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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

JORIS VAN WIJK*

Abstract

In 2011 three Congolese ICC defence witnesses applied for asylum in the Netherlands. A decision has not yet been made. This article argues that three outcomes of their procedures are most likely: (i) an asylum permit is granted, (ii) a permit is denied, or (iii) the applicants are excluded from refugee protection on the basis of Article 1(f)(a). All scenarios would have serious practical and political consequences for the ICC, the Netherlands, and the DRC. There is a limited, but real, chance that future defence witnesses will also apply for asylum. This mere threat might already seriously hamper future co-operation between the ICC and states parties. More practical and political dilemmas stemming from a lack of harmonization between international criminal law and principles of international protection lie ahead, since a coherent scheme on how to deal with ICC defendants whose case has been rejected in the pre-trial phase, who have been acquitted, or who have served their sentence and cannot be refouled to their country of origin has thus far not been realized. As it stands the international community does not have an answer to this fundamental system error yet.

Key words

acquittal; asylum; detention; International Criminal Court (ICC); non-refoulement; 1(f) exclusion clause; protection; sentence; witnesses

This contribution starts with the story of three men, two countries, one international court, and a simple plan that did not work out. It describes how three detained Congolese witnesses who testified on behalf of the defence before the International Criminal Court (ICC) requested the Dutch government to grant them asylum briefly after their testimony. Everything suggests that the government of the Democratic Republic of Congo (DRC), the Netherlands, and the ICC had not anticipated this asylum request. I will briefly describe how this situation occurred, give an update of

* Joris van Wijk works as an Assistant Professor of Criminology at VU University Amsterdam. He directs the master's course in International Crimes and Criminology and focuses his research on the effects of amnesties and the consequences of Art. 1(f) of the Refugee Convention [j.van.wijk@vu.nl]. The author would kindly like to thank Chizu Matsushita and Barbora Holá for reviewing the draft and for their valuable suggestions. Nonetheless, the views expressed in this article are his own and the responsibility for any errors or serious omissions rests with him alone.

the latest state of affairs, and discuss the possible practical and political consequences and implications of the witnesses' asylum applications.

Next, I will argue that the ICC and national governments will in the near future be confronted with more dilemmas stemming from a lack of harmonization between (the execution of) international criminal law and (upholding) principles of international protection. I will in this regard describe why and how also non-detained ICC defence witnesses might apply for asylum in the Netherlands and discuss the consequences this may have. It will be highlighted that the international community still has no answer to the question as to what to do with acquitted ICC defendants who cannot be refouled. As long as no concrete steps are taken to share the burden in this respect, the collective responsibility of the international community to protect these persons could de facto turn into an exclusively Dutch responsibility. Finally, it will be underscored that no solution yet exists on how to deal with individuals who are sentenced by international tribunals, but upon release cannot be refouled. Each and every sovereign country has legitimate reasons to not accept or invite foreign perpetrators of international crimes after they have served their sentence, but if all countries do so this results in a fundamental system error.

This article will not provide an in-depth legal analysis of the interrelation between criminal law, human rights law, and refugee law. Neither does it offer an exhaustive and fundamental discussion on the underlying procedures and principles. Instead, it identifies the problematic practical and political consequences of a limited number of (future) scenarios where (the execution) of international criminal law at the ICC may clash with (upholding) principles of international protection.

1. Congolese defence witnesses applying for asylum in the Netherlands[1]

1.1. The plan . . .

On 27 March 2011 three Congolese prisoners were transferred from Makala Prison in Congo and flown to the ICC Detention Centre in Scheveningen, the Netherlands. For several years prior to their transfer the men had already been detained, awaiting trial before a Congolese military tribunal. The purpose of their transfer was to testify in defence of the indicted alleged Congolese warlords Germain Katanga and Mathieu Ngudjolo Chui. In line with subparagraph 7(b) of Article 93 of the Rome Statute the witnesses were to remain in custody during the proceedings. And, as stated in that same article, when the purposes of the transfer had been fulfilled, the Court would return the witnesses 'without delay to the requested State'. In other words, the witnesses would come to The Hague, stay for a limited period of time in the ICC detention centre, testify, and be sent back to Congo after giving their statements.

1 With regard to the situation of the asylum-seeking Congolese witnesses a recent and detailed legal analysis can be found in G. Sluiter, 'Shared Responsibility in International Criminal Justice: The ICC and Asylum', (2012) 10 JCIJ 661. Sound summaries of the trial sessions and analyses on the issue are furthermore available at www.katangatrial.org.

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1.2. . . . and how it failed

In their testimony before the Trial Chamber of the ICC, the witnesses argued that the accused on trial should not be held accountable for committing the charged crimes. Instead, they implicated, amongst others, President Kabila of the DRC in the crimes against humanity committed in the Ituri District, a territory of the DRC. Shortly afterwards the witnesses submitted their applications for asylum to the Dutch authorities.[2] Given their statements they feared for their safety after their return to the DRC. This request for protection marked the beginning of a number of unprecedented legal procedures. The Katanga Trial Chamber recognized the principle of *non-refoulement*, the protection of refugees from being returned to a place in which their lives or freedoms could be threatened. Yet, as the Court itself has no territory, it urged the Dutch authorities to proceed in investigating the witnesses' claims. In the meantime the witnesses were to remain in ICC custody.

What follows is a period in which the Dutch Immigration and Naturalization Service (IND) – the administrative authority responsible for asylum decisions – was in constant discussion with the counsel for the asylum seekers. While their counsel argued that the IND had initially vowed the witnesses could follow a regular asylum procedure, in the media a representative of IND denied such promise had ever been made.[3] Tensions ran especially high when the counsel for the applicants compared his clients' situation with Guantánamo Bay, for the fact that they were detained without their criminal case being heard by an independent court.[4] In November 2011 the Dutch minister of immigration and asylum intended to bring clarity to the case. He argued that the witnesses during their stay in ICC custody were outside the jurisdiction of the Netherlands and that consequently Dutch asylum law was not applicable. Instead of a regular asylum procedure, the minister stated that the request for protection was dealt with as a *sui generis* procedure.[5] The details of this procedure are, however, uncertain.[6] In the meantime – six months after the initial request for protection – a formal reaction to the witnesses' asylum request has not yet been given and the witnesses have continued to stay in the ICC detention facility.

The position of the applicants' legal counsel was that there was no basis for deviating from the regular asylum procedure. They thus started various procedures to press the IND to make a substantive decision on the asylum applications. The Amsterdam District Court, competent in asylum matters, delivered a decision in which it ruled that the detained witnesses could apply for asylum in the Netherlands in December 2011.[7] It reasoned that although the witnesses fall under the jurisdiction of the ICC, this institution cannot offer protection since it does not have its own territory. It furthermore reasoned that the applicants actually resided on Dutch territory and that

2 For a detailed procedural history see Decision on an Amicus Curiae application and on the '*Requête tendant á 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), *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07, T.Ch. II, 9 June 2011, paras. 1–16.

3 'Getuigen ICC uit asielprocedure geweerd', *De Telegraaf*, 5 October 2011.

4 Ibid.

5 Aanhangsel Handelingen II, 2011/12, nr. 674.

6 For more on this procedure, see Sluiter, *supra* note 1, at 12.

7 District Court The Hague, seat Amsterdam, Decision of 28 December 2011, LJN: BU9492.

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they were not in the position to apply for asylum elsewhere. The court ordered the government authorities to come to a decision on the asylum applications by 28 June 2012. This decision was not appealed. At the moment of writing – October 2012 – the Dutch asylum authorities have not yet made a determination.

1.3. Possible outcomes of the asylum application

Next will be argued that there are basically three likely outcomes of the asylum procedure: (i) asylum will be granted, (ii) asylum will be denied, or (iii) the application will not be taken into consideration because the applicants are excluded on the basis of Article 1f(a) Refugee Convention. It is not my intention to predict the most likely outcome since I do not have any inside knowledge and do not know all the details of the case. Instead, I would like to think through what the possible *consequences* of the three mentioned outcomes may be. It will be argued that basically any scenario unfolding from this Gordian knot leads to a situation that is likely to be perceived as highly undesirable by the Netherlands, the DRC, and the ICC.

1.3.1. An asylum permit is granted

The witnesses will be granted refugee status if they are able to demonstrate that they, upon return to the DRC, have a well-founded fear of being persecuted because of their race, religion, nationality, political opinion, or membership in a particular social group.[8] Apart from such a so-called 'A-status' the witnesses may also qualify for other (temporary) residence permits mentioned in Article 29 Aliens Act (*Vreemdelingenwet*).[9] Especially the B-status is relevant in this regard, which can be granted if applicants demonstrate that they have well-founded reasons to fear that they run a real risk, after repatriation to their country of origin or continuous residency, to be exposed to torture or inhuman or degrading treatment or punishment.[10] Receiving any of these statuses would obviously be a preferable outcome for the witnesses.

For all other actors involved, however, this outcome would be highly complicated and is likely to lead to substantial tensions. The Dutch government, for example, should in that case prepare for critical questions from Parliament. How could it happen that the government facilitated the transfer of Congolese militia members from a filthy Kinshasa prison cell to a subsidized and clean terraced house in, say, Gouda? Where did it go wrong? Who is responsible? While the Dutch traditionally have a rather internationalist perspective, these days matters are more than ever approached from the question of whether any Dutch interests are harmed. The fact that the Dutch government – somehow, details by that time did not really matter any more – allowed African asylum seekers to come to the Netherlands will not be

8 Art. 1(a)(2) Convention to the Status of Refugees, 1951, 189 UNTS 137, 28 July 1951 (in force 22 April 1954).

9 Besides Art. 29(a), Art. 29(b) basically offers subsidiary protection, (c) a status on the basis of trauma, (d) a status on the basis of the categorical protection policy, (e) a status for family members who travel later in a narrower sense, and (f) a status for family members who travel later in a wider sense.

10 This stipulation is derived from Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

well received. Given that the political context that government has for years already been trying to bring down the number of asylum applicants, and given that Dutch society as a whole has become ever more inward-looking, citizens 'retreating behind their dykes', such a decision might even incite a broader and more fundamental discussion on the pros and cons of having the ICC in the Netherlands.

The perspective of Congolese parliamentarians will not differ much. How could it happen that government facilitated the transfer of Congolese militia members from *our* filthy Kinshasa prison cell to a *Dutch* subsidized and clean terraced house in Gouda? Where did it go wrong? We had a clear agreement with the ICC that they would be sent back. What is the value of such an agreement? How trustworthy is this court? Indeed, in one of the submissions to the Trial Chamber in August 2011 the Congolese authorities already displayed their frustration with the delayed return of their previously incarcerated suspects who were awaiting trial before Congolese military tribunals.[11] Since then, Congolese officials have on various occasions expressed their discontent. A magistrate from the High Military Court, for example, referred to the asymmetrical relationship between the Court and Congo: the Court failed to respect the Congolese government's position, while the DRC has always been very co-operative in sharing information with the ICC. Also representatives of the Comité mixte de justice, a co-ordinating body for the Congolese judicial system and donor governments, indicated that the witness-asylum issue has strained relations between the Court and a historically supportive state party.[12] Indeed, if asylum is finally granted this might also start a more fundamental discussion about co-operation with the ICC in Congo, the country with most ICC cases pending.

Given the above, it is evident that this outcome would also be very discomforting for the ICC. It may lead to a loss of credibility and legitimacy which is already at a low point in many African states and may hamper and complicate the organization with respect to current and future possibilities in coming to arrangements concerning the transfer of witnesses or exchange of information.

1.3.2. No asylum permit is granted

In case the Dutch immigration authorities decide that the applicants have not sufficiently substantiated their asylum claim, this would not necessarily mean that the witnesses will immediately be sent back to Congo and that problems for the ICC, the Netherlands, and the DRC cease to exist. In light of the Amsterdam District Court ruling that the witnesses have access to the regular Dutch asylum procedure, the witnesses also have access to the national appeal procedure and possibly even the European Court of Human Rights (ECtHR). The applicants' counsel will at this stage probably put forward that their clients can in the meantime not be transferred to Congo because they would risk being exposed to treatment contrary to Article 3

11 *Prosecutor v. Katanga and Ngudjolo Chui*, Registry's transmission of observations received from the DRC authorities in execution in relation to document ICC-01/04-01/07-3123, Annex 1, T.Ch. II, 22 August 2011.

12 S. Kendall, 'Defense Witnesses Claim Asylum in the Netherlands: Implications for State Cooperation' (29 August 2011) available at www.katangatrial.org/2011/08/defense-witnesses-claim-asylum-in-the-netherlands-implications-for-state-cooperation.

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ECHR.[13] The whole process can take considerable time, probably years rather than months.

In this event, the counsel will in all likelihood address the question of the witnesses' continuous detention. Not releasing them would lead to a violation of basic human rights. Release, on the other hand, could mean that the witnesses could go underground and move to other European countries. In the Netherlands, asylum seekers are not detained during their asylum procedure. They are issued a temporary residence permit and can move around freely. Although they are not allowed to cross any borders, this is in actual practice not very difficult because of the Schengen Agreement.[14] Should it in the end be concluded that the witnesses *can* indeed be deported, the question arises whether the Dutch authorities are still able to trace and apprehend them. They could by that time be anywhere in the Madrid/Brussels/Rome triangle. Also this outcome seems highly undesirable from the point of view of the ICC, the DRC, and the Netherlands.

1.3.3. Exclusion from refugee protection

On the basis of Article 1(f)(a) Refugee Convention no refugee status can be granted when there are 'serious reasons for considering' that the applicant has committed war crimes, crimes against humanity, or genocide.[15]

Although UNHCR Guidelines suggest that the threshold to exclude is high and should always be interpreted in a restrictive manner,[16] in actual practice providing proof to establish 'serious reasons for considering' that someone has committed a crime is essentially relatively low.[17] The standard of proof is much lower than the 'beyond reasonable doubt' threshold that is required for a criminal conviction.[18] Exclusion can be based on an array of different sources, such as statements that the applicants themselves have made during their asylum procedure, witness statements, photographs, membership passes, convictions, indictments, arrest warrants, media and NGO reports, books, and/or embassy/state department reports. It is not exceptional that applicants in the Netherlands are excluded on the basis of their (high-level) position in a militia (information which is often presented by the

13 Such a claim could possibly be supported by a request for a so-called Rule 39 Interim Measure at the European Court of Human Rights (ECtHR). By means of 'diplomatic assurances' the Dutch and DRC authorities may try to convince the ECtHR that the witnesses will not be mistreated upon return. The Registry already presented a similar plan in early August 2011, when it indicated that a transfer to Ndolo military prison would be the best option for the witnesses, and that the DRC authorities had agreed to place a security guard at the entrance of the wing where the detainees would be kept and to co-operate with the ICC and MONUSCO with regard to other prisoners kept in the same area as the three detained witnesses, *supra* note 12. It is not likely to lead to deportation, since the ECtHR recently ruled that diplomatic assurances are no guarantee for fair trial standards (*Othman (Abu Qatada) v. the UK*, ECtHR, 17 January 2012, 8139/09).

14 The Schengen agreement created an area of 26 countries within Europe without internal border controls.

15 In the context of this paper activities described under subpara. (b) (serious non political crimes) and subpara (c) (crimes against peace) are not taken into account.

16 UNHCR Guidelines on International Protection No. 5; Application of the Exclusion Clauses: Article 1(f) of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, UNHCR, 4 September 2003, Geneva, at 2.

17 J. Rikhof, *The Criminal Refuge: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law* (2012).

18 M. Bliss, '"Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of Article 1F Exclusion Clauses', (2000) 12 IJRL (Special Supplementary Issue) 92, at 115–16.

applicants themselves during the procedure), coupled with publicly available reports which state that (the particular unit within) the organization the applicant has worked for was responsible for committing international crimes at the time the applicant worked for the organization.[19] This could, for example, be Human Rights Watch or Amnesty International reports which assert that torture and summary executions were widespread practice at the time.

The Dutch exclusion policy follows the Canadian 'personal and knowing participation' test, which means that decision-makers determine whether the asylum applicant knew or should have known that the crimes were being perpetrated and whether the applicant personally participated in any way in this crime. The mere presence of the applicant at the location of the alleged crimes is not sufficient. He/she needs to have contributed significantly to facilitate the execution of a criminal act and his/her actions must have had a direct effect. It must be plausible that the crime could not, or could not in the same manner, have taken place without the applicant's contribution.[20] Examples of individuals who have been excluded based on their personal and knowing participation are high-ranking state officials like governors or ministers who drafted policies, but also lower-level executors like police officers and drivers who handed over suspects to others, resulting in violence against the suspects; people providing intelligence that possibly resulted in the harm of others; or people with support functions such as a bodyguards or prison guards.[21]

Two things are important to note in relation to the exclusion policy in the Netherlands. First, in contradiction to UNHCR guidelines and practice in most countries, Dutch authorities decide on 'exclusion before inclusion'.[22] This means that the Netherlands assess possible exclusion grounds prior to the applicants' alleged fear of persecution, while other countries do it the other way around. When in a certain case no (justified) fear of persecution can be established, the asylum claim of an excludable person would in other countries be rejected, while that very same person would in the Netherlands be excluded. This policy thus leads to a relatively high number of exclusions. A second observation in relation to Dutch exclusion policy is that it has over the past years proven to be relatively strict and often applied.[23] In the context of the 'no-safe-haven policy' an experienced and specialized 1(f) unit within the IND is tasked to assess possible exclusion cases, while specialist units within the prosecution and police services assess if prosecution of those excluded is viable.[24] From 1998 to 2007 the Netherlands has excluded more than 700 asylum seekers – approximately 0.3% of the total asylum population in

19 J. van Wijk, 'Als vluchtelingen (mogelijk) daders zijn; 1F uitsluiting van de asielprocedure en vervolging van internationale misdrijven', (2011) 4 *Tijdschrift voor Criminologie* 310.

20 Council of State, 16 January 2004, LJN: AO2496.

21 J. Rikhof, 'War Criminals Not Welcome: How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context', (2009) 21 IJRL 453, at 463–4.

22 Letter of UNHCR to the Dutch Ministry of Foreign Affairs on Khad/WAD Afghanistan, 9 July 2009. See www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2010/02/10/bijlage-2-kamerbrief-inzake-uitkomst-overleg-met-unhcr-inzake-de-note-on-the-structure-and-operation-of-the-khad-wad-in-afghanistan-1978-1992.html.

23 See Van Wijk, *supra* note 19.

24 REDRESS and FIDH, 'Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units', December 2010.

that time frame – while, for example, Belgium from 2004 to 2009 excluded 106 asylum applicants (0.1%).[25]

Based on their curricula vitae it is not unthinkable that some of the Congolese witnesses would qualify for exclusion. Some held high-level positions in militias in Congo. One of them, for example, acted as president of the Front des nationalistes et intégrationnistes (FNI). This militia is, according to Human Rights Watch (HRW), responsible for numerous rapes,[26] the killing of hundreds of civilians,[27] and the killing and abducting of Nepalese UN blue helmets.[28] One of the HRW reports states that he 'seemed unconcerned about the illegality of summary executions, saying "Congolese law does not apply here. This is the Republic of Ituri."'[29] Another witness is said to be a former secret agent of the Congolese government and founding member of the FNI,[30] while the Security Council states the third witness was the commander of the Front populaire pour la justice au Congo (FPJC), another militia associated with serious human rights violations in the Ituri region.[31]

Should the Dutch immigration authorities assess that there are 'serious reasons for considering' that any of the witnesses personally and knowingly participated in war crimes or crimes against humanity, the applicants can be excluded from refugee protection. If the IND did – for practical reasons – decide not to exclude them the Netherlands would violate the fundamental principle of the Refugee Convention that such persons are 'undeserving' of receiving refugee protection.[32] Exclusion is, however, a far from preferable scenario from the perspective of the Netherlands, the DRC, and the ICC. It would first of all and quite likely lead to appeal procedures. Should – in the end – the exclusion decision in appeals be confirmed, it would mean that the witnesses are not granted legal status to stay in the Netherlands. At the same time it might be decided that they cannot be deported because they risk facing ill-treatment. At that moment they are in a 'legal limbo'. They are ordered to leave the Netherlands, but at the same time the Dutch government is not allowed to deport them. The witnesses would in that case join a group of some dozens other excluded 'alleged' Afghan war criminals and Rwandan *génocidaires* living in a similar situation in the Netherlands. They are undocumented, are declared 'undesirable aliens', are not allowed to work, have no access to insurance, and are dependent on their social

25 For these figures, see Van Wijk, *supra* note 19. Other European countries do not publish any publicly available data on the number of exclusions.

26 Human Rights Watch (HRW), 'Seeking Justice: The Prosecution of Sexual Violence in the Congo War', 17(1A) (March 2005) 1, at 19.

27 'DR Congo: Army Abducts Civilians for Forced Labor', *HRW News*, 16 October 2006, available at www.hrw.org/news/2006/10/15/dr-congo-army-abducts-civilians-forced-labor.

28 '2 Nepalese Blue Helmets Released in DR Congo, 5 Still Held Captive – UN', *UN News Centre*, 27 June 2006, available at www.un.org/apps/news/story.asp?NewsID=19013&Cr=democratic&Cr1=congo.

29 See HRW, s*upra* note 26, at 19.

30 'Witnesses Complain about Their Detention in Kinshasa', *Arusha Times*, Issue 00663, 6 April–30 May 2011.

31 UN Security Council, 'Report of the Secretary-General on Children and Armed Conflict in the Democratic Republic of the Congo', S/2008/693, 10 November 2008, 1, at 3.

32 'The rationale behind the exclusion clauses is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice.' Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, UNHCR, 4 September 2003, Geneva, 1, at 3.

network or the informal labour market to subsist.[33] Yet the difference is that all these Afghans and Rwandans spontaneously and often illegally managed to enter the Netherlands, whereas the Congolese were knowingly and with permission of the Dutch authorities transported into the country. That, I guess, would provide grist for the mill for the parliamentary opposition: 'how could the Dutch government facilitate the transfer of alleged Congolese war criminals to the informal underground circuit in the Netherlands?' Questions might be asked if they pose a danger to society, while NGOs like HRW or Redress will push for prosecution on the basis of universal jurisdiction.[34] Such prosecution is, however, due to many difficulties relating to evidentiary issues, translation, etc. incredibly costly and time-consuming.

Obviously the Netherlands could request other countries to 'share the burden' and ask if they are willing to relocate the witnesses. But which country will invite and harbour them? Prosecutors of both the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) have in the past already expressed how difficult it is to relocate threatened and anonymous allegedly implicated insider witnesses.[35] These unknown individuals assisted in providing crucial evidence for convicting *génocidaires* and war criminals. It will be even more difficult to find a country opening its doors to – by now – well-known former rebels who testified on behalf of alleged murderers and are themselves associated with serious human rights violations. An illustration of the reluctance of the international community to relocate persons associated with international crimes is the case of the acquitted ICTR defendant André Ntagerura.[36] Rwanda's former minister of transport was acquitted in 2004 by the ICTR Trial Chamber. The acquittal was confirmed on appeal in 2006. Ever since, he has been living in a safe house in Tanzania at the ICTR's expense. Due to security issues he cannot be refouled to Rwanda, but no other country wants to host him. In an email exchange I had with him he writes, 'I believe that I can find a place where I can live legally and safely. It is one of my fundamental rights. The international community which . . . provided the mandate to arrest me, detain me and prosecute me also has the responsibility to solve my case.'[37] In July 2012 the UN Security Council has again in vain requested states' assistance in relocating him.[38]

If this scenario unfolds, the DRC might 'lose' its suspects to the Netherlands, the Netherlands might want to 'lose' them but cannot, while the ICC is blamed for making all of this happen. It would be a scenario in which all actors need their

33 See Van Wijk, *supra* note 19.

34 Even without such lobby, the Dutch integrated 'no safe haven' policy already ensures that the Public Prosecutor's Office receives the IND files of excluded persons in order to assess if criminal prosecution is viable. See Van Wijk, *supra* note 19.

35 For ICTR, see Justice Hassan B. Jallow, 'The OTP-ICTR: ongoing challenges of completion', Guest Lecture Series of the Office of the Prosecutor, The Hague, 1 November 2004, 1, at 6; for SCSL, see J. Bennett, 'Not above the Law', *Newsweek*, 11 June 2007.

36 For a detailed analysis of the situation of these acquitted ICTR defendants, see K. J. Heller, 'What Happens to the Acquitted?', (2008) 21 LJIL 663.

37 Personal email communication with author, 26 August 2011.

38 The Council reiterated its call to member states 'to co-operate with and render all necessary assistance to the International Tribunal in the relocation of acquitted persons'. See Security Council, S(RES) 2054, 29 June 2012.

best communication advisers to spin the possible consequences into a script that is digestible and acceptable to the general audience.

1.3.4. Current state of affairs

On 12 September 2012 the applicants' counsel, by means of summary proceedings, demanded that the Dutch state be compelled to declare itself willing to transfer the witnesses from the ICC detention centre into Dutch territory. It was argued that the Netherlands was depriving the men of the possibility of requesting a judge to assess their detention in full and that the Dutch state therefore acted in violation of Articles 5 and 13 of the European Convention on Human Rights. This, coupled with the fact that the Trial Chamber already in July 2011 had warned that the processing of their applications may 'in no way cause any unreasonable delay to their detention',[39] made the District Court of The Hague on 26 September 2012 rule that the custody of the witnesses should indeed be transferred from the ICC to Dutch authorities.[40] The Dutch authorities were ordered to contact the ICC and enter into deliberations on how to end the unlawful detention of the plaintiffs. At the moment of writing it is unclear if the witnesses will upon release (remain to) be detained or not.

Particularly interesting in the context of this article, is that the summary proceedings also shed some light on the possible outcome of the asylum procedure. During the court session the state advocate informed the judge that the Dutch authorities by June 2012 had expressed a letter of intention to exclude at least two of the applicants on the basis of Article 1(f) because there were serious reasons for considering they had committed crimes against humanity. The applicants submitted their views on this intended decision by July 2012. At the moment of writing a final decision has not yet been delivered.[41]

2. More dilemmas to come?

The dilemmas sketched above depict the practical and political problems that result from a lack of harmonization between (the execution of) international criminal law and (upholding) principles of international protection deriving from international refugee and human rights law. Although these strands of law have over the past decades become ever more interconnected, a hierarchical relationship does not exist. A recent Expert Meeting by the UN High Commission for Refugees (UNHCR) and the International Criminal Tribunal for Rwanda (ICTR) concluded that harmonization between the different regimes 'is not an objective in and of itself'. 'The overriding concern', it continued, 'should be clarity on the ordinary meaning of the provision

39 See *supra* note 2, para. 85: 'Since their testimony is now complete and since the three asylum applicants are in detention, it is imperative that the Dutch authorities examine the applications as soon as possible, since the processing of their applications must in no way cause any unreasonable delay to their detention under Art. 93(7) of the Statute. For this last reason, the Chamber must emphasize that the Court cannot contemplate holding these witnesses in custody indefinitely.'

40 District Court, The Hague, 26 September 2012, LJN: BX8320.

41 For more recent information on the case: updates on the case are normally provided on the website www.katangatrial.org. Another option is to look for press releases on the website of the applicants' counsel: www.bohler.eu.

at hand guided by the object and purpose of each regime or instrument, or the particular norm in question'.[42] Yet the situation of the Congolese witnesses shows that establishing the meaning and purpose of each and every legal regime in itself may not necessarily be problematic, but that applying these at the same time is; especially when the various actors involved have at times diametrically opposing interests.

This leads one to wonder whether we are looking at a highly exceptional incident, or whether we are to see more 'Gordian knots' where the application of international criminal law clashes with principles of refugee and human rights law in the future. My impression is that it will not end here. Below, three more (possible) quandaries stemming from a lack of harmonization between the various regimes will be highlighted.

2.1. What to do with other defence witnesses applying for asylum?

Briefly after the three witnesses discussed in this article applied for asylum, another detained Congolese defence witness in the *Lubanga* case did the same.[43] I agree with Sluiter that it is not very likely many more will follow, since detained witnesses testifying at the ICC will continue to be quite unique.[44] At the same time, it should be acknowledged that the current applications may set a precedent for the few that might follow, especially if the procedures lead to – from the perspective of the applicants – positive outcomes. Moreover, we should bear in mind that non-detained defence witnesses can apply for asylum as well. The Dutch government, already in 2001, confirmed that its asylum procedure is open to these individuals.[45] If this happens, the situation will generally be very different, especially because it is unlikely that there are any agreements on return between host countries and the ICC.

The fact that this has not yet occurred while the Netherlands has for almost 20 years been hosting the International Criminal Tribunal for the former Yugoslavia (ICTY) does not mean it will never take place in the future.[46] The context of the former Yugoslavia at the time of the trials differed considerably from the contexts relating to cases dealt with at the ICC. Although non-detained ICTY defence witnesses have in the past sporadically requested relocation because they feared persecution,[47] most Bosnian, Croat, Kosovar, or Serb defence witnesses could, after testifying, directly return to any of the newly established republics. If a Serb witness, for example, in the late 1990s testified on behalf of an accused former Serb colonel or politician, he

42 'Summary Conclusions of the "Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law" Which Took Place in Tanzania 11–13 April 2011', UNHCR and ICTR, Arusha, July 2011, at 1.

43 For the procedural history of the witness in Lubanga, see *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application, ICC-01/04-01/06,T.Ch.I, 5 August 2011, paras. 1–14.

44 See Sluiter, *supra* note 1, at 16.

45 Kamerstukken II 2001/02, 28098 (R1704), nr. 13.

46 See Sluiter, *supra* note 1, at 6.

47 See, e.g., *Prosecutor v. Zejnil Delalić et al.*, Decision on Confidential Motion for Protective Measures for Defence Witnesses, Case No. IT-96-21-T, T.Ch., 25 September 1997.

had few incentives to request protection in the Netherlands. The nationalist Serbian government happily welcomed him back. The same would generally go for defence witnesses from the other regions.

The context the ICC works in is often very different from the ICTY and the relationship of the latter with the former Yugoslavia. Similar to the ICTR, the ICC deals with a number of cases in which the former (military) opponent of the defendant holds power in the witnesses' country of origin at the time of a trial. This is the case in Congo, but also in countries like Ivory Coast, Libya, the Central African Republic, or Kenya. Consequently, persons who belonged to the inner circle of the defendant – those who are typically called as defence witnesses – often live under cover in the country of origin or have fled to a neighbouring country. They subsist under an alias in their great-grand aunt's quarters in a far outpost of Ivory Coast or reside as an undocumented migrant somewhere in Mali. And they are looking for a way out. Relocation in the ICC Protection Program (ICCPP) could then theoretically offer the possibility to escape such situations. In order to qualify for this, they would need the assistance of the defence team to call them as a witness. Prior to testifying, the Victims and Witnesses Unit (VWU) of the Registry should be requested to arrange for relocation.[48] Even if all of this succeeds, actual relocation is far from guaranteed. According to the ICTR the need to order protective measures can, for example, not be made purely on the subjective fear expressed by the witness. Rather, it should be established that an objective situation exists whereby the security of the witness is or may be at stake.[49] And protective measures outside the court are only provided to a limited extent. Relocation of witnesses as defined in Rule 16(4) of the ICC Rules of Procedure and Evidence (RPE) is generally regarded to be a measure of 'last resort', because it requires extensive support from the ICC and – difficult to obtain – assistance by third states.[50] Requests for relocation are certainly not automatically granted.

The current asylum proceedings, however, signal that there is also a shortcut to possible relocation in a European country. The former comrade of an ICC accused could reason that he can – like the Congolese witnesses – apply for asylum after testifying, instead of filing a request for relocation at the VWU prior to testifying. There seems to be little that the ICC or the Netherlands can do to prevent this. If the defence team wishes to call a relevant witness – no matter if he is an undocumented migrant who barely gets by in a forgotten place of the world – it is hard to conceive that merely the threat of an asylum application in the Netherlands could be invoked as a reason not to issue a travel document, especially because the Netherlands has unequivocally stated that defence witnesses are allowed to apply for asylum. Denying a defence witness to give *acte de présence* in the courtroom in The Hague would furthermore directly play into the hands of the defence team, which could argue that the defendant does not have a fair trial.

48 Art. 43(6) Rome Statute.

49 *Prosecutor v. Nteziryayo*, Decision on the Defence Motion for Protective Measures for Witnesses, ICTR-97-29-T, T.Ch. II, 18 September 2001, para. 6.

50 S. Arbia, 'The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits', (2010) 36 *Commonwealth Law Bulletin* 519, at 522; Information ICC website 'Victims and Witnesses Unit' of the ICC, available at www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm.

Is all of this a purely hypothetical and theoretical line of thinking? It might prove to be. But, perhaps one would have said the same if someone had presented a hypothetical scenario of detained ICC witnesses applying for asylum in the Netherlands two years ago. And what's more, politics – and often policy – is all about perceptions. Actual numbers do not necessarily matter. Even at this moment, with only four witnesses who applied for asylum, the perceived threat that more might follow is likely to already have a profound impact on co-operation practices. Sending countries, the ICC registry, and the Dutch government will think twice before new arrangements are made to transfer witnesses on request of the defence to The Hague; in particular, when they are detained, live under cover in the country of origin, or reside undocumented or with a refugee status in one of the neighbouring countries, and above all if they are possibly implicated war criminals themselves. New dilemmas might arise. The VWU should, for example, consider how to deal with defence witnesses who might use the threat of applying for asylum in the Netherlands as leverage to be relocated in the ICC Protection Program – a far from pretty perspective for a budget-tight ICC. There are no easy solutions, but the ICC and the Netherlands need to thoroughly think through how new asylum claims could be prevented. Or, as Sluiter suggests, better not worry too much and simply accept possible new claims as 'the price to pay' for hosting the centre of international criminal justice.[51]

2.2. What to do with the acquitted?

As discussed above, the international community even six years since the 2006 acquittal of André Ntagerura has still not come up with a solution where to relocate him. After a protracted process involving bilateral negotiations and court proceedings, the ICTR Registrar has over the past years managed to relocate at least five other acquitted defendants. They are reunited with family members and live as free men in Western European countries.[52] Ntagerura, however, is restricted in his movements; cannot visit his family members, who live in Europe; and still lives in a safe house in Tanzania. But he is not alone. Four other acquitted defendants without a country willing to accept them have in the meantime joined him.[53] Since procedures on how

51 See Sluiter, *supra* note 1, at 16 'If the submission of asylum applications by ICC-witnesses would be considered such a significant problem on the part of the Dutch authorities, the question arises why the Netherlands has always been so keen to host these international criminal tribunals. It should have anticipated that asylum applications are an inevitable consequence of serving as the host state to these institutions. If a state is unprepared to accept these consequences, it may be time seriously to consider other states to serve as the host for international criminal tribunals.'

52 *Bourgmestres* Ignace Bagilishema and Jean Mpambara went to France, former minister of education André Rwamakuba to Switzerland and former *préfect* Emmanuel Bagambiki to Belgium. All were reunited with their respective families. Father Hormisdas Nsengimana, a Catholic priest, was allowed to enter Italy, where according to an ICTR spokesman he is to participate in 'pastoral activities along with other priests in a northern Italy parish'. For details see R. K. G. Amoussouga, 'The ICTR's Challenges in the Relocation of Acquitted Persons, Released Prisoners and Protected Witnesses', presentation delivered at the forum between offices of the prosecutors of UN, ad hoc criminal tribunals and national prosecuting authorities, 26–8 November 2008, Arusha; 'Italy Takes in Nsengimana after His Acquittal', *Hirondelle News Agency*, 23 March 2010.

53 Protais Zigiranyirazo (brother-in-law of former Rwandan president Juvénal Habyarimana), the former Rwandan military officer General Gratien Kabiligi and the former ministers Casimir Bizimungu (health), Jérôme Bicamumpaka (foreign affairs). See 'ICTR Seeks Host Countries for Ex-Prisoners', *Hirondelle News Agency*, 14 January 2012.

to deal with the issue do not exist, the acquitted, the Registrar (who is responsible for them) and Tanzania (which hosts them) depend on the benevolence of individual states. And states are not known for basing their policy on compassion.

The case of Protais Zigiranyirazo, businessman and brother-in-law of former president Juvénal Habyarimana, illustrates states' reluctance in this regard. After his asylum application in 2001, the Belgian authorities arrested and transferred him to the ICTR,[54] where the Appeals Chamber acquitted him in 2009 because of lack of evidence.[55] Since his acquittal 'Mr Z', as he is often referred to, has continuously requested Belgium to allow him back into the country.[56] Though an indictment by an international criminal court is generally considered to be a basis for exclusion from refugee protection, it is also generally agreed upon that an acquittal on substantive (rather than procedural) grounds means that the indictment can no longer be relied upon to exclude someone.[57] Since the 2001 asylum determination process was suspended pending the outcome of the ICTR proceedings, Belgium should in principle resume the asylum procedure following the acquittal.[58] Up to this moment, however, Belgium does not seem eager to do so. Mr Z and the other acquitted recently had another disillusionment when the ICTR president dismissed a request to install a special chamber to hear their grievances concerning their relocation.[59] Their waiting continues.

In 2007 Kevin Heller already warned that 'there is no reason to believe that states' reluctance to grant asylum to defendants acquitted by the ICTR will not extend to defendants acquitted by the ICC'.[60] Four years down the line the conclusions from the UNHCR's Expert Meeting on the issue do not differ much.[61] So far, however, the ICC and the Netherlands have been spared any problems. No acquittals have occurred and the four cases which have been rejected by the pre-trial chambers at the stage of the confirmation hearing – situations which might, similarly to acquittals, lead to difficulties in relocating defendants – have not led to any problems either. The 2010 rejection[62] of the case against former commander of the Darfuri rebel group the Justice and Equality Movement (JEM), Bahar Idriss Abu Garda, did not result in a request for protection. He presented himself voluntarily in The Hague and after the acquittal returned to Sudan, where he was recently appointed minister of health

54 A. Osborn, 'Fossey Murder Suspect Arrested', *The Guardian*, 28 July 2001.
55 *Protais Zigiranyirazo v. Prosecutor*, Appeal Judgement, ICTR-01-73-A, A.Ch., 16 November 2009.
56 C. Muhenga, '"Mr. Z" Demands $1 Million Compensation from ICTR', *International Justice Tribune (RNW)*, 28 March 2012.
57 'Summary Conclusions of the "Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law" which took place in Tanzania 11–13 April 2011', UNHCR & ICTR, Arusha, July 2011, 1, at 7.
58 Ibid, at 8.
59 'Weekly Summary: ICTR Dismisses Acquitted Persons Request', *Hirondelle News Agency*, 20 July 2012.
60 See Heller, *supra* note 36, at 676.
61 *Supra* note 57, at 8: 'The problem of such relocation of persons is not easy to resolve and this problem is expected to persist beyond the existence of the ICTR and to arise in the future for other international criminal institutions and, in particular, the ICC.'
62 *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09, Pre-T.Ch. I, 8 February 2010.

in the national government led by his former foe President Omar Al-Bashir.[63] The rejections of the cases against the Kenyan Member of Parliament Henry Kiprono Kosgey and former Kenyan police commissioner Mohammed Hussein Ali[64] also led to no problems. They too were never detained in the Netherlands, did not request protection, and voluntarily returned to Kenya. Kosgey still is a parliamentarian, while Ali has been working as executive of the Postal Corporation of Kenya since 2009.[65] Finally, the pre-trial rejection of the case against alleged Rwandan rebel leader Callixte Mbarushimana has not led to difficulties. Though he was detained in the Netherlands he could, and wished to, return to France, the country which had already granted him asylum in 2003 after an acquittal by the ICTR.[66]

If accused like Katanga and Ngudjolo Chui are acquitted, things might look different, though. Their acquittal would more likely lead to a situation André Ntagerura and his co-residents in Arusha's safe house see themselves confronted with. Especially Ngudjolo, whose defence team in the closing arguments before Trial Chamber II contended that DRC's President Kabila himself planned an attack on Bogoro, might after a possible acquittal make a good case not to be refouled. At the same time he might not stand the best chance of being relocated and/or granted refugee status in any country. When the international community has already, for six years, frustrated the relocation of a former Rwandan minister of transport, there are few reasons to suppose countries will be keener in opening their borders to a former Congolese rebel leader.

To complicate matters even further, a conviction of Ngudjolo would also not necessarily carry off any relocation predicaments. Depending on the situation, relocation issues might merely be postponed. In order to understand this, we can, for example, look into the possible future perspective of Thomas Lubanga.

2.3. What to do with the sentenced?

The ICC in its first verdict found Thomas Lubanga guilty of recruiting and using child soldiers and convicted him to 14 years' imprisonment.[67] The ICC signed agreements on the enforcement of sentences with Austria, Belgium, Colombia, Denmark, Finland, Mali, Serbia, and the United Kingdom.[68] It is not yet known in which of

63 'Former Darfur Rebels Criticize the ICC, as Bashir Appoints Its Members in Sudan's Cabinet', *Sudan Tribune*, 19 December 2011.

64 *Prosecutor v. William Smoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges, Pre-T.Ch. II (ICC-01/09-02/11); and *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges, Pre-T.Ch. II (ICC-01/09-02/11, 23 January 2012.

65 'Kibaki Moves Ali, Names New Kenya Police Boss', *Daily Nation*, 8 September 2009.

66 The proceedings at the ICTR related to genocide in Rwanda, while the ICC accusation related to crimes against humanity committed in the DRC. See *Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10, Pre-T.Ch. I, 16 December 2011. The chamber established that 'Mbarushimana was granted refugee status in France in 2003 and holds a residence permit issued by the Police Department of Paris, valid from 31 December 2003 until 31 December 2013.' Also see 'Callixte Mbarushimana Is Released from the ICC Custody', press briefing ICC, ICC-CPI-20111223-PR760, 23 December 2011.

67 *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence Pursuant to Article 76, ICC-01/04-01/06-2901, T.Ch. I, 10 July 2007.

68 'Mali Becomes First African State to Sign an Agreement on the Enforcement of Sentences with the ICC', press briefing ICC, ICC-CPI-20120120-PR764.

these countries Lubanga will, if he is not acquitted in a possible appeal, serve his sentence. Whichever it is, its government will sometime between 2015 and 2020[69] be confronted with the question what to do with the – by then – about fifty-year-old ex-rebel leader after his release.

If Congo has at that moment turned into a pleasant and safe country, Lubanga is likely to return. If Congo has not – or if Lubanga perceives it not to be – he might apply for asylum. In that case the host country is confronted with the question how to interpret paragraph 73 of the 2003 UNHCR Background Note on the Article 1(f) exclusion clause:

> Bearing in mind the object and purpose behind Article 1F, it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. *Each case will require individual consideration*, however, bearing in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities. *In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply* [emphases added].[70]

What exactly 'truly heinous crimes' are is not elaborated on. But one could presume that 'the most responsible perpetrators of the most serious crimes' convicted by the ICC would certainly qualify as such.[71] Indeed, even having served a sentence, someone like Lubanga could still be excluded from refugee protection if he applies for asylum.[72] Since the decision to exclude someone is an administrative ruling and not a criminal conviction, this does not conflict with the *ne bis in idem* (or double jeopardy) principle that the same legal action cannot be instituted twice for the same cause of action.

The Swedish authorities currently possibly struggle with the very question of what to do with the asylum application of an already sentenced perpetrator of truly heinous crimes. When Rwandan *génocidaire* and former Tea Authority boss Michel Bagaragaza was set free from a Swedish prison in December 2011, he requested the right to stay.[73] He is still in Sweden while the Swedish authorities are examining his application. A representative of the ICTR Registry believes it is unlikely Sweden is to expel Bagaragaza 'since it had agreed to take him into one of its prisons'.[74] Bagaragaza is not the only individual who, having served an ICTR-ruled sentence,

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69 Should the sentence after a possible appeal remain 14 years, the time Lubanga has served in pre-trial detention since March 2006 will be deducted from the sentence. Depending on the sentencing regime in the host country he will either have to serve the full remaining eight years or part of it.

70 Art. 1(f) itself is silent on the consequences of having served a penal sentence. For this reason the authoritative Background Note is consulted to provide guidance. See *supra* note 32.

71 Para. 73 to a certain extent already suggests this by concluding that defining acts as truly heinous crimes is 'more likely to be the case' for crimes under Art. 1(f)(a) (crimes against humanity, war crimes, and genocide) than those falling under 1(f)(b) (serious non-political crimes).

72 All countries which signed agreements on the enforcement of ICC sentences are members of the 1951 Refugee Convention.

73 Whether Bagaragaza has applied for asylum or has made another request is unknown. 'ICTR/Bagaragaza: Freed Rwandan Convict Sill Seeking Legal Status in Sweden', *Hirondelle News Agency*, 11 January 2012.

74 Ibid.

is in search of protection and a place to legally reside. There are at least two other released Rwandans caught in limbo. Former colonel Anatole Nsengiyumva's 15-year sentence was more than his time served in ICTR detention. Because no country is willing to relocate him, he has joined André Ntagerura in the Tanzanian safe house.[75] After being granted early release in March 2012 former army lieutenant colonel Muvunyi for the same reason recently also arrived at the safe house.[76] Except for the first ICTR prisoner to have served his sentence, Pastor Ntakirutimana, who in 2007 died of natural causes less than a month after release,[77] it is largely unknown to what extent other released Rwandan *génocidaires* have encountered problems of this sort.[78]

Released ICTY convicts have not faced many problems in this regard because they can relatively safely return to the different republics with different ethnic make-ups in the former Yugoslavia. On a domestic level, however, one can also find illustrations of the discouraging situation of sentenced perpetrators of international crimes who cannot be refouled. The Rotterdam District Court in 2004, for example, sentenced the Congolese ex-colonel Sebastian N. – the *Roi des Bêtes* (King of the Beasts) – to two and a half years' imprisonment on charges of torturing detainees in a Congolese camp.[79] In 2006 briefly after his release he was arrested because he had remained in the Netherlands while he was declared an undesirable alien and hence subject to an exclusion order (*ongewenstverklaring*).[80] His counsel invoked a *force majeure* appeal that it would not be reasonable to expect his client to leave the Netherlands, because it was at the same time accepted that he could not be deported to Congo and that no other country was willing to relocate him.[81] The Court of Appeal did not accept this argumentation and the case went to the Supreme Court (Hoge Raad).[82] During

75 Ibid.

76 'ICTR: Early Release for Muvunyi', *International Justice Desk (RNW)*, 6 March 2012.

77 'Uwinkindi Is One of Seven Churchmen Indicted by ICTR', *Hirondelle News Agency*, 19 April 2012.

78 Former city councilman Vincent Rutaganira was released in March 2008. He allegedly left the UN's Special Detention Facility in Arusha aboard a UN vehicle with his luggage for an unknown destination. See S. Chhatbar, 'Ex-Rwandan Councillor Set Free', *Arusha Times*, Issue 00508, 8–14 March 2008; former youth organizer Joseph Nzabirinda was released from the UN detention centre in Arusha in December 2008. As he left prison, he told journalists that he would consult his lawyer to see how he could rejoin his family in Belgium. Whether he indeed successfully managed to get to Belgium is unknown. See S. Chhatbar, 'Rwandan Released after Serving 7-Year Sentence', *Seattle Times*, 19 December 2008; Italian-Belgian journalist Georges Ruggiu was transferred to an Italian prison in February 2008 and in 2009 released in breach of the ICTR Statute. His whereabouts are unknown. See 'Genocide-Convict Journalist Ruggio Set Free in Violation of ICTR Statute, *Hirondelle News Agency*, 28 May 2009; Former Lieutenant Samuel Imanishimwe was on 8 August 2011 released upon completion of his sentence in Mali. He reportedly did not want to return to his native Rwanda, but his current whereabouts are, as far as I could establish, unknown. See 'More ICTR Convicts Transferred to Mali and Benin to Serve Their Sentences', ICTR press briefing, ICTR/info-9-2-726.EN, 3 July 2012; ex-mayor Juvénal Rugambarara was on 8 February 2012 released upon serving three-quarters of his sentence in Benin. Also his whereabouts are unknown.

79 District Court Rotterdam, 7 April 2004, LJN: AO7178. English version available at www.asser.nl/upload/documents/20120413T095005-Nzapali%20Judgment%20District%20Court%20Rotterdam%20(English).pdf.

80 As a consequence of the conviction the *Roi des Bêtes* (who entered the Netherlands as an asylum seeker) had been excluded. As a matter of principle the Netherlands issues a declaration of undesirability to all excluded individuals. Persons who are declared undesirable commit a criminal offence if they continue to stay on Dutch territory. The confirmation of the status of declaration of undesirability: Council of State, nr. 200602401/1/v4, 7 August 2006.

81 Court of Appeal Den Bosch, 21 September 2007, LJN: BW4831.

82 Supreme Court, 1 December 2009, LJN: BI5627.

all these procedures, which took more than three years, the ex-colonel must have illegally roamed in the Schengen territory. Except for the Netherlands he apparently also visited Belgium, since the advisory opinion of the Attorney General contains the following remarkable account: 'During the procedure ... a surprising twist occurred, namely, that the Ministry of Justice informed me that investigations have led to the conclusion that the claimant in January 2008 received a valid Belgium residence permit.'[83] The opinion does not provide any specifics regarding the basis on which the permit was granted.[84] In this case Belgium for some reason helped out the relatively unknown *Roi des Bêtes* – and the Netherlands – by providing him a residence permit. It is to be expected that more (in)famous individuals in similar situations face more difficulties.

The above demonstrates that countries which prosecute perpetrators of international crimes on the basis of universal jurisdiction,[85] as well as countries which enforce the sentences of ICC convicts, may in the future be confronted with the fact that they cannot relocate criminals who have already served their sentence. Even the most recent agreements on the enforcement of ICC sentences do not offer any solutions in this regard.[86] This again serves as an illustration of how a lack of harmonization between (the execution of) international criminal law and principles of international protection leads to practical and political challenges. One of the aims of sentencing is rehabilitation. But when all countries refuse already sentenced perpetrators who are threatened in their country of origin to find a place to legally reside and build up a normal life, such rehabilitation can de facto not take place. Each and every sovereign country has legitimate reasons not to accept or invite foreign perpetrators of international crimes who have served their sentence, but if all countries do so this results in a fundamental system error. As it stands international law and politics do not yet have an answer to this.

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83 Ibid., r.o. 9.

84 In 2008 N. started a case against the Netherlands at the ECtHR concerning Arts. 3, 8, and 13 of the ECHR. This case is still pending; the court has requested that the Netherlands government provide more information on the matter, available at www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39989.

85 In the Netherlands, for example, this could already happen rather soon. In 2007 two Afghans were on the basis of universal jurisdiction convicted to 12 years' imprisonment. Like the Congolese they are excluded from refugee protection and declared undesirable aliens. See The Hague, Court of Appeal, 29 January 2007, LJN: AZ7143. For an English translation see http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=LJN+AZ7143.

86 See, for example, the 'Agreement between the Kingdom of Denmark and the International Criminal Court on the Enforcement of Sentences of the International Criminal Court', ICC-PRES/12-02-12, date of entry into force 5 July 2012. Art. 16 on the transfer of the sentenced person upon completion of the sentence states, 'Following completion of the sentence, the sentenced person who is not a national of Denmark may, in accordance with the law of Denmark, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless Denmark authorizes the person to remain in its territory ... Denmark may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.' No reference is made to the responsibilities of Denmark or the ICC in case none of these options is available. Agreements with other countries use similar wordings. See www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal.

3. Concluding observations

This article identified a number of practical and political challenges that (might) stem from a lack of harmonization between the relatively new (procedures of) international criminal law and well-established principles of international protection. It discussed the three most likely outcomes of the asylum procedures of three Congolese defence witnesses in the Netherlands and reasoned that basically all are problematic from the perspective of all involved parties. It argued that there is a limited, but real, chance that future defence witnesses will apply for asylum in the Netherlands, and that this threat alone might already seriously hamper co-operation practices between the ICC and states parties. It concluded with the notion that the international community has still not come up with a coherent scheme on how to deal with acquitted and sentenced ICC defendants who cannot be refouled to their country of origin.

In particular the position of the host country of the ICC, the Netherlands, is interesting. On the one hand, the Dutch government wants to be a good host to the ICC and facilitate the course of international criminal justice where possible. On the other hand, it has to take into account principles of protection in refugee and human rights law, national interests, diplomatic relations, and – not to be overlooked – national political sentiments. This article illustrated scenarios where many of these interests clash. As long as no concrete steps are taken to share the burden, the collective responsibility of the international community to host ICC witnesses and acquitted defendants in need of protection could de facto turn into an exclusively Dutch responsibility. Tanzania currently experiences what it means if no other countries are willing to share the burden of hosting acquitted defendants. It now hosts an ICTR-financed safe house for such persons in Arusha. With this perspective in mind the Dutch government could together with the ICC already reflect on the idea of where to locate a future safe house in Scheveningen.

Dutch diplomacy could in the meantime consider what leverage it has to entice or incite other countries to relocate future threatened witnesses and defendants, while countries that agreed to enforce ICC sentences could do the same for their inmates who upon release cannot be deported. It might in that respect be fruitful to inquire into the way in which the Obama administration managed to resettle its 'first-they-were-and-now-they-are-not-any-more-terrorists' from Guantánamo Bay. No quid pro quo has become public, but the tropical island of Bermuda has in 2009, for example, happily received four Uighur ex-Guantánamo inmates.[87] With some wheeling and dealing Dutch or Danish authorities might in the future succeed in relocating their acquitted or sentenced Congolese commanders to the Caribbean.

87 E. Eckholm, 'Out of Guantánamo, Uighurs Bask in Bermuda', *New York Times*, 14 June 2009.