

When International Justice Concludes

Undesirable but Unreturnable Individuals in the Context of the International Criminal Court

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Abstract

The story of international criminal justice does not end when the verdict is read; for both the affected communities and for the individual accused, the story goes on. This article explores the situation facing some accused before the International Criminal Court (ICC) once their trial is over, their sentence (if convicted) is served, and they are released from custody. In many cases, the former ICC accused will simply return home and continue on with a life similar to the one they led before their ICC trial. But for some this will not be possible, particularly where the situation in their home country is such that they would be at risk if they returned there. In that case, they will need to find another country where they can safely reside, but such efforts will often be hindered by a reluctance on the part of states to host persons accused of international crimes, no matter the outcome of the trial. In these cases, such individuals can often become stuck in the legal limbo of being ‘undesirable but unreturnable’ (hereinafter, ‘UbU’): undesirable because they are unwelcome in other states, but unreturnable because they cannot be returned home. This article explores what the expression ‘undesirable but unreturnable’ means, how the situation that it describes arises in general international law, and in particular how the situation arises in the ICC context. The article then looks at the practice of the ICC to date in dealing with former accused who face being caught in the ‘UbU’ limbo, and goes on to set out three ways in which the ICC could play a bigger role in addressing the issue.

1. Introduction

The story of international criminal justice does not end when the verdict is read, the judges rise, and the accused is lead away from the court. The fall-out from the atrocities and crimes that led to the trial in the first place lingers on for the affected communities and victims, and the discussions surrounding the conclusion of international criminal justice often centre on this aspect. But the story goes on for the individual accused also; many of those convicted will eventually be released, and along with acquitted persons, must return to ‘normality’ and

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a life of freedom. The subject matter of this article is the position that some former accused before the International Criminal Court (ICC) may find themselves in upon release, and how they might become trapped in the legal limbo of being ‘undesirable but unreturnable’ (hereinafter, UbU): unable to find a new home, but unable to return to their old one.

When an individual’s involvement with the ICC concludes, either by acquittal or because they have served the duration of their sentence,¹ the next step is release. The wish of many former accused is to return to their home country, and indeed this is the easiest option given that their country of nationality is obliged to receive them. But their ability to return safely greatly depends on the political situation in their country at the time of their release. Individuals tried by the International Criminal Tribunal for the former Yugoslavia (ICTY) are often welcomed home in their respective countries as heroes, returning to their lives and even running for public office.² The experience of those tried by the International Criminal Tribunal for Rwanda (ICTR) has been very different, with individuals claiming to face violence and persecution if they return to Rwanda, where Tutsi governments have been in power since the genocide.³ Indeed, there have been challenges in this regard since modern international criminal justice began. The three defendants acquitted by the International Military Tribunal at Nuremberg following the Second World War were rearrested immediately afterwards and retried in domestic proceedings.⁴

No general statements are yet possible about the ICC, given the range of situations under investigation and the differences between them. There is clearly no difficulty for former ICC accused from the Kenya situation in returning home, but accused from the Democratic Republic of Congo (DRC) have raised valid concerns about their safety in their home country.⁵ For some ICC accused therefore, building a life after a trial at the ICC will not be as simple as boarding an airplane and beginning a life at home in freedom.

Section 2 of the article sets out what is meant by the expression ‘undesirable but unreturnable’, its legal background, and how the issue arises in international law generally.

¹It is possible for international criminal trials to end in ways that do not involve acquittal or release on completion of sentence. For example, charges may not be confirmed (e.g. *Mbarushimana*), or a case may be ceased for lack of state cooperation (e.g. *Kenyatta, Ruto*). However, this paper will be confined to acquittal and release on completion of sentence.

² Naturally, this has not always been the case. For more information, see among others B. Holá and J. van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview', 12 *Journal of International Criminal Justice (JICJ)* (2014) 109, at 130 and K.J. Heller, 'What Happens to the Acquitted?' 21 *Leiden Journal of International Law* (2008) 663, at 664–665.

³ Holá and van Wijk, Heller, *ibid*.

⁴ A. Walker, *Nazi War Trials* (Pocket Essentials, 2006), 149.

⁵ Concerns were raised by the European Court of Human Rights in *Z.M. v. France*, Appl. No. 40042/11, judgment of 14 November 2013, § 66.

The same section then explains how UbU situations arise in the ICC context, and the two forms they can take. Section 3 explores the limited practice of the ICC in situations where a former accused is at risk of becoming UbU, including both the legal decisions rendered by the Court and alternative ways in which events could have unfolded. This is followed in Section 4 by proposals on how the ICC could play a greater role in preventing such situations from arising in the future. As will become clear, there are more actors than just the ICC involved in a situation concerning UbU former ICC accused, but the focus has been restricted to the ICC alone, on which there is already much to discuss.

2. Legal Background: UbU Individuals in International Law and in the ICC Context

One of the fundamental principles of the 1951 Refugee Convention is that an individual who is outside their country of origin can ask for refugee protection if they would be at risk of persecution if returned home. The state in which protection is requested will be termed ‘the protection state’. But there is no absolute right to refugee status; even if a person meets the criteria to qualify as a refugee, they can still be excluded from protection under certain circumstances. Particularly relevant for this article are the grounds for exclusion listed in Article 1F of the Refugee Convention. Under this provision, a person can be excluded from refugee status if there are serious reasons for considering that they have committed a war crime, crime against humanity, or acted contrary to the purposes and principles of the United Nations. A person who has been excluded from refugee status is not entitled to remain in the country where protection was requested and may be removed. However, that does not mean that the individual has reached the end of the road. Their transfer back to their country of origin may still be prevented if they qualify for complementary protection under human rights law.

Certain human rights law provisions have been interpreted so as to entail their own prohibition on removal. The landmark case for this was *Soering*⁶ before the European Court of Human Rights (ECtHR), whereby the United Kingdom was prevented from transferring an individual to the United States, as to do so would have exposed him to a real risk of inhuman treatment, thereby violating Article 3 of the European Convention on Human Rights (ECHR). Other provisions have since been interpreted to contain similar prohibitions, including Article 2 and Article 6 ECHR,⁷ as have other human rights treaties, including the International

⁶ *Soering v. The United Kingdom*, Appl. No. 14038/88, judgment of 7 July 1989.

⁷ See generally M. den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights', 10 *European Journal of Migration & Law* (2008) 277; for

Covenant on Civil and Political Rights.⁸ Unlike under the Refugee Convention, there are no exclusion clauses for complementary protection. If to return an individual to another state would expose him or her to a real risk of violations of certain rights then, regardless of how egregious the person's past conduct may be, they cannot be returned. The co-existence of these two protection regimes gives rise to what are termed 'undesirable but unreturnable' individuals. Certain characteristics of their past conduct make them 'undesirable' and allow for their exclusion from refugee status, but as they are still at risk if returned, they are 'unreturnable' under human rights law. From the protection state's point of view, the problem of UbU individuals is that the state is precluded from removing an unwelcome individual from its territory. From the individual's standpoint, the problem is the unregulated nature of their position. As refugees they would have a regularized status, with prescribed rights and duties; their exclusion from that status means they are not entitled to those rights. The complementary protection regime is much less well developed, and does not offer the individual a standard regularized status. This can result in a form of legal limbo, where the individual cannot be removed from the protection state, but equally does not have access to important rights in that state, such as being able to work, to access education, to have assistance in finding housing or other amenities, etc.⁹

Having set out this general legal background to the UbU problem, we can turn to see the — basically two — ways it arises in the ICC context. The first instance does not largely differ from the description in the above paragraphs, in that it concerns a state having an unwelcome individual on its territory that it cannot remove. In order for a person to be tried by the ICC, they must be relocated to the seat of the Court in the Netherlands ('the host state', in this case), thereby transferring them outside of their country of nationality.¹⁰ If they are acquitted, they will be released from the custody of the ICC detention centre in The Hague, meaning that the person will be released in the Netherlands. If, on the other hand, they are convicted, they will be sent to a third state to serve their sentence (this state will be

Art. 6 case law, see Appl. nos 46827/99 and 46951/99 (*Mamatkulov and Askarov v. Turkey*, Judgment of 4 February 2005), Appl. No. 8139/09 (*Othman (Abu Qatada) v. the United Kingdom*, judgment 17 January 2012).

⁸ *General Comment 31 (80): The Nature of the General Legal Obligation Imposed Upon States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, § 31, and as an example of a case before the Human Rights Committee, see *Ng v. Canada (Communication No. 469/1991)*, UN Doc. CCPR/C/49/D/469/1991, 7 January 1994.

⁹ For more details, see J. Reijven and J. van Wijk, 'Caught in Limbo: How Alleged Perpetrators of International Crimes who Applied for Asylum in the Netherlands are Affected by a Fundamental System Error in International Law', 26 *International Journal of Refugee Law* (2014) 1.

¹⁰ Unless, of course, a Dutch national is ever brought before the Court.

referred to as ‘the enforcement state’).¹¹ When the convicted person’s sentence is complete, they will be released from custody in the enforcement state. Upon gaining his or her freedom, the individual may wish to return to their home country, and this is what happens in many cases. However, as outlined above, the security situation in the home country may sometimes prevent this solution, in which case the priority of the former accused person will be to find somewhere safe to reside. To that end, the individual can seek asylum in the state where they are released, whether this be the host or the enforcement state.

Faced with an asylum application from a former ICC accused, the host or enforcement state have a powerful card to play if they do not want the person residing on their territory: Article 1F of the Refugee Convention. Convicted persons can certainly be excluded; the fact that they have ‘served their time’ does not affect the application of the Article 1F exclusion. But even with an acquittal in hand, states can still exclude former ICC accused because the standard of proof for Article 1F is lower than the standard of proof adopted in criminal proceedings.¹² That being said, where asylum-seeking-former-ICC-accused qualify for complementary protection under human rights law, they will have a card that will trump Article 1F. Where this is the case, the host state or enforcement state will be unable to remove them, resulting in a UbU situation.

The second instance in which the UbU problem arises in the ICC context differs significantly from the above scenario, and is referred to as an UbU-type problem more for ease of reference than for accuracy. In this situation, instead of a former ICC accused turning to the host state or enforcement state for protection on release from custody, the individual relies on the ICC alone, and remains the responsibility of the Court. The experience of the ICTR is a good illustration.¹³ When a person acquitted and released by the ICTR is unable to return to Rwanda, they remain on Tanzanian territory (where the Tribunal is located) but in a safe house under the control and responsibility of the Tribunal.¹⁴ The individual in question, with the assistance of the Tribunal, then goes about the difficult task of finding a state that is willing to host them. What makes it difficult is the reluctance on the part of states to agree to

¹¹ In the past, the exclusive practice at international criminal tribunals has been to prevent convicted persons from serving their sentence in their home state (Hóla and van Wijk, *supra* note 2, at 117, Table 2). However, as discussed below, the ICC may be breaking away from this practice.

¹² The standard of proof for Art. 1F is ‘serious reasons for considering’, as opposed to the ‘beyond reasonable doubt’ standard of criminal law. As such, even when evidence does not suffice for a criminal conviction, it may justify a finding that there are ‘serious reasons for considering’ that the individual has committed a crime.

¹³ It is not clear exactly why the individuals in question have not requested protection from the Tanzanian authorities. Possibly such applications have been made and refused. In any case the ICTR, not Tanzania, has retained responsibility for these individuals.

¹⁴ For background information, see <http://whenjusticeisdone.org/index.php/acquittedd> (visited 15 April 2016). See also Heller, *supra* note 2, at 664.

host individuals that have been accused of international crimes, no matter the outcome of the trial. The result is that those acquitted by the ICTR have spent, and are still spending, years in safe houses, in a state of semi deprivation of liberty. André Ntagerura, former minister in the Rwandan government, was acquitted in 2004. Asylum applications submitted to France and Canada have been rejected, and he has lived in an ICTR safe house near the Tribunal for more than 10 years.¹⁵ Prosper Mugiraneza, also a former government minister, was acquitted in 2013 and shares this safe house.¹⁶ In these situations, the individual is unreturnable because they cannot return to Rwanda, but it is undesirable for the Tribunal,¹⁷ for Tanzania, and for the individual, that they be left in this limbo; hence the term ‘UbU’ still broadly applies. For the ICTR this situation has proved a significant headache, not to mention a financial burden. The President of the Tribunal has issued repeated calls for ‘urgent action to help to find host countries’ for acquitted, and considers ‘the resettlement of persons acquitted by an international criminal tribunal to be a fundamental expression of the rule of law’.¹⁸ This has been supported by similar calls from the Security Council.¹⁹ Since the ICTR wrapped up operations on 31 December 2015, the issues with relocating acquitted persons have been inherited by the residual Mechanism for International Criminal Tribunals (MICT).

This second type of UbU issue — that has plagued the ICTR — will trouble the ICC also. When the Rome Statute was drafted, no provision was made for this eventuality, and so as the ICC continues its work, there is nothing to prevent the problems that have beset the ICTR from being repeated in the ICC context.

This overview illustrates that the UbU problem affects more than just the individual — who is left in legal limbo — but potentially also the enforcement state, the host state, and the ICC. Each of the mentioned actors could play a role in addressing UbU issues in the

¹⁵ ‘Acquitted of Rwanda genocide, now left in legal limbo’, Daily Mail, 18 December 2014, available online at <http://www.dailymail.co.uk/wires/afp/article-2879322/Acquitted-Rwanda-genocide-left-legal-limbo.html> (visited 4 January 2016). It should be noted that not all ICTR acquitted have been unsuccessful in their relocation efforts: Jean Mpambara, acquitted of genocide charges by the ICTR in 2007, was permitted by France to join his family on Mayotte, a small French island in the Indian Ocean; Bagambiki, also acquitted by the ICTR, now lives in Belgium. (Heller, *supra* note 2, at 669).

¹⁶ *Ibid.* See Heller also for a detailed overview of the legal and factual challenges that persons acquitted by the ICTR face in getting their asylum claims heard and accepted from the safe house, at 668–675.

¹⁷ The Tribunal experiences not only reputational but also financial concerns, given that maintaining the safe houses is a costly business. Each safe house resident costs the Tribunal approximately \$1,500 a month for rent, telephone, guards, etc. ‘Rwanda court’s forgotten men pose challenge to international justice’, Reuters, 28 September 2014, available online at <http://www.reuters.com/article/us-un-justice-insight-idUSKCN0HN0NK20140928> (visited 17 April 2016).

¹⁸ *Report of the International Criminal Tribunal for Rwanda*, UN Doc. A/66/209-S/2011/472, 29 July 2011, § 87; *Report of the International Criminal Tribunal for Rwanda*, UN Doc. A/70/218-S/2015/577, 31 July 2015, § 65.

¹⁹ SC Res. 2054, 29 June 2012, § 6.

context of ICC proceedings, but this article will focus only on the options available to the ICC itself, leaving the role of other actors to further work. Before examining the ICC's potential role in detail, it is helpful to first discuss the ICC's limited practice concerning UbU issues, and consider the alternative ways in which the practice could have turned out. This analysis aims at illustrating the pitfalls in the way that the ICC is currently addressing the issue, in preparation for the solutions proposed in Section 4.

3. The ICC Practice To Date: Unfulfilled Potential

In its limited practice to date, the ICC has made some attempt to deal with, and in some instances pre-empt, UbU situations. At the time of writing, there are two individuals with regard to whom the practice of the ICC in this matter is relevant to the discussion: Mathieu Ngudjolo Chui, the only person acquitted so far by the ICC, and Germain Katanga, the first person released by the ICC on completion of his sentence. In the end, neither Ngudjolo nor Katanga were left in an UbU situation; however, this outcome could easily have been different. The catalogue of decisions surrounding Ngudjolo's situation provide an insight into the ICC's efforts to deal with possible UbU issues and where they went awry; with regard to Katanga we can only speculate as to the ICC's intentions at the moment. This section will first describe what happened in the Ngudjolo and Katanga cases, and second will put forward alternative ways in which the cases might have developed. In this way the author hopes to show the role the ICC has so far taken in these situations, and highlight its limitations.

Ngudjolo was acquitted by the ICC of war crimes and crimes against humanity allegedly committed during an attack on the village of Bogoro, in the Ituri region of the Democratic Republic of Congo (DRC).²⁰ The decision to acquit was made by the Trial Chamber in 2012 and confirmed on appeal in 2015. An application to keep Ngudjolo in detention pending his appeal was rejected²¹ and so, after the first instance judgment, the ICC set about making arrangements for his release.²² The Netherlands had declined to allow Ngudjolo to reside on its territory pending the appeal, but before he could be transferred outside the Netherlands, the UN travel ban imposed on him needed to be lifted, even

²⁰ For an overview of the *Ngudjolo* case, visit the ICC website: www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/ICC-01-04-02-12/Pages/default.aspx (visited 4 January 2016).

²¹ Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, *Ngudjolo Chui* (ICC-01/04-02/12-12), Appeals Chamber, 20 December 2012.

²² For more details see a decision of the Dutch Council of State, the highest court of appeal in the Netherlands for administrative law issues, including immigration law. Council of State, 12 November 2013, ECLI:NL:RVS:2013:2050.

temporarily. The ICC and the Netherlands reached an agreement allowing Ngudjolo to remain in the Netherlands, in a designated ICC hotel room,²³ while the travel ban was dealt with and arrangements were made. Due to a last minute administrative problem with that hotel room, this agreement fell through, and the Dutch authorities sought to deport him instead. Ngudjolo prevented his imminent removal by making a claim for asylum.

Perhaps predictably, the application for refugee status was refused on the basis of Article 1F. The Netherlands considered that, even though Ngudjolo had been acquitted of the Bogoro attack, there were grounds to consider that he was involved in other atrocities, as well as holding leading positions in a number of military groups in the periods of time not addressed by the ICC case.²⁴ That being said, even if the Netherlands were making an assessment based on the same evidence presented before the ICC, Ngudjolo could still have been excluded under Article 1F. As Heller points out, an acquittal means that the prosecution failed to prove a case *beyond reasonable doubt*, not that there are not *serious reasons for considering* that the individual committed a crime.²⁵ Ngudjolo's claim for complementary protection under the ECHR was also unsuccessful, as it was deemed to be without merit for lack of evidence.²⁶ Ultimately, despite refusing to grant protection, the Netherlands did not return Ngudjolo to the DRC, and he was allowed to remain on Dutch territory awaiting the outcome of his appeal. When the Appeals Chamber confirmed the acquittal, the decision to exclude him from refugee status was upheld, and in May 2015 he was returned to the DRC.²⁷ Thus, Ngudjolo did not end up in the UbU situation, as his claim for protection from removal under Article 3 ECHR was not successful. However, a different outcome would have been more than plausible. There are two alternative ways the Ngudjolo situation could have played out, each of which has an UbU dimension. First, the administrative error with the hotel room that led to the asylum claim might not have happened, and Ngudjolo might have resided in a hotel designated as an 'ICC zone'²⁸ until a state willing to receive him had been found. This

²³ According to the agreement between the Netherlands and the ICC, Ngudjolo would temporarily reside in a hotel at the Amsterdam Schiphol International Airport. This particular hotel has two sections, one of which is in the international airport zone. For this section, guests are not required to pass through Dutch customs control. The other side of the hotel is on Dutch territory proper. The agreement was for Ngudjolo to stay on the 'international' side, but the reservation had been made for the 'Dutch' side. The Dutch authorities, it seems, were not willing to allow him to stay on 'their' side, and sought to remove him. For more details, see *ibid*.

²⁴ T. de Boer and M. Zieck, 'ICC Witnesses and Acquitted Suspects Seeking Asylum in the Netherlands: An Overview of the Jurisdictional Battles between the ICC and Its Host state', 27 *IJRL* (2015) 573, footnote 153.

²⁵ Heller, *supra* note 2, at 671.

²⁶ Council of State, 15 October 2013, ECLI:NL:RVS:2014:3833 at § 4.4 and § 9.1.

²⁷ For a detailed examination of the Dutch domestic decisions in the Ngudjolo case, see de Boer and Zieck, *supra* note 24, at 593 onwards.

²⁸ This is potentially a very interesting concept, but the Council of State's decision does not provide a precise explanation of what this would have meant.

scenario would have been similar to the approach taken by the ICTR (and now by the MICT), where acquitted persons are accommodated in safe houses in Tanzania while a host country is identified.²⁹ This presupposes that Ngudjolo had opted not to involve the Netherlands, and instead relied exclusively on the ICC to remedy his situation. Second, Ngudjolo's Article 3 claim might have been successful, making the Netherlands the protection state unable to remove him. Indeed, The Hague District Court in an earlier decision determined that Ngudjolo could well have had an Article 3 claim, although this was overruled on appeal.³⁰ In different ways for the different parties, both of these outcomes would have been unwelcome. Ngudjolo in particular would have been at a disadvantage: in one scenario he would spend his days in a hotel, waiting under restrictive conditions for an indefinite amount of time for a country to accept him; in the other scenario he would live in the Netherlands but with an unregularized status and great uncertainty about his future.

In what could be perceived as an attempt to prevent a similar situation occurring for persons released on completion of sentence, the ICC in the case of Germain Katanga took a rather unusual step.³¹ Katanga had remained at the ICC detention centre since his conviction in May 2014. Having served two thirds of his prison sentence, Katanga's sentence was reduced and his release date set for 18 January 2016.³² With his release imminent, the ICC designated the DRC as the enforcement state, and transferred Katanga there in December 2015 to serve the rest of his sentence. In the practice of previous international criminal tribunals, a convicted person had never been sent to their country of nationality (or, where they are different, the country where the crimes took place) to serve their sentence.³³ In a statement to the press, Katanga said that his intention was to try to join the regular DRC army, and if not become a farmer in his native region.³⁴ Recent developments indicate that this seems unlikely, as Katanga's release date came and went without his release, due to the fact that DRC authorities are pursuing domestic criminal proceedings against him.³⁵

²⁹ Heller, *supra* note 2; *infra* notes 47 and 48.

³⁰ The Hague District Court (sitting in Amsterdam), 28 May 2014, ECLI:NL:RBDHA:2014:6711, at § 11.2 and 11.3.

³¹ This is speculation on the part of the author. The ICC has not made the motivation for this course of action public, nor is it likely to.

³² Decision on the review concerning reduction of sentence of Mr Germain Katanga, *Katanga* (ICC-01/04-01/07-3615), Appeals Chamber, 13 November 2015.

³³ Hóla and van Wijk, *supra* note 2, at 117, Table 2.

³⁴ J. Easterday, 'ICC Judges to Consider Katanga's Early Release', International Justice Monitor, 2 October 2015, available online at <http://www.ijmonitor.org/2015/10/icc-judges-to-consider-katangas-early-release/> (visited 4 January 2016).

³⁵ Human Rights Watch, 'DR Congo: ICC Convict Faces Domestic Charges', 23 December 2015, available online at <https://www.hrw.org/news/2015/12/23/dr-congo-icc-convict-faces-domestic-charges> (visited 4 January 2016).

It appears Katanga did not oppose his transfer to the DRC, even though he may have known that he would face charges on his return.³⁶ But had he chosen to oppose the transfer, he may have had grounds to do so, and so once again it is worth considering the alternative ways in which Katanga's story could have played out. In the first alternative scenario, the ICC did not designate the DRC as the enforcement state and did not transfer Katanga there towards the end of his sentence. In that case, he would have been released directly from the custody of the ICC detention centre in The Hague on 18 January 2016 and could have sought protection in the Netherlands. This protection would have comprised complementary protection under Articles 3 and 6 ECHR (it is assumed that an asylum application would have been rejected under Article 1F). In terms of Article 3, concerns have been raised by the ECtHR that individuals returning to the DRC are at risk of ill treatment and torture if they are deemed to be opponents of the Kabila regime.³⁷ As for Article 6, Katanga could have pointed to the charges that the DRC authorities were planning to bring, and argue that the trial conditions in the DRC were so unsatisfactory as to lead to a flagrant denial of justice.³⁸ Such concerns have in fact been raised by Katanga's ICC defence team following his return to the DRC. The defence requested that the ICC prevent national proceedings from going ahead, on the basis that, inter alia, Katanga would not get a fair trial.³⁹ As such, in the alternative scenario where Katanga was not transferred to the DRC, it is feasible that a complementary protection request would have been successful. In this eventuality, Katanga would have been safe for the time being from return to the DRC, but would be in an unregularized UbU situation in the Netherlands.

In the second alternative scenario, Katanga would have been transferred to a third state to serve the remainder of his sentence, instead of the DRC. In that case, he could have requested asylum and/or complementary protection in the enforcement state. Had he been excluded on the basis of Article 1F, but successful in claiming complementary protection, Katanga would have become an UbU individual and the enforcement state would have become his protection state.

³⁶ Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo, *Katanga* (ICC-01/04-01/07-3635), The Presidency, 22 January 2016, at §§ 60–66, in which the Defence counsel communicates that they had some indication that charges would be brought, but not of which ones exactly.

³⁷ *Supra* note 5.

³⁸ European Court of Human Rights, 'Guide on Article 6: Right to a Fair Trial (criminal limb)', 2014, at 53.

³⁹ *Supra* note 36, from § 46. The ICC would be empowered to act in this sense under Art. 108(1) ICCSt., which states: 'A sentenced person in the custody of the state of enforcement shall not be subject to prosecution or punishment or to extradition to a third state for any conduct engaged in prior to that person's delivery to the state of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the state of enforcement.'

In either of these alternative scenarios, it is also possible that the ICC could have taken a more proactive role (as it initially did in the Ngudjolo case) and arrange for Katanga to remain in the host/enforcement state under the auspices of the ICC while another state was found willing to accept him. However, as described above, this could also have led to an UbU situation of another type, with Katanga confined to a hotel room or safe house for an indefinite period of time.

It is certainly arguable that the ICC played a role in avoiding, or attempting to avoid, UbU situations developing with regard to Ngudjolo and Katanga. In Ngudjolo's case, initially arrangements were made for him to remain in an ICC designated hotel room while his situation was addressed, and the possibility of an asylum application was not discussed. As for Katanga, the ICC ensured that, at the time of his release, he would be in his country of nationality. Both the cases themselves and the alternative outcomes show that the ICC's role was in fact very limited. When the arrangements for Ngudjolo fell through, the Court took a back seat and left the matter largely to the Netherlands to resolve according to its own obligations. A similar approach would likely have been taken if Katanga had been sent to an enforcement state other than the DRC and sought asylum there. If either Ngudjolo or Katanga had ended up in an ICC designated hotel room or safe house awaiting admittance from a state, the ICC would have been forced to wait as well. In these different permutations of the UbU problem, the ICC's currently limited role would not have allowed it to render much assistance. Because the high probability that UbU issues will continue to arise at the ICC in the future, it is worth exploring ways in which the ICC could play a stronger and more effective role.

4. How Can the ICC Facilitate Solutions to the Problem?

There are three avenues that would allow the ICC to play a larger role in addressing potential UbU issues. The first of these is for the ICC to be a focal point of coordination and communication, the aim of which would be to find a state for acquitted or released persons to reside in. The second and third avenues are ways of allowing former defendants to return home by minimizing the risk they would face, thereby removing the 'unreturnable' part of UbU. These involve using the protection infrastructure that may already exist in the home country, and/or assurances between the ICC and the home state.

A. Coordination and Communication

The ICC is an international organization with presence on the international stage. Through the Assembly of State Parties, the Presidency and the Registry, the ICC has contacts with different states and an overview of cooperation between states and the Court. Given this position, the ICC is well placed to act as a hub and focal point for discussions regarding acquitted and released persons. In the case that these individuals are unable to return home when their involvement with the ICC concludes, the Court could coordinate the process of seeking a host state. This is preferable to each state dealing only bilaterally with the individual seeking protection, as it allows for a dialogue *between* states on how to resolve the issue collectively. A cooperative discussion, coordinated by the ICC, could help prevent the situation where each state refrains from acting in the expectation that another will, and promotes more equitable burden sharing. It is certainly possible that the ICC already plays some such role, but little information is publicly available. The President of ICTR has been open about the fact that the Tribunal's Registrar acts as a 'channel of communication' between the Tribunal and the diplomatic community. Between 2014 and 2015 the Registrar transmitted more than 114 *notes verbales* and other correspondence relating to securing state assistance with the relocation of acquitted and released persons. With the closure of the Tribunal, this function has passed to the MICT.⁴⁰ This precedent shows that the role proposed for the ICC is by no means unheard of.

There is no explicit provision in the ICC legal framework that could be cited as a basis for the ICC taking on this role. However, there are a number of provisions which arguably support the spirit of the idea. The Regulations of the Court and the Regulations of the Registry entrust the Registry with ensuring that a detained individual is provided with consular and diplomatic assistance from their country of nationality, or where applicable, an international body.⁴¹ The Rules of Procedure and Evidence (RPE) provide that the Registry makes agreements with states for the relocation of witnesses, and in the same vein the Registry has made an agreement for hosting persons granted interim release.⁴² Lastly, the Registry is assigned the task of being the channel of communication for the Court.⁴³ It is true that none of these provisions deal with the question in hand directly, but they demonstrate a broader role for the Registry in coordinating and communicating with states on the issue of individuals who are outside of their country of nationality. It is not too much of a leap to suggest that the ICC could perceive itself as having a *de facto* responsibility to assist in

⁴⁰ Report of the ICTR 2015, *supra* note 18, at § 32.

⁴¹ Reg. 152, ICC Regulations of the Registry; Reg. 98, ICC Regulations of the Court.

⁴² Rule 16, ICC Rules of Procedure and Evidence.

⁴³ Rule 13, *ibid*.

resolving UbU situations involving former defendants.⁴⁴ Indeed, the ICTR Registrar considered the Tribunal to have such a de facto responsibility to assist acquitted persons in finding a host state and acquiring travel documents and money for the journey.⁴⁵

Advantages come with the ICC adopting (or furthering) its role as coordinator for former defendants seeking protection. If the problem is resolved prior to the person's release, UbU issues do not arise. However, the extent of the ICC's role and impact are limited. Importantly, it can only coordinate discussion and encourage states to host the concerned individuals, but it can by no means compel states to do so. ICC Trial Chamber II was correct in stating that it cannot use the ICC Statute's cooperation mechanisms to compel a state to receive an individual on its territory.⁴⁶ To do so would exceed the purpose of those mechanisms and intrude into domestic considerations of immigration policy, traditionally tied to state sovereignty.

These limitations are well known at the ICTR.⁴⁷ When the Tribunal was closing down, there was much discussion on the acquitted persons' fate. Despite years of talks and negotiations,⁴⁸ no progress had been made in identifying a host state for these individuals. The ICTR Registrar acknowledged the Tribunal's restricted role in these matters, due to the limited diplomatic influence it has over the concerned countries.⁴⁹ Much will depend therefore on the ICC's diplomatic clout..

B. Existing Infrastructures of Protection

The impact of an ICC trial on the population of an affected area is far reaching. It is not simply a case of arresting a suspect and removing them to The Hague; there are witnesses,

⁴⁴ 'Article 107', in W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), at 1086

⁴⁵ R.K.G. Amoussouga, 'The ICTR's Challenges in the Relocation of Acquitted Persons, Released Prisoners and Protected Witnesses at the Forum Between Offices of the Prosecutors of UN Ad Hoc Criminal Tribunals and National Prosecuting Authorities', presentation at the forum held between officers of the UN ad hoc criminal tribunals and national prosecuting authorities, East Africa Hotel, Arusha, Tanzania, 26–28 November, 2008, at § 32.

⁴⁶ 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), *Katanga and Ngudjolo* (ICC-01/04-01/07-3003-tENG), Trial Chamber II, 9 June 2011, § 64. There is also support for this stance from the ICTR: Decision on the Motion by an Acquitted Person for Cooperation from Canada, Article 28 of the Statute, *Ntagerura* (ICTR-99-46-A28), Trial Chamber III, 15 May 2008, § 4 — the obligation to cooperate under the Statute does not imply that a state should grant residency to a person; it is sufficient that the state consults with the Court about the issue.

⁴⁷ For an overview see B. Henry, 'The Acquitted Accused, a Forgotten Party of the ICTR', 12 *New England Journal of International and Comparative Law* (2005-2006) 81.

⁴⁸ In the case of *Ntagerura*, more than 10 years, *supra* note 15.

⁴⁹ Henry, *supra* note 47, at 86, conversation with the ICTR Registrar. The reference is correct, unless you refer to the layout of the reference? I have added the author's name now

victims, and their families to consider. These individuals, who continue to live in the affected areas, might require protection from retaliation for their involvement in the trial(s). To this end, the ICC works with the local authorities to create infrastructures of protection which remain in place as long as the risk does. In other words, the ICC operates a witness protection programme.⁵⁰ This same infrastructure might also be used to protect acquitted or released persons returning home at the conclusion of their involvement with the ICC.

It is the nature of these protection infrastructures that they remain largely confidential, with the consequence that relatively little is known of them. However, there is one example for which some information is available. The Initial Response System (IRS) is an emergency hotline that protected individuals can use, should their security be threatened. Use of the hotline activates a network of local partners with the capacity to extract the individual and move them to a safe place.⁵¹ While it is often the local police who run the IRS system, it is the ICC Victims and Witnesses Unit (VWU) which manages and funds it.⁵² The ICC is involved in training the officers, regularly tests the system's efficacy and responsiveness, and maintains regular contact with the local authorities.⁵³ The IRS is a way of bolstering the capacity of local authorities which — as a consequence of corruption, conflict, or other reasons — might be unable to provide the necessary level of protection when acting without assistance. That being said, an effective IRS still requires a certain level of stability in the country. Following the conflict and change of government in the CAR, only a limited IRS could be maintained.⁵⁴

The IRS is currently used for protected witnesses, but it has the potential to be used for other individuals also. Depending on the level and severity of the threat, a person released or acquitted by the ICC could return to their home country to an area covered by an IRS, and

⁵⁰ Reg. 96, Regulations of the Registry: 'The Registry shall take all necessary measures to maintain a protection programme for witnesses, victims who appear before the Court and persons at risk'; Reg. 93: 'The Registry shall implement measures for the protection of witnesses, victims, who appear before the Court and persons at risk on the territory of the state of their residence'. Further on this see M. Eikel, 'Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice', 23 *Criminal Law Forum* (2012) 97; S. Arbia, 'The International Criminal Court: witness and victim protection and support, legal aid and family visits', 36 *Commonwealth Law Bulletin* (2010) 519, at 521; C. Mahony, 'The Justice Sector Afterthought: Witness Protection in Africa', Institute for Security Studies (2010), ISBN 978-1-920422-07-3, at 18; 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* (2013).

⁵¹ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* (2008) at 152–153.

⁵² Eikel, *supra* note 50, at 121.

⁵³ *Report of the Court on the Kampala Field Office: activities, challenges and review of staffing levels; and on memoranda of understanding with situation countries*, ICC-ASP/9/11, 30 July 2010.

⁵⁴ *Ibid.*

use it when threatened. Importantly, the feasibility of using existing infrastructures of protection greatly depends on the source of the threat. If third parties are the source of the danger to the person, and the domestic government is merely unable to protect them, then it is a plausible solution. However, if the government of the home country is itself the source of the threat, the IRS infrastructure becomes less useful. Thus, in these last cases, the existing infrastructure for protection could be supplemented by the use of assurances.

C. Assurances

Just as with using the existing protection infrastructure, assurances are a potential way of minimizing the risk and allowing acquitted or released individuals to return to their home state. Assurances are particularly relevant where the home state itself is the source of the danger. For example, a home state might undertake that an individual will not be ill-treated on their return, and offer a number of guarantees to this effect.

In the past, assurances have been used in ICC practice in relation to witnesses. A number of detained witnesses who were transferred from the DRC to the ICC to give evidence claimed that if they were returned to the DRC they would be subject to a continued violation of their right to liberty.⁵⁵ They had been detained in the DRC without trial for a number of years, a situation that seemed set to continue, and they were concerned that their testimony before the ICC against the DRC government would place them at risk of ill treatment. In order to secure their return while at the same time guaranteeing their safety,⁵⁶ the ICC was given a number of assurances from the DRC, some of which were quite intrusive: the DRC was required to place the detained witnesses in a facility offering maximum security, with specially trained guards; if the witnesses were moved, the VWU was to be informed; the VWU was to have access to them twice a week on a confidential basis; and the VWU was to attend their trial to monitor fairness.⁵⁷ The VWU was given the overall responsibility of monitoring compliance with the assurances, and another assessment was to be made after the conclusion on their trial.

⁵⁵ For more details, see among others: de Boer and Zieck, *supra* note 24; E. Irving, 'Protecting Witnesses at the International Criminal Court from Refoulement', 12 *JICJ* (2014) 1141; G. Sluiter, 'Shared Responsibility in International Criminal Justice: The ICC and Asylum', 10 *JICJ* (2012) 661; 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.

⁵⁶ Because they were witnesses, the ICC had a specific obligation to protect them under Art. 68 ICCSt.

⁵⁷ Decision on the security situation of three detained witnesses in relation to their testimony before the Court (art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with article 93(1)(j) of the Statute, *Katanga and* (ICC-01/04-01/07-3033), Trial Chamber II, 22 June 2011, § 41.

The nature of the ‘state-ICC’ assurances given in relation to the witnesses were different from those that could have been given in a ‘state-state’ context. States are precluded by sovereignty from being able to directly monitor compliance with assurances. It is in part for this reason that extensive criteria have been developed by the ECtHR on when assurances can be considered sufficient to safeguard rights.⁵⁸ In this respect, assurances given by a state to the ICC may provide more guarantees than those given between states. In state-state scenarios, monitoring compliance with assurances depends on international bodies or diplomatic channels. This is not so with the ICC, where the presence of Court personnel on the ground helps the Court to itself monitor compliance. As already described, VWU staff members are able to visit the individuals in question, follow trials, be involved in training special prison guards, and so on. These staff members are independent and protected from arrest or interference by immunities. While this does not counteract other disadvantages that relying on assurances can have, it does in some respect place the ICC in a stronger position to ensure the rights of those it would return to a state. In particular, even though the ICC — unlike states — cannot threaten economic sanctions or other forms of pressure, receiving states may be more cautious of ignoring assurances when they are being so closely watched. The extent of assurances given by the DRC in the case of the detained witnesses hints at the possibility of this mechanism being used in other situations too. Naturally, the assurances would take a different form if the individual was at liberty rather than detained, although — as the *Katanga* situation described above shows — returning home after being released by the ICC does not guarantee liberty. Unfortunately, this otherwise optimistic picture must be tempered by the reality of the detained witnesses’ situation since their return to the DRC. A report from December 2015 showed that the detained witnesses are yet to be tried, despite being returned in August 2014.⁵⁹ The effectiveness of the ICC’s monitoring system following assurances is therefore not watertight.

5. Conclusion

There is space for optimism that the ICC could potentially play a stronger role in preventing UbU situations from occurring, or addressing them where they do arise, with regards to those it acquits or those released on completion of sentence. Beyond the steps the ICC already takes, there is potential for the Court to use its position and existing infrastructures to play an

⁵⁸ *Case of Othman (Abu Qatada) v. the United Kingdom*, Appl. No. 8139/09, judgment of 17 January 2012, at § 189.

⁵⁹ *Supra* note 35.

even bigger role. However, as noted above, each proposed solution carries its own limitations due to the ICC's inherent structural features. And so, this article should be seen as the starting point for further discussion on the role that other actors can play, alongside the ICC. While this article was limited to the ICC, states are in many ways the missing piece of the discussion: enforcement states, the host state, and other States Parties. Only a combination of their efforts can effectively address the UbU issue in the ICC context.

Immigration policy is central to state sovereignty — a state must be permitted to control those who enter and remain on its territory. A corollary of this is that states are free, to the extent permitted by their international obligations, to exclude from protection individuals they consider to be undesirable. However, some international obligations may preclude the individual's removal even if they are denied refugee protection. When such a situation occurs, it is generally a bilateral matter between the protection state and the individual in question; UbU situations arising from ICC proceedings are different. Individuals acquitted or released by the ICC are placed in the position of being UbU, at least in part, because of their involvement with the Court. After all, they are present on foreign territory precisely because of their trial, and where convicted, their sentence. Furthermore, their status as former ICC defendants may make states even more reluctant to host such individuals.

All states that negotiated the Rome Statute and which subsequently joined it should be concerned that the ICC — created to bring justice to victims of human rights violations — not leave individuals in a legal limbo which potentially gives rise itself to human rights violations.⁶⁰ As Bonjani Majola, the ICTR Registrar, stated: '[i]t weakens the arguments that people should be taken to an international criminal tribunal if they are going to become stateless after the whole process'.⁶¹ States have, then, a strong incentive to work collaboratively, and be open and willing to adopt solutions. To fail to do so undermines an international institution that has been over 50 years in the making.

It has been noted that the UbU problem in international criminal justice is not limited to the ICC. Problems of this type have notoriously affected the ICTR, and can be said to stretch back to Nuremberg. More significantly, the problem is not limited to international criminal justice only, but affects a large number of individuals all over the world who cross borders for an assortment of reasons. The solutions proposed in this article are very closely

⁶⁰ For example, confining an individual to a safe house may affect their right to liberty.

⁶¹ 'Rwanda genocide court's stranded men', Aljazeera America, 30 December 2014, available online at <http://america.aljazeera.com/articles/2014/12/30/rwanda-ictr-tanzania.html> (visited 4 January 2016).

tied to the ICC's special nature, and are not necessarily suited to be applied elsewhere. The circumstances of the ICC's creation and continuing existence constitute an incentive for collaborative state action that is often otherwise lacking, and its institutional structure gives the ICC tools that states lack in their bilateral relations with each other. An existing protection infrastructure inside the home state, the presence of Court organs to oversee its effectiveness, and the ICC capacity for coordinating states' efforts and communications are just examples of what makes the Court unusual. While international bodies such as the UNHCR or other UN agencies may play a similar role, it is also possible that measures adopted by the ICC are not transposable to other situations.

Ultimately, and returning to the ICC context, it may have to be considered that the solution to UbU acquitted and released persons is further from our grasp than we think. Indeed, it may be indicative of a deeper issue affecting international criminal justice. A failure by a state to protect acquitted or released persons when they return home, or collaboration by that state in the danger facing these individuals, is symptomatic of a disconnect and lack of trust between individual states and the international criminal justice mechanisms addressing their nationals. A failure by the international community at large to host at-risk acquitted or released persons is symptomatic of a lack of commitment to, and investment in, criminal justice at the international level. This larger trend must also be addressed.