfalls in the ICC witness protection regime can be addressed by reference to international human rights norms, particularly the prohibition on refoulement, through the interpretative tool in Article 21(3) of the ICC Statute. For the shortfalls that cannot be lessened in this way, seeking protection from The Netherlands may be a viable option. However, the possibility of a non-refoulement claim against the Netherlands, as an alternative to protection by the ICC, does not necessarily solve all of the difficulties facing ICC witnesses.

1. Introduction

Not all testimony given by witnesses participating in international criminal trials is welcome to all. The trials are often contentious in the countries where the alleged crimes took place, and vested interests at all levels of society can make participation in these trials dangerous. International criminal law requires the testimony of witnesses, and so it must seek to protect them against the risks associated with their role. Where the risk to a witness is particularly severe, it will not be possible for that person to return home after testifying. In that case, they must be relocated to a safe third country.

Many of the witnesses who testify before the International Criminal Court (ICC) can be adequately protected through the Court's witness protection programme. However, the programme is characterized by an opaqueness that has left some witnesses unwilling to rely on it for their protection. These witnesses suggest that the programme's lack of transparency conceals a number of shortfalls that limit its

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effectiveness. As these witnesses find themselves on the ICC host state's territory, they have turned to The Netherlands as an alternative source of protection. They argue that they cannot be removed from the territory of The Netherlands because this would violate the international law obligation of non-refoulement. The prohibition on refoulement is, at its most basic, the right not to be returned to a country where one would be exposed to certain risks.

In recent years, a number of witnesses have lodged asylum applications with The Netherlands. While not always successful, the resulting case law before the Dutch Courts has shed light on the interesting interaction between the ICC protection regime and the Dutch protection regime. However, the possibility of a non-refoulement claim against The Netherlands is not a problem-free alternative to protection by the ICC; the co-existence of two protection regimes can lead to buck-passing among the actors involved. For this reason it is important for the ICC to ensure, as far as possible, that its witness protection programme remedies the shortfalls that give witnesses cause for concern. To an extent this can be done by incorporating substantive and procedural elements of the international law prohibition on refoulement into the programme's operation. Article 21(3) ICC Statute provides a tool for doing so, as it requires that the Statute be interpreted and applied in line with human rights norms. However, there are limitations to what can be achieved with Article 21(3), and not all problems can be remedied in this way.

In order to explore the issues described above, this article will begin with a preliminary overview of the nature of the obligations incumbent on the ICC and The Netherlands, as regards non-refoulement. This will be followed in Section 3 by a description of how witness relocation at the ICC operates and the shortcomings of the witness protection programme. It will be suggested that some of the shortfalls can be addressed by incorporating in the ICC's witness relocation programme the requirements of the prohibition on refoulement. In Section 4, the paper will go on to discuss the case law that has arisen from ICC witnesses seeking protection from refoulement before Dutch Courts, and how these Courts have worked out the interaction between the two regimes. Section 4 will conclude with a description of the problems that arise when multiple protection regimes operate simultaneously.

2. Preliminary Observations on the Nature and Scope of Obligations

Article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention) is the cornerstone of the obligation of non-refoulement in international refugee law. However, the ICC, as an international organization and not a state, cannot be party to the Refugee Convention. This does not mean the ICC is unaffected by non-refoulement. Article 21 ICC Statute sets out the sources of law to be applied by the Court and establishes the hierarchical relationship between them. The top of the hierarchy is stipulated by Article 21(3), which is said to establish a ‘super-legality’:¹ 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'. The prohibition on refoulement is generally agreed to be customary international law.² Although it originates in refugee law, its humanitarian and social nature gives it a human rights law character.³ Therefore, where applicable, non-refoulement should guide the Court in how it interprets and applies the other sources of law.

In practice, the Court has taken a restrictive view of the impact of the prohibition on refoulement on the ICC’s obligations. While it considers that ‘the Court cannot disregard the customary rule of non-refoulement’, it maintains that it is ‘unable to implement the principle within its ordinary meaning ...only a state which possesses territory is actually able to comply with the *non-refoulement* principle.’⁴ To an extent this analysis is correct: in order for a person not to be expelled, there must be a territory from which they are to be expelled. The ICC has no territory on which to offer the protection that the prohibition from refoulement entails. However, it will be argued below that the obligation of non-refoulement can influence other aspects of

¹ A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), at 1079.

² Among others: J. Allain, 'The Jus Cogens Nature of Non-Refoulement', 13 *International Journal of Refugee Law (Int'l J Refugee L)* (2001) 533, at 6; G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn., Oxford University Press, 2007), at 218-232; A. Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', 20 *Int'l J Refugee L* (2008) 373, at 384.

³ In the American Convention on Human Rights (Organization of American states (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969) Art. 28 sets out a right almost equivalent to Art. 33 of the Refugee Convention. See also Chapter 1(2) of the Statute of the Office of the United Nations High Commissioner for Refugees, GA Res. 428(V), 14 December 1950; D.J. Cantor and S.E. Barichello, 'The Inter-American human rights system: a new model for integrating refugee and complementary protection?' 15 *The International Journal of Human Rights* (2013) 689; K. Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia, 2009), at 165.

⁴ Decision on an *Amicus Curiae* application and on the “Requête tendant 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), *Katanga and Ngudjolo Chui* (ICC-01/04-01/07), Trial Chamber II, 9 June 2011 (*Katanga*, 9 June 2011).

witness protection, and just because the ICC cannot implement it in a traditional manner, does not mean that it should not inform the interpretation and application of the law.

The Netherlands, for its part, is bound by Article 33 of the Refugee Convention. For individuals to invoke this obligation, they must be subject to a particular kind of risk, as not all types of risk give rise to the prohibition on refoulement. The risks in Article 33 are confined to: a threat to life or freedom on account of race, religion, nationality, membership or a particular social group or political opinion. There are more provisions on non-refoulement in other international conventions, such as Article 3 of the Convention Against Torture and Article 3 of the European Convention on Human Rights, the latter being particularly relevant where The Netherlands is concerned. However, due to space limitations, the focus of this article will be limited to Article 33 of the Refugee Convention.

The obligation of non-refoulement under the Refugee Convention is closely linked to the legal status of asylum. Where non-refoulement is successfully invoked, this will often mean that an application for asylum would also be successful. They are both necessary for an individual fleeing risk: non-refoulement is the right not to be sent back, while asylum is the right to stay. Article 1 Refugee Convention sets out when a person qualifies for asylum. The wording is different from Article 33; instead of requiring a threat to freedom or life, there must be a well-founded fear of persecution (the grounds of race, religion, etc., remain the same). However, there is general consensus that these provisions are intended to cover the same risks and have the same meaning.⁵ Therefore, when this article discusses examples from practice of asylum applications made by witnesses, this is taken to apply equally to non-refoulement situations.

3. Witness Relocation at the ICC

A. *The Statutory Basis for the ICC Protection Programme*

An effective witness protection programme is vital for the operation of any international criminal tribunal. Many of the situations currently before the ICC involve conflicts where the system of government and formal authority has broken

⁵ W. Kälin, M. Caroni and L. Heim, *Article 33, para. 1 Prohibition of expulsion or return ('refoulement')/Défense d'expulsion et de refoulement*, in A. Zimmermann et al. (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 1327, at 1387-1388.

down. As documentary evidence for use at trial is not always widely available, individuals who have seen the events first hand are essential to the criminal justice process. The circumstances in the witnesses' home countries also make a well functioning protection scheme at the Court all the more important, as there may not be the national resources available to offer protection at the domestic level.

To date, most witnesses before the ICC have required some degree of judicial protective measures. These measures can only be ordered by the Chambers of the Court, and include the use of pseudonyms, excluding the public from observing the testifying witness (closed session), and image and voice distortion.⁶ At times however, these measures are not considered sufficient to keep a witness safe from reprisals. Before they come to the Court, the Victims and Witnesses Unit of the ICC must ensure some witnesses can be relocated to a safe third state after giving their testimony. Relocation is a non-judicial protective measure created to cope with the most serious challenges of witness protection.⁷ Witnesses can be relocated within their own country, or they can be relocated abroad. It is the latter situation that is most relevant to this article. The Appeals Chamber has been keen to stress that as it is highly disruptive to the lives of the witnesses and their families, relocation is a measure of last resort and should not be used lightly.⁸

Article 68 is the principal witness protection provision in the ICC Statute, and covers all protective measures including relocation. The Article imposes an overarching duty on the Court as a whole to 'take all appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. The article was broadened from its originally proposed formulation, which required only 'necessary measures' to be taken.⁹ The formulation of Article 68 is broad, and leaves it open to the Court to order measures not explicitly mentioned in the ICC documents.¹⁰ The more particular responsibility for the protection of

⁶ Art. 68 ICCSt.; Rule 87 ICC RPE.

⁷ M. Eikel, 'Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice', 23 *Criminal Law Forum* (2012) 97, at 118.

⁸ Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-776), Appeals Chamber, 26 November 2008, § 66 (*Katanga*, 26 November 2008); See also S. Arbia, 'The International Criminal Court: witness and victim protection and support, legal aid and family visits', 36 *Commonwealth Law Bulletin* (2010) 519, at 522.

⁹ W. Schabas, *The International Criminal Court: a commentary on the Rome Statute* (Oxford University Press, 2010), at 823.

¹⁰ *Ibid.*, at 824.

witnesses is divided among different organs of the Court; the Statute imposes protection obligations on the Prosecutor,¹¹ the Chamber,¹² and the Registry.¹³ This has led to some ambiguity as to which organ should take the lead, with consequent calls for the system to be clarified.¹⁴ However, most relevant to the relocation of witnesses is the role of the Registry, and more specifically, the Victims and Witnesses Unit (VWU).

The VWU is situated within the Registry so as to retain a neutral position¹⁵ and is tasked with providing protective measures and security arrangements for witnesses and victims. One of its functions is the management of the International Criminal Court Protection Programme (ICCPP). This was set up by the Registry, and managed by the VWU, in order to comply with Regulation 96 of the Regulations of the Registry,¹⁶ which requires the Registry to maintain a witness protection programme.

The precise way in which the ICCPP operates is confidential,¹⁷ and therefore information about its functioning, financing, and the number of witnesses participating in it are not readily available. However, the text of Regulation 96 does provide some details on the criteria for participation. The Registry must consider the involvement of the person before the Court; whether the person or their family is endangered because of their involvement with the Court; and whether the person agrees to enter the programme. Once accepted into the programme, the VWU must determine whether the risk at return is such that relocation of the witness is necessary, and if so, find a state willing to host the witness. The details on how the risk level is assessed are contained in a Joint Protocol between the Office of the Prosecutor and the VWU, which remains confidential.¹⁸

¹¹ Arts 54(1)(b) and 54(3)(f) ICCSt.

¹² Arts 57(3)(c), 64(2), 64(6)(e), 87(4) and 93(1)(j) ICCSt.; Rules 87 and 88 ICC RPE.

¹³ Art. 43(6) ICCSt.

¹⁴ Eikel, *supra* note 7.

¹⁵ *Katanga*, 26 November 2008, *supra* note 8, § 90.

¹⁶ Regulations of the Registry, 6 March 2006, ICC-BD/03-01-06.

¹⁷ R. Frölich, 'Current Developments at the International Criminal Court', 9 *Journal of International Criminal Justice (JICJ)* (2011) 931, footnote 54.

¹⁸ The Protocol sets out the procedures for conducting risk assessments and identifying the appropriate measures for risk treatment, Assembly of States Parties, 'Report of the Court on the implementation and operation of the governance arrangements', Tenth Session ICC-ASP/10/7, 17 June 2011, § 21.

B. The Shortfalls of the ICCPP

Witnesses who are included in the ICCPP must deal with a protection regime that is opaque and lacks transparency. As such, it is not always clear what type of treatment they will receive. This has left some witnesses dissatisfied with the protection offered by the ICC, and these have looked elsewhere for protection, in particular to The Netherlands. One might wonder what would lead a witness to this choice, when the ICC is able to protect them from returning to a situation of risk through relocation. The witnesses who have applied for asylum in The Netherlands have put forward a number of arguments as to why they prefer the asylum route to ICC relocation. First, the witnesses pointed out that it was not clear whether they would have the same procedural and substantive rights as they would otherwise have under international law. Second, they pointed to the fact that the scope of protection under the ICCPP is narrower than under refugee law. And thirdly, the witnesses had concerns about the ICCPP's dependence on state cooperation.

Beginning with the first point, the witnesses argued that international law requires a certain quality of protection for persons who would be at risk if returned to their home country, and that this can only be provided by a state. Since the ICC has no territory, it cannot guarantee the rights that the Refugee Convention would ensure for the witnesses. They went on to suggest that, even if the ICC could provide these rights, it is not bound by the Refugee Convention and so has no obligation to do so.¹⁹ There are two strands to this argument. On the one hand, there may be procedural rights that the Refugee Convention grants which are not covered by the ICCPP. On the other, there are substantive rights that attach to persons covered by the Convention that may not be granted to witnesses in the ICCPP.

To begin with procedural matters, it is not clear what safeguards and assistance is given to witnesses in the ICCPP. For example, it is not known whether witnesses in the ICCPP have access to legal assistance when seeking relocation. Under the Refugee Convention, there is an obligation on states to provide free legal representation from the beginning of an asylum procedure.²⁰ This is necessary because the individual in question will not be familiar with the legal system of the receiving

¹⁹ Uitspraak 201303197/2/V3 en 201303198/2/V3, 12 November 2013, Aliens Chamber, § 1.12.

²⁰ UNHCR, 'Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member states for Granting and Withdrawing Refugee Status', Council Document 14203/04, Asile 64, of 9 November 2004; UNHCR, 'Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards', at 3, § 5.

state or with the grounds for the recognition of refugees. It will be harder for individuals to make their case if they do not know what type of information they should be providing. This is surely of equal importance when witnesses are making their case for participation in the ICCPP and for relocation. The ICC system will more than likely be unfamiliar to them, as will the grounds for protection through relocation. Other procedural issues include access to a court to deal with issues that may arise with the relocation and a lack of access to review of decisions made about a person's protective measures in the context of the ICCPP.²¹

Turning to substantive rights, under the Refugee Convention refugees are given certain rights. Refugees who lawfully stay on a state's territory can work, receive an education and benefit from a number of welfare provisions.²² The position of witnesses relocated through the ICCPP is much less clear. The confidentiality of the programme is such that it is not known whether there is a set of minimum rights that witnesses will benefit from, and or whether these are the same in all receiving states. Furthermore, the witnesses specifically raised the issue of the long-term reliability of their relocation.²³ Will they retain their protected status once the trial is concluded? What about ten years from now? It is possible that the risk will reduce over time, but it also may not. There will be a difference in the dynamic between the individual seeking protection and the receiving state depending on whether the witness is protected under the Refugee Convention or through the ICCPP. In the former case, the relationship exists principally between the individual and the receiving state, with the individual's country of origin playing but a small role. In the latter, the relationship between the individual and the receiving state is less important than that between the ICC and the receiving state. The latter relationship might affect the attitude of the state towards the witness. This is a matter of concern, especially given the changeability of public opinion towards the ICC.

These problems are not without solution. Article 21(3) of the ICC Statute could be a tool to deal with these shortfalls in the ICCPP. Article 21 refers to the application of the law by the Court as a whole and not only by the Chambers. The Registry is therefore also bound by the interpretation and application rule in Article 21(3). The Registry was required to set up the ICCPP by Regulation 96 of the

²¹ Under the Refugee Convention, Art.16 grants free access to the Courts of all contracting states.

²² Arts 17, 22, and 24 respectively.

²³ *Supra* note 19, § 1.6.

Regulations of the Registry, and in applying this provision, the Registry should bear the customary prohibition on refoulement in mind. In this way, the operation of the ICCPP would necessarily involve certain safeguards and provide certain rights. This may involve going beyond the words of the Statute, but Article 21(3) has been used by the Trial Chamber and Appeals Chamber to generate new powers for the Court in the past. During the *Lubanga* trial, the Prosecution created a situation where full disclosure to the Defence was not possible, as evidence had been given to the Prosecution on the basis of confidentiality. Deciding that a fair trial was no longer possible, the judges of Trial Chamber I unconditionally stayed proceedings against the defendant and ordered his release.²⁴ While the order for release was overturned on appeal, the Appeals Chamber did agree that Article 21(3) created a power to stay proceedings, both permanently and conditionally.²⁵ Neither this power, nor the other uses to which Article 21(3) has been put,²⁶ are found elsewhere in the Statute.

If the programme were actively applied in a manner consistent with the international customary law right of non-refoulement, many of the issues regarding procedural and substantive rights could be addressed. The availability of legal assistance to witnesses and other procedural rights would be relatively easy to apply (except perhaps on the budgetary level). As to the substantive rights, provision for these could be made in the relocation agreements. Some may argue that the procedural safeguards and detailed substantive rights discussed in the preceding

²⁴ Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *Lubanga Dyilo* (ICC-01/04-01/06-1401), Trial Chamber I, 13 June 2008 (*Lubanga*, Stay of Proceedings Decision); Decision on the release of Thomas Lubanga Dyilo, *Lubanga Dyilo* (ICC-01/04-01/06-1418), Trial Chamber I, 2 July 2008.

²⁵ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", *Lubanga Dyilo* (ICC-01/04-01/06-1486), Appeals Chamber, 21 October 2008, §§ 76-80.

²⁶ The possibility of a stay of proceedings had arisen previously in the *Lubanga* case. The Appeal Chamber decided that the doctrine of abuse of process applied to ICC proceedings based on Art. 21(3) (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, *Lubanga Dyilo* (ICC-01/04-01/06-772), Appeals Chamber, 14 December 2006, §§ 36-39); Further, through Art. 21(3), Pre-Trial Chamber III utilised the concept of 'reasonable suspicion' from the ECHR to determine the meaning of 'reasonable grounds to believe' in Art. 58(1)(a) ICCSt. (Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Bemba Gombo* (ICC-01/05-01/08-14-tENG), Pre-Trial Chamber III, 10 June 2008, §24); Art. 21(3) has also been employed to shape the meaning of 'victim' in light of human rights norms (Fourth Decision on Victims' Participation, *Bemba Gombo* (ICC-01/05-01/08-320), Pre-Trial Chamber III, 12 December 2008, §40; Decision on victims' participation, *Lubanga Dyilo* (ICC-01/04-01/06-1119), Trial Chamber I, 18 January 2008, §§35-38).

paragraphs are not part of the customary norm, but rather exist only within the treaty regime. It is argued here that these rights imbue the prohibition on refoulement with fairness and are necessary to make the right effective.

The second objection of the witnesses to the ICCPP related to its scope. The scope of protection is limited to risks incurred because of the witness' testimony and their association with the Court. Textually, this accords with the wording of Rules 17 and 87 Rules of Procedure and Evidence (RPE), which allow for protective measures where a witness is at 'risk on account of testimony given'. This approach has also been confirmed by Trial Chamber II in the *Katanga* case.²⁷ The Chamber made a distinction between risks arising from a witness' cooperation with the Court, risks arising because of the human rights situation in their home state, and the risk of persecution in their home state that would give rise to an asylum claim.²⁸ While it is true that the overall human rights situation in a state will influence and exacerbate the risks incurred by associating with the Court, Trial Chamber II held that the three types of risks should remain separate for a witness protection assessment. Only risks associated with cooperation with the Court will trigger witness protection.²⁹

The Chamber went on to say that Article 21(3) does not alter this analysis, as it does not place an obligation on the Court to ensure that states parties properly apply human rights in their own proceedings before domestic courts.³⁰ It could be argued that the Court is being too narrow in its understanding of Article 21(3). It is possible for the Court itself to violate the prohibition on non-refoulement if it applies the law in a way that contravenes it, and indeed Trial Chamber II itself stated that the Court cannot disregard non-refoulement. However, as Trial Chamber II also said, the Court cannot fully implement the prohibition on refoulement. The most it can do is make the operation of the ICCPP compliant with non-refoulement and seek to guarantee its protection that way. It is argued here that Trial Chamber II was correct in not extending the scope of risk covered through the use of Article 21(3). This would not be compatible with the ICC's mandate and would intrude into the domestic affairs of states.³¹ There are limits to the powers that the Article 21(3) provision can generate

²⁷ *Katanga*, 9 June 2011, *supra* note 4.

²⁸ *Ibid.*, § 59.

²⁹ *Ibid.*, § 61.

³⁰ *Ibid.*, § 62.

³¹ M. Cupido and J. Wijk, 'Testifying Behind Bars: Detained ICC Witnesses and Human Rights Protection', available on SSRN: <http://ssrn.com/abstract=2374678> or <http://dx.doi.org/10.2139/ssrn.2374678>, visited 13 October 2014 at 15.

for the Court. The ICC after all is a criminal court and so is not equipped to conduct a broader assessment of risk. This is a task usually reserved for an asylum judge.³² Imposing this role on the Court would be an undue burden, especially as the Court is already struggling to protect the witnesses currently in the ICCPP.³³

And finally, the witnesses highlighted a more general problem with the ICCPP: its dependence on state cooperation. Simply put, if states do not cooperate in witness relocation, the whole programme becomes ineffective.³⁴ A witness at risk must be relocated to a state willing to host them, and possibly their family too. This is done most effectively where the receiving state voluntarily enters into a relocation agreement with the ICC. The existence of these agreements is very important, as they reduce the time it takes to relocate a witness from approximately one year to six months, and they significantly reduce the resources that both the state and the ICC must invest in the relocation process.³⁵

Unfortunately for the ICCPP, state cooperation in relocating witnesses has not been sufficient for the ICC to meet its witness protection mandate.³⁶ As the witnesses pointed out before the Dutch Courts, there is no obligation on states to conclude relocation agreements,³⁷ and for a number of witnesses in the ICCPP, there are insufficient agreements in place.³⁸ A development designed to promote the signing of more agreements is the creation of the Special Fund.³⁹ This fund seeks to make hosting relocated witnesses more financially attractive by distinguishing between host states and donor states.⁴⁰ A state that lacks resources but is willing to host a relocated witness can do so, while a state that cannot host a witness but can afford the associated costs can make a donation to the Fund. Despite this initiative, states continue to be slow to sign agreements with the Court. This greatly compromises the

³² G. Sluiter, 'Shared Responsibility in International Criminal Justice: The ICC and Asylum', 10*Journal of International Criminal Justice* (2012) 661, at 670.

³³ International Bar Association, 'Witnesses before the International Criminal Court: An international Bar Association International Criminal Court Programme report on the ICC's efforts and challenges to protect, support and ensure the rights of witnesses', July 2013 (IBA Report), at 35.

³⁴ See Arbia, *supra* note 8, at 522.

³⁵ IBA Report, *supra* note 33, at 36.

³⁶ Assembly of States Parties, 'Report of the Court on cooperation', Twelfth Session, ICC-ASP/12/35, § 30.

³⁷ *Supra* note 19, §1.12.

³⁸ IBA Report, *supra* note 33, at 35. The information in this Report is based on IBA consultation with an official from the Registry in February 2013.

³⁹ Assembly of States Parties, 'Report of the Bureau on cooperation', Twelfth session, ICC-ASP/12/36, 21 October 2013, at 4 and 8; 'Report of the International Criminal Court to the United Nations for 2010/2011', Sixty-sixth session, A/66/309, 19 August 2011, at § 106.

⁴⁰ Arbia, *supra* note 8, at 523.

Court's ability to effectively protect witnesses, leading to calls from the ICC Assembly of States Parties for states to conclude more relocation agreements.⁴¹

Even if a state agrees to sign a relocation agreement with the Court, there is nothing in that agreement to compel a state to accept witnesses on its territory in any given instance.⁴² The Assembly of States Parties has used this factor to encourage states to enter into relocation agreements, highlighting that the agreements are 'extremely flexible as witnesses are accepted on a case-by-case basis'.⁴³ What this means however, is that even with relocation agreements in place, the ICCPP is still at the mercy of state cooperation.

The witnesses were justified in raising concerns about the functioning of the ICCPP, and these concerns should be carefully examined by the ICC. Some of them would be relatively easy to resolve through the mechanism in Article 21(3). Others would not be so easily dealt with; the matter of state cooperation is likely to plague the Court for some time. It is not surprising therefore that some witnesses have turned to the arguably more secure and transparent route of claiming protection from refoulement from The Netherlands. That being said, before this route could be considered a viable alternative to ICC protection, the interaction between the ICC regime and the Dutch protection regime had to be worked out.

4. The Interaction Between the ICCPP and the Non-Refoulement Obligations of The Netherlands

The witnesses who raised concerns about the ICCPP turned to the ICC's host state as an alternative source of protection. However, there is an important preliminary remark to be made. The types of risks that could found a non-refoulement claim in The Netherlands are not unlimited; there must be a risk to life or freedom on grounds of race, religion, nationality or membership of a social group or political opinion.⁴⁴ It is possible then that not all witnesses who would qualify for participation in the ICCPP could also be protected by The Netherlands. Where there is overlap between the regimes, with witnesses who qualify under both regimes, only then need the interaction between them be established.

⁴¹ *Supra* note 36, §§ 30-31.

⁴² IBA Report, *supra* note 39, at 36.

⁴³ *Supra* note 36, § 31.

⁴⁴ Art. 33(1) Refugee Convention.

The discussion can be illustrated with some examples from practice. Since 2011, a number of asylum claims have been lodged with The Netherlands by witnesses appearing before the ICC. As mentioned above, asylum claims are not strictly the same as seeking protection from refoulement, but the approach to deciding their merits is in the relevant ways the same.

At this stage, a distinction must be drawn between normal witnesses and detained witnesses.⁴⁵ Normal witnesses come to the seat of the Court and are free to move around the host state as they wish (subject to possible restrictions placed on them by the host state). Detained witnesses on the other hand, are those who are imprisoned in their own country for domestic crimes. They are transferred to the ICC pursuant to Article 93(7) ICC Statute, which stipulates that they must remain detained while at the Court and be returned to the sending state on completion of their testimony. An agreement to this effect is also concluded between the sending state and the Court, with the legal basis and authority for detaining the witnesses remaining with the sending state. The ICC detention unit essentially carries out the detention imposed by a state.

For these two categories of witnesses, the interaction between the ICC protection regime and The Netherlands' non-refoulement obligations is different. The practice for each will be discussed in separate sections, followed by an overview of the dangers that the interaction between the regimes can engender. Rather than ensure better protection for witnesses, the existence of more than one regime of protection might actually reduce their security.

A. *Non-detained Witnesses*

For witnesses at liberty, the division of labour for protection from return to a situation of risk would seem to apply in a straightforward way. The primary responsibility for witnesses' protection rests with the ICC because the state parties, when drafting and ratifying the ICC Statute, agreed to make it so. The Statute and RPE are unambiguous in placing the Court as a whole under an obligation to protect witnesses from being

⁴⁵ There are of course, more categories of individuals that could raise an asylum claim in the ICC's host state. On 21 December 2012, the first person to be acquitted by the Court, Mathieu Ngudjolo Chui, applied for asylum in The Netherlands. While originally being held in immigrant detention, Ngudjolo was released to await the outcome of his appeal and currently resides in The Netherlands (Registry's update on the situation in relation to Mathieu Ngudjolo Chui, *Ngudjolo Chui* (ICC-01/04-02/12-69-Red), Appeals Chamber, 3 June 2013. Other such categories include convicted persons and family members of accused appearing before the Court.

returned to a situation of risk. It is for the benefit of the Court that the witnesses give their testimony and incur the associated risk of harm. However, for the reasons discussed above (Section 3B), witnesses might be unhappy with the protection offered by the ICC, and seek to remain in The Netherlands as refugees.

In 2002, in a letter to the Lower House of Parliament in The Netherlands, the Minister of Justice wrote that ICC witnesses should be treated as any other alien on Dutch territory.⁴⁶ The letter stated that witnesses come to the ICC on a purely voluntary basis and can move freely in The Netherlands; therefore they do not fall under the jurisdiction of the ICC. The ICC Statute and RPE do not delegate to the ICC the role of ensuring the safe return of witnesses after their business with the ICC is complete. Consequently, asylum law should apply in the same way to them as to any other individual present on Dutch territory.

The possibility of witnesses claiming asylum envisaged by the Minister of Justice in 2002 became a reality in January 2011, when two witnesses at the ICC applied for asylum. They were accepted into the ICCPP with a view to being relocated to a third state, but they also lodged an asylum application with the Dutch authorities. Contrary to the statements made by the Minister of Justice in 2002, the State Secretary rejected their application, specifically because the ICC was involved.⁴⁷ His reasoning was that, as the ICC was already providing for the relocation of the witnesses, there was no danger of them being returned to their country of origin. As such, there was no well-founded risk of persecution on the grounds listed in the Refugee Convention.⁴⁸ The witnesses appealed this decision, leading to a decision of the Council of State of The Netherlands, the highest appeal court for matters of administrative law, including immigration law. This appeal decision, which was in favour of the witnesses, was delivered in February 2014.

In this appeal, the State Secretary continued with the line of argument that the Refugee Convention did not apply, supplemented with assertions that the ICC has always found a safe third country to relocate witnesses to in the past, and that it must be assumed that the ICC is bound by non-refoulement.⁴⁹ On the applicability of the Refugee Convention to the witnesses, the Council of State disagreed with the state

⁴⁶ 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.

⁴⁷ Uitspraak 201303197/1/V3 en 2013003198/1/V3, 18 February 2014, Council of State, § 6.

⁴⁸ *Ibid.*, § 6.1.

⁴⁹ *Ibid.*

Secretary. It held that under Article 1(A), a refugee is defined as an alien who is outside of their country of nationality because of a well-founded fear of persecution and who, for this reason, cannot return to their country. The only exceptions are contained in Article 1(C) to (F). What determines a person's refugee status is not whether there is a danger that they will be returned to their country of origin, but whether, if they were returned, there is a risk of persecution.⁵⁰ In other words, a person is not a refugee if there is a risk of refoulement, but rather if a person is a refugee then they must not be expelled. So it mattered not that the ICC's involvement meant that there was no risk of them being returned.⁵¹ Any other interpretation, according to the Council of State, would mean reading an implicit limitation into Article 1(A). This would contradict the Refugee Convention system, which explicitly states the limitations to refugee status in Article 1(C) to (F).

The conclusion of the Council's line of argument is that the participation of the witnesses in the ICCPP does not preclude the applicability of the Refugee Convention. In essence, the Council held that both systems of protection apply in parallel. The result was that the witnesses were indeed granted asylum, and now live as refugees in The Netherlands.

B. Detained witnesses

The situation of detained witness is more complex. Detained witnesses have additional reasons for not relying on the ICC protection regime, as the ICC does not have the same options for protecting detained witnesses as for non-detained. The outcome of the Dutch Courts' analysis was the same as for non-detained witnesses, in that The Netherlands was held to have obligations under refugee law towards the witnesses. The reasoning though, was different.

The difficulties for detained witnesses are best illustrated through practice. In May and June 2011, four ICC witnesses filed asylum applications with the Dutch authorities. Three of these witnesses were from the *Katanga* case file (Trial Chamber II) and one from the *Lubanga* case file (Trial Chamber I). Before coming to the Court they were detained in the Democratic Republic of Congo (DRC), three of them since 2005 on suspicion of involvement in the death of United Nations peacekeepers, and

⁵⁰ *Ibid.*, § 6.2

⁵¹ The obligation of non-refoulement applies independently of the individual's entitlement to other forms of protection, G. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', 23 *Int'l J Refugee L* (2011) 443, at 444.

one since 2010 on suspicion of treason. No formal charges have been brought to date. Due to their status as detained persons, their transfer was affected pursuant to Article 93(7) ICC Statute.

Article 93(7) stipulates that detained persons appearing before the ICC must remain detained while at the premises of the Court, and be returned to the sending state on completion of their testimony. This is reiterated in Rule 192 RPE and in the Standard Operating Procedure. According to the agreement between the ICC and the DRC, the authority to detain the witnesses remains with the DRC. In the normal course of events, the witnesses would simply have been returned to the DRC on conclusion of their testimony. However before they could be returned, they applied for asylum in The Netherlands and began a long legal dispute about their status. The detained witnesses had further arguments for not participating in the ICC witness protection program. The reasoning was explained by Duty Counsel for the witnesses, who pointed to the fact that the ICC witness protection regime was designed for people at liberty, and so various protective measures are simply not available for detained persons, the most obvious being relocation.⁵² While the ICC can seek assurances from the sending state as to the treatment of the witness on return, assurances can leave much to be desired in human rights protection. This is evidenced by the strict requirements that the European Court of Human Rights places on assurances when an individual is removed to a non-member state.⁵³ Furthermore, Duty Counsel argued that the ICC did not have the power to ensure proper protection in the DRC through assurances, as it is from the DRC authorities themselves that the witnesses required protection.⁵⁴ The following discussion will outline the position of the ICC on this issue, followed by the position of the host state, and concluding with the current state of affairs.

Trial Chambers I and II, while adopting separate decisions on the matter, both refused to issue an order for the witnesses' return once the asylum applications had been made.⁵⁵ The decision was made on the basis of Article 21(3), as to return the witnesses immediately would interfere with their right to seek asylum, as well as with

⁵² *Katanga*, 9 June 2011, *supra* note 4, § 27.

⁵³ *Case of Othman (Abu Qatada) v. the United Kingdom*, Appl. no. 8139/09, 17 January 2012.

⁵⁴ *Katanga*, 9 June 2011, *supra* note 4, § 27.

⁵⁵ *Katanga*, 9 June 2011, *supra* note 4; Redacted Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 5 August 2011.

the ability of The Netherlands to comply with its obligation to consider the asylum claim.⁵⁶ According to Trial Chamber I, it is the responsibility of the Court to ensure that the witnesses have a “real – as opposed to a merely theoretical – opportunity” to make an asylum request before being returned to the DRC.⁵⁷ As such, the ICC had to ensure a delay until the Dutch authorities had time to consider the application, as well as allow access to lawyers. This further demonstrates the importance of Article 21(3): in this case it allowed the Chambers to refuse to apply a provision of the Statute on human rights grounds.

According to the Trial Chambers, this was as far as the ICC’s obligation extended in the matter of the asylum application and non-refoulement of the witnesses. Even though the Court cannot disregard the rule of non-refoulement, it was the opinion of Trial Chamber II that only a state that possesses territory can apply it.⁵⁸ Nor can the Court use the cooperation mechanisms in the Statute to compel a state to accept a witness onto their territory.⁵⁹ As the matter proceeded, the Trial Chambers considered that their own obligations under Article 68 ICC Statute were discharged. They had secured from the DRC sufficient guarantees for the protection of the witnesses to remove any impediment to their return, save for the Dutch asylum proceedings.⁶⁰

The initial position of The Netherlands in 2011 was that the asylum claims could proceed as any other under national law.⁶¹ However a few months later the authorities changed their mind, stating that the Dutch asylum procedure did not apply, and that the claims would be dealt with as ‘requests for protection’.⁶² It was unclear whether this *sui generis* request for protection would have the same safeguards as the domestic procedures, such as access to judicial review. It was also unclear whether this process would have resulted in refugee status, or whether they would have some lesser status.⁶³ This particular issue was resolved on 28 December 2011, when the

⁵⁶ *Katanga*, 9 June 2011, *supra* note 4, § 73.

⁵⁷ *Lubanga*, *supra* note 55, § 86.

⁵⁸ *Katanga*, 9 June 2011, *supra* note 4, § 64.

⁵⁹ *Ibid.*

⁶⁰ Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07), Trial Chamber, 24 August 2011.

⁶¹ *Amicus Curiae* Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19, *Lubanga Dyilo*, (ICC-01/04-01/06-2827), Trial Chamber I, 23 November 2011, § 7.

⁶² *Ibid.*, § 8.

⁶³ *Ibid.*

Amsterdam District Court (sitting in The Hague) issued a decision stating that Dutch asylum law and procedure did indeed apply to the witnesses.⁶⁴

The reasoning of the District Court was as follows. The non-applicability of Dutch law in relation to the ICC, as agreed in Article 8 of the Headquarters Agreement, should be read in a restrictive and functional manner, namely that Dutch law should only not apply to the premises of the ICC where it would interfere with the proper functioning of the ICC. As applying asylum law would not interfere with the proper functioning of the Court, asylum law applies.⁶⁵ This was also the answer given to the Dutch state's argument that applying asylum law would interfere with the agreement between the ICC and the DRC: there was no interference. The District Court noted the decision of Trial Chamber II on 9 June 2011, which held that the application of Dutch asylum law to the witnesses was in accordance with the proper functioning of the ICC.⁶⁶

Arguments were also made by the Dutch authorities on the matter of jurisdiction: did The Netherlands have jurisdiction under refugee law that would allow it to hear the asylum claims? The Netherlands accepted jurisdiction in principle over the non-detained witnesses, but fiercely contested it for the detained witnesses. The Dutch authorities argued that Article 8 of the Headquarters Agreement created a 'carve out' of Dutch jurisdiction. This carve out applies in particular to persons in the Court's detention centre. The witnesses, being in the temporary custody of the Court with the agreement of the DRC, were never in Dutch custody. As such, The Netherlands has no jurisdiction over them.⁶⁷

The District Court disagreed with these arguments. It distinguished this situation from that of asylum applications submitted to Dutch embassies abroad. In those cases, there is an alternative forum for an asylum claim, namely the state where the embassy is located.⁶⁸ This is one of the more interesting aspects of this decision. The approach to jurisdiction seems to be that it exists because it must, because otherwise there would be a legal vacuum. If the witnesses cannot turn to The

⁶⁴ Uitspraak ECLI:NL:RBSGR:2011:BU9492, 28 December 2011, The Hague District Court.

⁶⁵ *Ibid* § Section 9.

⁶⁶ *Ibid* § Section 9.

⁶⁷ ICC Transcript, ICC-01/04-01/07-T-258-ENG ET WT, 12 May 2011, at 72.

⁶⁸ *Supra* note 64 § 9.8

Netherlands for asylum, they cannot turn to anyone.⁶⁹ As the decision was not appealed, the reasoning went unchallenged.

There are further arguments in favour of the existence of Dutch jurisdiction. First, non-refoulement applies to rejection at the frontier.⁷⁰ Even if the witnesses are in ICC custody, they are still on Dutch territory. As such, they can be said to be at the legal frontier of the state and can request entrance. The same non-refoulement obligations would therefore apply and the host state could not remove the individual from its territory. Second, an analogy can be drawn between international criminal tribunals and so called 'international zones', such as airports and areas of territory declared to be outside the realm of the law. States have sought to remove these areas from the jurisdiction of refugee law, but the applicability of non-refoulement remains unchanged.⁷¹

The current state of affairs for the detained witnesses in this case is as follows. Even though the jurisdiction hurdle was passed, the obstacle of the witnesses' personal history was not. The Netherlands opted to exclude them from refugee protection under Article 1(F) of the Refugee Convention, on the basis that there were serious reasons to believe that they had committed war crimes. Efforts to prevent their return to the DRC based on Articles 3 and 6 of the ECHR eventually failed on appeal.⁷² These articles deal respectively with torture and inhuman and degrading treatment, and fair trial. Article 3 in particular operates to prevent an ECHR member state from sending an individual to a country where they would be exposed to a risk of torture and inhuman and degrading treatment.⁷³ As such the article is an important source of protection complementary to the Refugee Convention. The witnesses have now returned to the DRC.

⁶⁹ This was an opinion that was repeated when the witnesses brought a challenge against their on-going detention before the same District court, based on their right to liberty under the ECHR (Uitspraak ECLI: NL: RBSGR: 2012: BX8320, 26 September 2012, The Hague District Court). While the state argued that there was no jurisdiction under the ECHR, the Court held that there must be because, if there were not, the witnesses would be left without protection. This opinion was not repeated when the decision was appealed domestically, and the District Court was overruled by the ECtHR in the *Longa* case, which held there was no jurisdiction under Art. 5 of the Convention (*Djokaba Lambi Longa v. The Netherlands*, Appl. no. 33917/12, 9 October 2012).

⁷⁰ *Supra* note 3, at 51.

⁷¹ *Supra* note 3, at 16.

⁷² ECLI:NL:RVS:2014:2426, 27 June 2014, Council of State.

⁷³ *Case of Soering v. The United Kingdom*, Appl. no. 14038/88, 7 July 1989.

C. The Dangers of Overlapping Protection Regimes

What the case law shows is that for both detained and non-detained witnesses, the protection regimes at the ICC and in The Netherlands operate in parallel, both applying to the same individuals simultaneously. The fact that one actor is obliged to protect the witnesses does not remove the obligation from the other. This gives rise to a shared responsibility situation, as both parties are concurrently responsible for protecting witnesses from refoulement. This is a positive, but also potentially dangerous, development.

It is positive in the sense that it provides a broader protection for witnesses coming to the ICC. Their protection from return to a situation of risk covers a broader range of risks than the ICC alone can provide. In addition to risks incurred because of their association with the Court, witnesses are also covered for the risks enumerated in Article 33 Refugee Convention (if these happen to not overlap). Furthermore, the shortcomings in the ICCPP could be to some extent addressed by using an asylum procedure instead. The choice of protection rests with the witnesses themselves, as both regimes are based on consent.

But there are a number of issues that remain problematic. Firstly, the host state could rely on the ICC's assessment of the witnesses' protection needs in order to make its own determination. The host state authorities, rather than conducting its own inquiry, might simply take note of the decision reached by the ICC on the risks to the witness, and act solely on that basis. In so doing, The Netherlands would be delegating its responsibilities under the Refugee Convention entirely to an international organization, which is not appropriate. The Dutch authorities may not have access to the same information on which the ICC based its decision, or indeed may have additional information not available to the Court. The same is also true in reverse: the ICC could unduly rely on the outcome of a Dutch asylum procedure to make its own decision on witness protection. The ICC and The Netherlands would have to take great care to remember that the scope of protection under refugee law and under the witness protection regime at the ICC are different. While they may in some instances overlap, the risks protected against are different, and if when relying on the assessment of the other this is overlooked, a witness could be wrongfully deprived of protection.

The second problem is that it is not clear at what point one regime takes priority over the other. They may both operate in parallel, but an individual cannot be both relocated through the ICCPP, and at the same time be a refugee in The Netherlands. This would require the witness to have dual status, which would involve both parties using their resources to doubly protect an individual: something highly unlikely. That being said, both parties are still obliged to discharge their obligations, and it is not clear whether they can refer to the actions of the other when doing so. According to Duty Counsel for the detained witnesses, presenting the witnesses to the host state authorities for an asylum determination qualifies as a protective measure under Rule 88 ICC RPE.⁷⁴ But in that case the ICC elected to discharge its obligations independently from the asylum proceedings, namely by seeking assurances from the DRC as to the detained witnesses' safety. Can one regime be said to prevail over the other, and if so on what basis? Does one regime provide intrinsically better protection, such that the other regime becomes secondary?

Recent practice has shed some light on these issues. In its June 2014 decision⁷⁵ (which resulted in the return of the detained witnesses to the DRC), the Dutch Council of State discussed the relationship between the protective measures ordered by the ICC, and the obligations of The Netherlands towards the witnesses. On the matter of assessing the protection needs of witnesses, the Council stressed that this was a question for The Netherlands, and was not to be left to the ICC. There had been no transfer of jurisdiction on this point to the ICC.⁷⁶ The Council of State did feel able, however, to rely on the protective measures put in place by the ICC in order to satisfy The Netherlands' obligations under the ECHR (the Refugee Convention was no longer relevant, as the witnesses had been excluded under Article 1F). In response to claims by the witnesses that their Article 3 and 6 ECHR rights would be violated if returned to the DRC, the Council held that the assurances given by the DRC, as well as the continuing involvement of the VWU, meant that no significant risk existed.⁷⁷ The Court evaluated the assurances against the criteria set out by the European Court of Human Rights in *Othman*⁷⁸ and found them satisfactory. Furthermore, it held that

⁷⁴ *Katanga*, 9 June 2011, *supra* note 4, § 27.

⁷⁵ *Supra* note 72.

⁷⁶ *Supra* note 72, § 8.

⁷⁷ *Supra* note 72, sections 9 and 10.

⁷⁸ *Supra* note 53.

the protective measures would, in practice, guard against risks not related to the witnesses' involvement with the ICC.⁷⁹

A final danger is that of 'buck passing'.⁸⁰ This is often a feature in situations of shared responsibility: the presence of numerous, potentially responsible, entities can decrease the sense of accountability in all. In this context, it describes the possibility that each actor, namely the ICC and The Netherlands, might reduce the scope of its protection in the expectation that the other will fill the resultant gap.⁸¹ One might speculate as to whether buck-passing has occurred in the case of the detained witnesses set out above. In the day-to-day practice of the ICC, it seems unlikely that a differentiation as strict as that applied by Trial Chamber II, between the different risks suffered by witnesses,⁸² would be used. It is more probable that relocation is simply granted when the individual is deemed to be at risk, as long as the risk is not too far removed from the witness' involvement with the Court. However when the detained witnesses situation arose, the Chamber knew that the asylum proceedings would go ahead regardless. Arguably, the distinction between types of risk was therefore emphasised in order for primary responsibility of the witnesses to pass to The Netherlands, which also tried to avoid responsibility.

5. Conclusion

It has been suggested that asylum proceedings of the kind discussed in this paper are being used as a shortcut to relocation in a European country,⁸³ specifically The Netherlands. But this assumption overlooks the genuine concerns that witnesses can have about the quality of protection provided by the ICC through witness relocation. The ICC has the opportunity, through Article 21(3), to deal with these concerns and make the ICCPP more attractive to witnesses seeking protection. However, there are other difficulties for which Article 21(3) offers no solution. The dependence on reluctant states for cooperation in relocation is particularly problematic; and the

⁷⁹ *Supra* note 72, § 9.5.

⁸⁰ On the use of the term see e.g. A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', 34 *Michigan Journal of International Law* (2012-2013) 359.

⁸¹ Sluiter, *supra* note 32, at 671.

⁸² See above in Section B, also *Katanga*, 9 June 2011, *supra* note 4.

⁸³ J. 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', 26 *Leiden Journal of International Law* (2013) 173, at 184.

narrow scope of risk covered by the ICCPP, while justified, may result in witnesses being returned to situations of risk.

As a solution to these issues, claiming protection from refoulement against the host state of the ICC is a possibility. Now that the particulars of the interaction between the ICC and Dutch protection systems has been to a large extent worked out, it will be easier for witnesses in the future. But this is not a full solution. What is meant to enhance witness protection may actually diminish it if the dangers of overlapping protection regimes are not carefully considered. The differences in the scope of the regimes, and the different approaches permitted to each actor, are factors that must be borne in mind if witnesses are not to fall through the protection net. It will be important for all involved to bear in mind, as these cases proceed and as more inevitably arise, that the paramount concern should be the protection of the witness, and not shifting responsibility between the actors and failing to act in the expectation that the other will. It would be a blemish on the face of international justice if a witness were to be killed or harmed following their involvement with the process, and would work against the aims that international justice is seeking to achieve.