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INTERNATIONAL CRIMINAL COURT AND TRIBUNALS

The Relationship between the International Criminal Court and its Host State: The Impact on Human Rights

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Abstract

When an international criminal tribunal establishes its headquarters in a state, its legal relationship with that state must be carved out. This legal relationship has the potential to exclude the applicability of human rights protection by curtailing the host state's jurisdiction in parts of its territory. Despite this, there is little clarity as to when when such curtailment should arise. This problem is illustrated by the situation regarding witnesses at the International Criminal Court, which has recently been the subject of decisions of the Hague District Court and of the European Court of Human Rights. These two courts disagree on the threshold at which the human rights issues engaged by the situation are brought under the jurisdiction of the Netherlands. This article submits that the European Court in *Djokaba Lambi Longa* v. *The Netherlands* set the threshold for jurisdiction under the Convention too high. In applying easily distinguishable previous case law, and failing to take into account all relevant facts, the Court's finding of inadmissibility is unconvincing. The Dutch Court, on the other hand, took a broader approach from which the European Court of Human Rights could learn. Ultimately the two decisions give contrasting interpretations of the relationship between the ICC and its host state, which could have wider ramifications.

Key words

European Court of Human Rights; host state; human rights; International Criminal Court; jurisdiction

1. INTRODUCTION[1]

When an international organization establishes its headquarters in a state, its legal relationship with that state must be carved out. This legal relationship will govern the distribution of jurisdiction between the two entities, thereby affecting their respective international law obligations. This is particularly so for human rights obligations, given that a state's international obligations towards individuals are

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1 Please note that this is topic continues to develop, and this article has not taken into account events occurring after the 11 September 2013.

inextricably linked to its jurisdiction. Where the international organization is an international criminal tribunal (ICT), this human rights element merits particular attention, given the inherent involvement of individuals in every stage of the international criminal justice process.

In 2012, a Dutch court decided that, under some circumstances, the presence of the International Criminal Court (ICC) on the territory of the Netherlands is sufficient to bring human rights concerns at the Court within the Netherlands' jurisdiction. One such circumstance, as the case study in this article will demonstrate, arises when a witness detained at the ICC is unable to avail him- or herself of the procedural safeguards of the ICC. According to the Dutch Court, in such a case the witness will be in a dead-end detention situation, and, as such, the Netherlands must concern itself with the right to liberty of that individual. In other words, where human rights are at stake, the ICC's seat on Dutch territory 'offers sufficient links to assume that the Netherlands has jurisdiction'.[2]

The rationale for such an approach is arguably two-fold. First, the Netherlands, as a contracting state of human rights conventions, most pertinently the European Convention on Human Rights (ECHR), cannot be absolved of its responsibilities under those conventions by transferring competences to an international organization. Second, human rights should not be left unprotected when a lack of protection would result from the involvement of multiple entities and an ensuing lack of clarity in the law. These rationales support the decision of the Dutch Court. The European Court of Human Rights (ECtHR), on the other hand, disagrees. In the ECtHR's opinion, the Netherlands is not sufficiently connected to the situation for jurisdiction under Article 1 of the ECHR to be established. As with previous cases involving ICTs on the territory of the Netherlands, the mere presence of the ICC on Dutch soil was not enough.

Differing opinions as to whether the Netherlands has jurisdiction are borne out of differing views on the legal relationship between the ICC and the Netherlands. The Netherlands has argued, and the ECtHR agrees, that the relevant jurisdiction has been transferred to the ICC. But this raises the question: is that transfer absolute, or conditional? From the language of both the Dutch Court and the ECtHR, transfer of jurisdiction would seem to be conditional. Neither rules out the possibility of the Netherlands having jurisdiction entirely. It is on the degree of conditionality where they disagree, and this is reflected in the threshold at which the human rights concerns come within the jurisdiction of the state. For the Dutch Court the threshold was lower than it was for the ECtHR.

Both the ECtHR case and the Dutch Court decision are the most recent developments surrounding four ICC witnesses, three of which are currently detained at the ICC detention centre, following their asylum applications to the Dutch authorities more than two years ago. The background information to this situation is set out in section 2 of this article, which includes an outline of the two court decisions. The two subsequent sections examine the decisions in more detail, first looking at the

2 *Djokaba Lambi Longa v. The Netherlands*, Decision of 9 October 2012, Application No. 33917/12, at para. 38.

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different strands of reasoning put forward by the ECtHR, then at the decision of the Dutch Court.

This article will argue that the reasoning supporting the ECtHR's decision of inadmissibility is unconvincing. The Court applied a broad-brush approach that lacked the necessary nuance. Section 3 of this article will set out three critiques of the decision. First, it will argue that the Court applied case law precedent that was easily distinguishable on the facts. Second, that in making its finding of inadmissibility, the Court failed to take into account all the relevant facts. And third, that the Court altogether failed to address the applicant's argument relating to the human rights protection at the ICC. The decision of the Dutch Court examined in section 4 will provide an alternative perspective on the case study, which it is argued, is more convincing that that taken by the ECtHR. Ultimately, this article will argue that the decisions directly impinge on the legal relationship between the ICC and the Netherlands, which may have wider ramifications.

2. A CASE IN POINT: DETAINED WITNESSES AT THE ICC

2.1. An outline of the case study

On the 12 May 2011 and 1 June 2011 respectively, three witnesses from the *Katanga* case file (Trial Chamber II) and one from the *Lubanga* case file (Trial Chamber I) filed applications for asylum with the Dutch authorities.[3] All four witnesses had been detained in the Democratic Republic of Congo (DRC) prior to their transfer to the ICC to give testimony. Three were arrested in 2005 for suspected involvement in the death of UN peacekeepers, and the fourth in 2010 for, among other things, treason. None have yet been brought to trial. Their transfer was affected pursuant to Article 93(7) of the Rome Statute, which sets out the particular conditions governing detained witnesses.[4]

The legal framework governing the transfer of the witnesses to the ICC is an agreement between the ICC and the DRC, under the terms of which the authority to detain the witnesses remains with the authorities of the DRC. The ICC is obliged

3 For a more detailed procedural history, see for witnesses in *Katanga*: *Prosecutor v. Katanga and Ngudjolo Chui*, 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' (Arts. 68 and 93(7) of the Statute), ICC-01/04-01/07-3003-tENG, Trial Chamber II, 9 June 2011, at paras. 1-16. For the witness in *Lubanga*: *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the request by DRC-DOl-WWWW-0019 for special protective measures relating to his asylum application, ICC-01/04-01/06-2766-Red, 5 August 2011, at paras. 1–14. For additional detail, see 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', (2006) 26 LJIL 1, at 173–191.

4 Art. 93(7):
(a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:
(i) The person freely gives his or her informed consent to the transfer; and
(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.
(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

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to keep them in custody while at the court by Article 93(7) of the Rome Statute and Rule 192 of the ICC Rules of Procedure and Evidence (RPE).[5] According to these provisions, and to the Standard Operating Procedure in place between the parties, the witnesses were to be returned to the DRC on completion of their testimony. However, both Trial Chambers concluded that an immediate application of the obligation to return would not accord with Article 21(3) of the Rome Statute, as this would interfere with the ability of the Netherlands to properly deal with the asylum claims.[6] Article 21(3) requires the terms of the Statute to be interpreted in accordance with internationally recognized human rights norms. As such, an interpretation of Article 93(7) that allowed for such an interference with the right to seek asylum would not accord with Article 21(3). Since those Trial Chamber decisions, the ICC Registry has attempted to consult with the Netherlands with the aim of transferring the witnesses, but to no avail.

The Netherlands, for its part, has refused to enter into the consultations proposed by the ICC Registry, which would seek a consensual solution to the situation. Despite the Dutch authorities accepting that they will hear the asylum claims as they would any other claim, they maintain that they cannot take custody of the witnesses. The Netherlands argued that a bilateral agreement between the ICC and the DRC could not place upon it an obligation to accept illegal foreigners on its territory.[7] By means of *notes verbale*, the Dutch authorities have stood firm: 'The position of the Netherlands has consistently been that the witness [i.e. the applicant] is to remain in custody of the Court during the asylum procedure'.[8]

As the ICC and the Netherlands continue to attempt to pass responsibility for these persons between them, the detention of the witnesses continues in the ICC detention centre in The Hague, over two years after the end of their testimony. Focus has now shifted from their asylum claims as such, to the more pressing matter of their ongoing detention and their right to liberty. It is a mark of the seriousness of the situation for these witnesses that the witness attached to the *Lubanga* case has now withdrawn his application for asylum and has returned to the DRC. However, before doing so, Mr Longa had sought to bring an end to his detention by initiating proceedings before the European Court of Human Rights in Strasbourg (ECtHR).[9] The witnesses attached to the *Katanga* case continue to pursue a solution through the Dutch courts.

Actions brought against the Netherlands to uphold the right to liberty are inextricably linked to the question of jurisdiction. As the relevant source of human rights protection in this situation is the ECHR, if the Dutch government has no jurisdiction under that Convention, then they have no obligation to guarantee the right to liberty of the witnesses. The Netherlands is a monist legal system, and, as such,

5 See ICC-01/04-01/07-3003, *supra* note 3 at paras. 79–85; *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, ICC-01/04-01/07-3254, 1 March 2012 at paras. 17–21.

6 See ibid. ICC-01/04-01/07-3003 at para. 73; see ICC-01/04-01/06-2766-Red, *supra* note 3 at para. 86.

7 See *supra* note 2, at para. 22.

8 Ibid.

9 This step followed a number of proceedings before Dutch courts. For details see *supra* note 2, at paras. 27–31.

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the ECHR is directly applicable. This is important given that little national human rights law is in place that would apply to this case study. It is therefore useful for the purposes of this article to contrast the ECtHR and Dutch cases, despite the fact that one operates at the international level and the other at the national. When a Dutch court issues a decision on the ECHR and jurisdiction, this illustrates the Dutch domestic understanding of the notion of jurisdiction under the ECHR. The ECtHR and Dutch court decisions therefore offer different understandings of the same issue.

2.2. Outline of the Dutch Court and ECtHR decisions

To facilitate the discussion of these cases, it is helpful to provide a brief outline of the decisions. In both decisions the right to liberty was at the centre of the claim of the witnesses, the ultimate aim being speedy release.

Following the timeline of events, we begin with the Dutch Court decision of the 26 September 2012. The fact that there is 'no prospect of a speedy end' to the asylum proceedings has, in the Dutch Court's opinion, rendered the ongoing detention of the witnesses unlawful, despite the witnesses being formally in the custody of the DRC, as implemented by the ICC. Given that neither the ICC[10] nor the DRC can review the detention, it is the responsibility of the Netherlands to do so. The Court rejected the Netherlands' argument that it lacked jurisdiction. It was merely held to be the case that jurisdiction is not exercised under the Aliens Act 2000, but this 'does not make any difference to the possibility that the State may be legally bound to take over the plaintiffs from the International Criminal Court'.[11] The Dutch authorities were given four weeks to consult with the ICC with a view to ending what has become an unlawful detention situation.

The ECtHR took a rather different approach. While acknowledging that jurisdiction is primarily territorial, it invoked exceptions established in previous case law to hold that the mere presence of the ICC on Dutch territory is not sufficient to engage Dutch jurisdiction. It went on to dismiss the arguments made that the level of human rights protection at the ICC is deficient, and then rejected the notion that, by accepting jurisdiction to hear the asylum claims, the Netherlands had also accepted jurisdiction under the Convention. In sum, the Netherlands was held to have no jurisdiction over the individuals concerned, and the application was declared inadmissible.

The disagreement between the Dutch Court and the ECtHR, it is submitted, stems from a differing understanding of where the threshold for jurisdiction lies under the ECHR. As reiterated in *Longa*, jurisdiction is a threshold criterion.[12] Generally, when events take place within a Convention state's territory, this threshold is easily passed: there is jurisdiction because of the territoriality principle. When the situation is more complicated, as in the *Longa* case, the threshold might be harder to meet. The stage at which it can be said that the threshold for jurisdiction has been passed can differ depending on the appraisal of the situation and the interpretation of the law.

10 For more detail on the Trial Chamber's opinion on this issue, see *supra* note 2, paras. 10–24.
11 Ibid., at para 38.
12 See *supra* note 2, at para. 61. This principle is stated in a number of other cases which deal with Art. 1.

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The Dutch Court, for instance, appears to adopt a lower threshold than the ECtHR. Arguably, the higher threshold gives more scope for states to alter their international obligations by entering into legal relationships with other subjects of international law.

3. A HIGH JURISDICTION THRESHOLD: THE DECISION OF THE ECtHR IN *DJOKABA LAMBI LONGA* V. *THE NETHERLANDS*

The applicant in *Longa* sought a solution to his ongoing detention before the ECtHR. In alleging violations of Articles 5 and 13 of the ECHR, two alternative strands of argument were provided. The first was a direct action against the Netherlands, arguing that the violations caused by his ongoing detention were attributable to acts or omissions of the Netherlands itself. The second posited, in the alternative, that, if the detention were deemed to be under the authority of the ICC, the Netherlands as a member state of the ICC could not be absolved of the obligations it would otherwise have under the Convention. These arguments target two aspects of the legal relationship between the ICC and the Netherlands: that of ICT and host state, and that of ICT and member state.

3.1. Host state responsibility

The ECtHR held that the Netherlands' position as host state was not sufficient to give rise to jurisdiction under Article 1. It will be argued that this finding was problematic for two reasons. First, the Court applied previous case law dealing with the relationship between an ICT and its host state without examining the important differences between those cases and the *Longa* case. Second, the ECtHR failed to take into account all the relevant facts set out to the Court by the applicant. In so doing, the Court unduly deprived the applicant's argument of much of its strength.

3.1.1. A Failure to distinguish

In holding that the presence of the ICC on Dutch territory was insufficient to establish jurisdiction, the ECtHR applied previous case law on ICT–Host State relationships. However the Court did this in a wholesale way, without the warranted analysis of whether the circumstances of the *Longa* case merited this equivalent treatment. The Dutch Court decision of 26 September 2012 distinguished the previous case law based on the position of the applicant within the ICC procedural structure. This will be examined in section 4 of this article. The current section will focus on additional grounds that set the *Longa* case apart.

In reaching its decision on this particular issue, the Court employed the reasoning from the cases of *Galić*[13] and *Blagojević*[14], which both concerned applications by defendants indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY). Those cases were also held inadmissible, the presence of the ICTY on Dutch

13 *Galić v. The Netherlands*, Decision of 9 June 2009, Application No. 22617/07.
14 *Blagojević v. The Netherlands*, Decision of June 2009, Application No. 49032/07.

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territory not being enough to bring the alleged violations of Articles 6 and 14 of the Convention within Dutch jurisdiction under Article 1.

At first glance, one might agree with the ECtHR that *Galić*, *Blagojević*, and *Longa* all deal with an international criminal tribunal headquartered in a Convention member State, and therefore are subject to the same legal reasoning. However the reasoning of the ICTY cases cannot be so easily applied to the *Longa* situation. The Court overlooked important differences between the cases – the devil is, as they say, in the detail.

It was of great importance in *Galić* and *Blagojević* that the tribunal was a subsidiary organ of the UN; indeed, this underpinned much of the reasoning. The Court's analysis in *Galić* and *Blagojević* began by reiterating the following section of its decision in *Behrami*:

> [S]ince operations established by [Security Council] Resolutions under Chapter VII of the [United Nations] Charter are fundamental to the mission of the [United Nations] to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by [Security Council] Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the [United Nations]'s key mission in this field including, as argued by certain parties, with the effective conduct of its operations.[15]

In the *Behrami* case the reasoning set out in this paragraph led to the conclusion that the actions of troops contributed by member states of the Council of Europe to KFOR (a UN Security Council presence in Kosovo) could not be attributed to member states, but rather only to the UN. The UN, not being a member of the ECHR, could not be brought before the ECtHR. The Court's approach to the relationship between itself and the UN runs as a red thread through the subsequent case law. Following *Behrami*, the case of *Berić* saw the same reasoning analogized to the presence, in a Convention member State, of a UN-established international administration.[16] In *Galić* and *Blagojević* the red thread continued, applying the *Behrami* reasoning to the presence of a UN ICT in a state. The Court again underscored in these cases the importance of not interfering with the role of the UN Security Council as maintainer of international peace and security.[17] Indeed, the Court has in previous cases highlighted the unique nature of the UN. There was said to be a 'fundamental distinction' between the nature of the European Union (EU) as an international organization and as a forum for international organization, and the nature of the

15 *Behrami and Behrami v. France; Saramati v. France, Germany and Norway*, Decision of 2 May 2007, Application No. 78166/01, at 149

16 *Berić and Others v. Bosnia and Herzegovina*, Decision of 16 October 2007, Application Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05, and 25496/05

17 See *supra* note 13, at paras. 39 and 46; see *supra* note 14, at paras. 39 and 46.

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UN. This distinguishability stems from the UN's universal jurisdiction to fulfil its imperative collective security objective.[18]

If the EU is easily distinguishable from the UN, then the ICC certainly is also. The ICC is a multilateral treaty body with a limited relationship with the UN Security Council and certainly no dependence on it.[19] This stands in contrast to the ICTY, which is a subsidiary organ of the UN Security Council. This, in itself, points to potential differences in the legal relationship between the ICTY and the Netherlands on the one hand, and the ICC and the Netherlands on the other, which would justify different treatment. Article 103 of the UN Charter prioritizes obligations under the Charter above other treaty obligations that UN member states might have in case of a potential conflict. Therefore, the Netherlands might be unable to prioritize its human rights obligations under the ECHR over those imposed on it by the ICTY. There is no such hierarchy where the ICC is concerned.[20]

The ECtHR in the *Behrami* set of cases not only stresses the international peace and security aspect of the UNSC, but also the fact that the UN as a whole is founded on the principle of respect for human rights.[21] Here the ICC also differs from the UN. The Preamble to the Rome Statute is concerned with ending impunity, and at no point expressly mentions human rights. Of course, it is not argued here that the ICC is unconcerned with human rights, indeed Article 21(3) suggests the opposite. The argument can be made that the prosecution of war crimes is part of the global effort to protect human rights, as crimes against humanity, genocide, and war crimes involve violations of fundamental human rights on a large scale.[22] However, the clear focus on human rights in Article 1 of the UN Charter[23] is lacking in the Rome Statute. Even the Treaty on the European Union contains an express reference to human rights,[24] and still the ECtHR held that the EU is fundamentally different from the UN. The ICTY Statute may lack an express reference to human rights equivalent to Article 21(3) of the Rome Statute, however, the ICTY was established to further the aims of the UN as set out in Article 1 of the Charter, which does prioritize human rights.

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18 See *supra* note 15, at para. 151. See also T. Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', (2010) 10(3) *Human Rights Law Review* 529.

19 No dependence in the legal sense that the prosecutor can initiate proceedings without its consent. No comment is made here on the political relationship between the two.

20 D. Sarooshi, 'The Statute of the International Criminal Court', (1999) 48(2) *The International and Comparative Law Quarterly* 387, at 390.

21 See *supra* note 17.

22 J. Mayerfeld, 'Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights', (2003) 25 *Human Rights Quarterly* 93, at 98. See also L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms … or Tied Down?', (2006) 19 LJIL 847; A. Cassese, 'The International Criminal Tribunal for the Former Yugoslavia and Human Rights', (1997) 4 EHRLR 329.

23 Art. 1: The Purposes of the United Nations are:(3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

24 2010, Treaty on the European Union, OK 2010 C83/01), Art. 2:The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

One cannot equate the role of the UN Security Council within the international legal order with that of the ICC. Given the importance attributed to the UN element in *Behrami*, and, by extension, *Galić* and *Blagojević*, the dependence by the ECtHR on these cases in *Longa* is unconvincing. *Behrami* is the starting point for the reasoning in *Galić* and *Blagojević* which culminated in the preclusion of Dutch jurisdiction. At every stage of this reasoning, including its stepping-stone application to the presence of an international administration in *Berić*, the importance of the UN element is crucial.[25] It is plausible to say, then, that the legal relationships between the Netherlands and the ICC, and the Netherlands and the ICTY, are different, and hence merited different treatment by the ECtHR.

This is not to say that there might not be pertinent legal or policy reasons for excluding Dutch jurisdiction with regards to the ICC which are equivalent to those put forward regarding the UN – the ECtHR just does not explore them. For instance, one might say that the ICC was established by states to provide the public good of punishment and deterrence of international crimes. This function should not be disturbed by the ECtHR, just as the UNSC function of maintaining peace and security must not be undermined.[26] Instead, the ECtHR overlooks any differences between the ICTY and the ICC entirely, merely quoting *Galić* and *Blagojević* as determinative precedent.

3.1.2. Failure to take into account all relevant facts

The second problematic element in the ECtHR's approach to the applicant's claim regarding host state responsibility lies in the fact that it fails to take into account all the relevant facts of the case. The territoriality issue discussed above should have been considered in combination with, and in light of, the other arguments put forward by the applicant. Namely these concern the Netherlands' involvement in the ongoing detention and how this could bring the matter within Dutch jurisdiction.

The idea of state involvement sufficing to engage a state's responsibility under the Convention where an international organization is involved originates in the case law of the ECtHR itself. In *Berić*[27] the applicants were removed from their public and political party positions by the UN High Representative in Bosnia Herzegovina. This power of removal was held by the High Representative by virtue of a UN Security Council Resolution[28] and a decision of the Bosnia Peace Implementation Council.[29] The ECtHR held that there was no jurisdiction *ratione personae* because the action did not require any implementing measures by the national authorities. Therefore it remained an action attributable only to an international organization that was not

25 See *supra* note 16, at para. 29.
26 C. Fehl, 'Explaining the International Criminal Court: A "Practice Test" for Rationalist and Constructivist Approaches', (2004) 10 *European Journal of International Relations* 357, at 369.
27 See *supra* note 16, at para. 29. See generally C. Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organisations', (2011) 60(4) *International and Comparative Law Quarterly* 997.
28 UN Doc. S/Res/1031 (1995).
29 See *supra* note 16, at para. 26.

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party to the Convention.[30] *Berić* can be contrasted to *Kokkelvisserij*[31] which concerned an application to the ECtHR by a person who had been denied permission to submit written observations to the opinion of the Advocate General of the European Court of Justice (ECJ, as it then was). The Court distinguished this case from similar cases on the basis that the domestic court had made a preliminary reference to the ECJ, and 'it cannot therefore be found that the respondent party is in no way involved'.

While these cases concern member state responsibility for acts of international organizations, their logic can be extended by analogy to the host state responsibility situation. If member states can be responsible for playing a part in the actions of international organization of which they are part, surely the same is true of host states which involve themselves in the actions of an international organization which they host?

It is significant in light of *Kokkelvisserij* that the Dutch domestic courts have played a role in the situation. Two decisions stand out as particularly significant, although many others have been taken regarding the four witnesses.[32] First, it was a decision of The Hague District Court that compelled the Dutch authorities to hear the asylum claim in the normal way. The Netherlands sought to argue that the asylum application could not be dealt with as such because the Netherlands had no jurisdiction. Therefore, they wanted to hear the application as a *sui generis* application for protection. However, The Hague District Court considered there to be no basis in law for excluding the witnesses from the ordinary asylum procedure and ordered a decision on the applications to be given within six months. That deadline passed in June 2012.[33] Secondly, as described above, the District Court of The Hague in September 2012 decided that the ongoing detention was illegal, and ordered the Dutch government to consult with the ICC with a view to the witnesses being transferred to them.

Given these decisions then, it is indeed hard to argue that the Netherlands 'was in no way involved'. One could argue that those decisions concerned applicants different from that in the *Longa* case, and, as such, do not constitute involvement on the part of the Dutch state in the sense of the *Kokkelvisserij* case. However, it is submitted that, given the identity in the circumstances of all four witnesses, a legal finding concerning one constitutes a legal finding concerning them all. The Netherlands in its actions has not sought to differentiate one set of witnesses from the other, based on the ICC case to which they are attached. Indeed, the asylum applications are being dealt with in the same way for all four witnesses.

In not appealing the December 2011 Hague District Court decision, the Dutch authorities implicitly agreed that they did have jurisdiction to decide upon the

30 Ibid.
31 *Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v. The Netherlands*, Decision of 20 January 2009, Application No. 13645/05, at 18.
32 For more detail on the other decisions, see *supra* note 2 at paras. 27–31 and J. van Wijk, *supra* note 3, at 175–6.
33 For the English translation of this case, see *supra* note 2, paras. 26 and 33.

asylum claims. The applicant argued that this acceptance[34] was an acceptance of jurisdiction under the Convention also, as it is not possible to pick and choose the elements of jurisdiction most advantageous for the state. The ECtHR dismissed the argument on the basis that states are under no obligation to allow foreign nationals to await the outcome of asylum proceedings on their territory, and that the Convention does not guarantee the right to enter or reside in a state of which one is not a national.[35] However, in doing so the Court failed to appreciate that hearing the asylum applications is another form of involvement by the Dutch state. As the ECtHR held in *Illascu*[36] when considering whether Moldova had effective control over its territory, 'the Court must examine on the one hand all the objective *facts* capable of limiting the effective exercise of a State's authority over its territory, and on the other the State's own conduct'.[37]

The involvement of the Dutch authorities in the asylum claims is certainly one such fact to be considered. The Dutch Court decision took this up, stating that 'it is because of the Netherlands asylum proceedings that the plaintiffs cannot be returned to the Democratic Republic of the Congo'.[38] While acceptance of jurisdiction to hear the asylum claims may not be sufficient in and of itself to engage Dutch jurisdiction under Article 1 of the ECHR, it should be seen as part of a larger picture. If these facts had been taken into account in the ECtHR's decision, and the *Galić* and *Blagojević* cases properly distinguished, likely the Court's reasoning may have taken a different turn.

3.2. Member state responsibility

If the ECtHR did not accept that the Netherlands could have the detention directly attributed to it by virtue of it being the host state, then the applicant put forward what is known as the *Bosphorus* argument. *Bosphorus*[39] concerned the Convention duties of Ireland when implementing obligations imposed on it by the European Union. The Court found it necessary to balance, on the one hand, the interests of states in being able to form, and be members of, international organizations which further international co-operation, and the integrity of the Convention on the other. This balance would be upset it states could entirely absolve themselves of their obligations under the Convention by delegating certain powers to such organizations.[40] This, then, is a different aspect of the legal relationship between the ICC and the Netherlands: that of international organization and member state, rather than host state.

The *Bosphorus* ruling established a presumption that, when an international organization has equivalent or comparable human rights protection to that under the Convention, a state's actions carried out in compliance with legal obligations

34 *Supra* note 2, at para. 62.
35 *Supra* note 2, at paras. 81–3.
36 Case of *Ilascu and Others v. Moldova and Russia*, Judgment of the 8 July 2004, Application No. 48787/99.
37 Ibid., at para. 313 (emphasis added).
38 See *supra* note 2, at para 38.
39 Case of *Bosphorus Hava Yollari TurïZm Ve TïCaret AnoniM ŞIRketï v. Ireland*, Judgment of the 30 June 2005, Application No. 45036/98.
40 See also the case of *Waite and Kennedy v Germany*, Judgment of 18 February 1999, Application No. 26083/94.

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arising by virtue of its membership are justified. Only if, under the circumstances of a particular case, the protection of Convention rights was 'manifestly deficient' could the presumption be rebutted.[41]

The applicant in *Longa* argued that the *Bosphorus* presumption was rebutted in this case, as the protection offered by the ICC was insufficient. This was rejected by the ECtHR. The Court pointed to the possibility for the ICC to order protective measures under Rules 87 and 88 of the Rule of Procedure and Evidence (RPE), and held that it could not be decisive that the exercise of these powers could not secure the release of the witnesses by the DRC authorities.[42] Rules 87 and 88 relate to the protection of witnesses and victims, such as the use of pseudonyms. However, the argument of the applicant concerned the deficiencies in the ability of the ICC to review his detention and address the Convention rights affected by that detention – Rules 87 and 88 have no bearing on this. The Court, then, has failed to really address the argument.

Remarking that the human rights protection at the ICC is comparable to that required by the Convention has wider ramifications than just the *Longa* case. There are a number of areas where protection is not comparable, and following the *Longa* decision, member states may feel free to simply follow the ICC approach without subjecting it to proper scrutiny. The case study of this article provides further food for thought if one looks at the asylum aspect of it. Does the ICC offer the same protection for persons at risk as the Netherlands is obliged to provide under the ECHR?

When assessing the protection needs of a witness under Article 68 of the Rome Statute,[43] the ICC limits its assessment to risks that witnesses incur due to their co-operation with the Court. Wider protection issues unrelated to involvement with the ICC are not of the Court's concern and do not entitle the individual to ICC protection, according to Trial Chamber II.[44] This can be contrasted with the obligations of Convention member states, who must consider all risks that could create a prohibition on *refoulement*. Trial Chamber II has sought and received assurances from the DRC government such that it considers its protection obligations under Article 68 complied with. These assurances relate to, among other things, the protection of the witnesses in prison in the DRC and the training of prison guards. Such assurances, however, may not be sufficient for a Convention member state, as the latter are bound by the well-developed case law of the ECtHR relating to diplomatic assurances. In the most recent case, *Othman*, the Court provides an extensive list of considerations that must be taken into account when determining whether assurances remove a real risk of human rights violations.[45] The scope of obligations on

41 Ibid., at paras. 155–6. See also C. Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', (2006) *Human Rights Law Review* 87; Lock, *supra* note 18; and Ryngaert *supra* note 27.

42 *Supra* note 2, at paras. 79–80.

43 The most pertinent section of Art. 68 is para. 1, which requires the Court to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.

44 See *Katanga*, *supra* note 3, at paras. 59–62.

45 Case of *Othman (Abu Qatada) v. The United Kingdom*, Judgment of 17 January 2012, Application No. 8139/09, at para 189.

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the member states and on the ICC are therefore clearly different and merited much closer attention by the ECtHR in the *Longa* case.

4. A LOW JURISDICTION THRESHOLD: THE DECISION OF THE HAGUE DISTRICT COURT

Less than two weeks before the ECtHR handed down its decision, the Hague District Court produced a summary decision which took a very different approach to the human rights of the detained witnesses, and, by extension, to the legal relationship between the Netherlands and the ICC. The point at which the matter came within the Article 1 jurisdiction of the Netherlands was set at a much lower threshold. The Dutch Court distinguished *Galić* and *Blagojević* for different reasons than those set out above, and used *Bosphorus* style reasoning to uphold the territoriality principle.

An important consideration for the Dutch Court was the fact that, because of their position in the procedural structure of the Court, the witnesses did not have access to another remedy. *Galić* and *Blagojević* were distinguished on the basis that, in those cases, the applicant could make use of the procedural guarantees of the Tribunal, whereas the detained witnesses at the ICC could not make use of such guarantees and could not challenge their detention. Both the ICC and the Dutch authorities claimed to have no competence to adjudicate on the detention. The Court goes on to state that in such a situation, 'it cannot be excluded that the International Criminal Court's seat in the Netherlands offers sufficient links to assume that the Netherlands has jurisdiction'.[46] In essence the Court appears to be saying that where human rights protection at an ICT is lacking, the rebuttal of the presumption of territoriality is not possible.

It is submitted that such an approach would yield more desirable results if also applied by the ECtHR. In essence the Dutch Court applied the same type of reasoning used by the ECtHR in *Bosphorus*. It stands to reason that if a state cannot be absolved of its Convention obligations by virtue of its membership of an international organization, the same should be true for hosting an international organization on its territory. Therefore a host state benefits from the presumption that the organization has equivalent human rights protection to that provided by the state. As such, the state is deemed to have transferred its jurisdiction in such matters to the international organization. However, as with the *Bosphorus* reasoning, this presumption can be rebutted. The Dutch Court in this regard highlighted the dead-end nature of the detention, with no near prospect of trial or release. Neither the ICC nor the DRC were in a position to review the detention and release the witnesses. Therefore the presumption of equivalent protection was rebutted and the territoriality principle confirmed.

The position can be summarized as follows: given that the ICC is on Dutch territory, the Netherlands *prima facie* has jurisdiction over the witnesses and their human rights concerns. Due to the fact that the witnesses are being held in ICC

46 Ibid.

detention, Dutch jurisdiction is suspended because of the conditional transfer of jurisdiction on such matters to the ICC. The transfer of jurisdiction is premised on a presumption that the ICC provides equivalent human rights protection to that required under the ECHR. Where this presumption is rebutted, the jurisdiction of the Netherlands resumes.

If the ECtHR transplanted the *Bosphorus* reasoning to the host state scenario, and took into account the facts highlighted in section 3.2 above, it would surely have reached the same conclusion: in this instance, the ICC does not provide equivalent protection to the ECHR and therefore the Netherlands should step in to protect the witnesses. This approach best honours the integrity of the Convention, while preserving the delicate distribution of jurisdiction governed by the legal relationship between host state and ICT.

5. Conclusion

The approaches of the two Courts offer insights into the complex legal relationship between an ICT and its host state, and how it can be subject to differing interpretations. The contrast between the high threshold for jurisdiction and the low threshold reflects the place that human rights norms might take within this complex relationship.

What has become clear is that caution must be used when drawing comparisons between the different ICTs. It is possible that each relationship between an ICT and its host state will be of a *sui generis* nature, with variations stemming from the terms of the headquarters agreements, national implementing legislation, and the nature of the tribunal. On the last point one cannot, for example, equate the ICTY (a UN subsidiary body), with the ICC (a multilateral treaty body), with the Special Court for Sierra Leone (bilateral agreement between the UN and the Sierra Leonean government). The relationship will also vary depending on the host state: the human rights obligations of the Netherlands are not the same as those of Tanzania, which hosts the International Criminal Tribunal for Rwanda.

There are certainly policy arguments in favour of the Dutch authorities not being held responsible for human rights violations that arise due to the operation of an ICT on its territory.[47] It is important not to dissuade states from taking on the role of headquartering international organizations. Indeed, if the state is precluded by agreements and general public international law from interfering with the operation of an ICT, then it would be inequitable to then hold them responsible for wrongful acts that arise because of its operation. However, the case study of this article shows that grey areas can arise where the state is not wholly uninvolved, and where these policy arguments have less weight as a consequence. Upsetting the distribution of jurisdiction between a host state and an ICT should certainly be the exception not the norm, but it is submitted that the ECtHR was too quick to dismiss the possibility that it was indeed faced with an exception in this case. Instead its blanket approach

47 For a detailed exposition of the different policy concerns relating to the asylum claims of the witnesses, see J. van Wijk, *supra* note 3.

has left four individuals unprotected. In light of the decision, one can understand the scepticism about the utility of the ECtHR in dealing with human rights concerns at ICTs.[48]

When speaking of the witnesses' asylum claims, van Wijk noted that the difficult situation presented by the detained witnesses is caused by a lack of harmonization between the (execution of) international criminal law and the (upholding) of principles of international protection.[49] But van Wijk's noted lack of harmonization extends beyond the execution of international criminal law, to the whole legal framework that surrounds it, including the relationship between an ICT and a host state. In this respect, the ECtHR judgment in *Longa* represents a deepening of this problem as it affects more human rights issues than the detention itself. In Convention member states, the jurisprudence of the ECtHR prevents the extradition[50] or expulsion[51] of a person from their territory where that person faces a real risk of harm that would breach the Convention. This additional layer of protection applies even where the individual in question was denied asylum. Following *Longa*, the witnesses detained at the ICC will not benefit from this complementary protection if their asylum request is turned down.

Armed with the *Longa* decision, the Dutch authorities won an appeal against the Dutch Court Decision in December 2012.[52] The Dutch Appeals Court denied the lower court's assertion that the witnesses were in a dead-end detention situation, which, as it had no end in sight, had therefore become illegal. It was held that just because the asylum procedure was lengthy, did not mean it was unending. The Court stated that, in any case, it was not for it to consider whether there was a conflict between the detention and Articles 5 and 13 of the ECHR: as the ECtHR had said in *Longa*, the Netherlands lacked jurisdiction under Article 1. The case study of witnesses at the ICC therefore remains unresolved. A decision in their asylum applications remains pending.

48 W. Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights', (2011) *Journal of International Criminal Justice* 609, at 610.

49 J. van Wijk, *supra* note 3, at 182–3.

50 *Soering v. United Kingdom*, Judgment of the 7 July 1989, Application No. 14038/88

51 *Chahal v. United Kingdom*, Judgment of 15 November 1996, Application No. 22414/93.

52 *The Netherlands (Ministry of Foreign Affairs and Ministry of Security and Justice) v. Respondent 1, Respondent 2, and Respondent 3*, Interim Appeal, Case No. 200.114.941/01, ILDC 1966 (NL 2012), 18 December 2012.