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# International Criminal Tribunals and their Relation to States

GÖRAN SLUITER

## 1 Introduction

Shared responsibility between international criminal tribunals and states occurs in three successive phases of the functioning of international criminal tribunals: first, the phase prior to the exercise of criminal jurisdiction, or the so-called allocation of cases phase; second, the pre-trial and trial phase, i.e., the actual criminal proceedings; and, third, the post-trial phase, being conviction and acquittal scenarios.

Questions of shared responsibility have started to arise in respect of each of these phases. They are complex, largely unresolved, and in development. The debate on shared responsibility between states and international criminal tribunals is yet to be fully conducted. Of course, the law on cooperation between states and international criminal tribunals has resulted in frequent scholarly writing, and in that context issues of shared responsibility have been addressed to a certain degree. Recent incidents concerning the functioning of the International Criminal Court (ICC or Court), however, do not fit very well within that scholarly writing, and compel us to address questions of shared responsibility also outside the particular context of state cooperation. These incidents concern the questions as to which entity should take responsibility for accused persons who are acquitted by the ICC; whether persons provisionally detained by the ICC should be released, even when no state is prepared to accept a provisionally released person on its territory; and

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whether the ICC should declare cases against suspects admissible with a view to protecting them against a potentially unfair trial and/or the death penalty in national justice systems. This chapter deals only with the ICC, as it is the most important international criminal tribunal at present and the tribunal which is of most relevance to the shared responsibility debate.

The present chapter will deal with all of the aforementioned issues as they perfectly illustrate the difficulties in the shared responsibility debate in relation to international criminal tribunals. However, it will be nowhere near a conclusive legal analysis of all of these matters, and just serves – hopefully – as a starting point for future and more thorough scholarly research.

The central questions that this chapter seeks to answer are which problems of shared responsibility are at present the most challenging for international criminal justice, and how might they be addressed in the future?

In order to answer these questions, the chapter will start with an attempt to clarify the conceptual notion of shared responsibility in relation to international criminal justice (section 2). Next, the chapter will be structured around the three chronological phases in the administration of international criminal justice: the exercise of jurisdiction/allocation of cases phase (section 3); international criminal proceedings, arrest of persons, and the collection of evidence (section 4); and post-trial issues of conviction and acquittal (section 5). For each of these phases a problem of shared responsibility will be illustrated by a factual scenario. Following the discussion of these three phases, an attempt will be made to discern a number of common problems in respect of these instances of shared responsibility (section 6). The concluding remarks offer a few tentative recommendations (section 7).

## 2 What is Shared Responsibility and How Does it Concern International Criminal Justice?

The concept of ‘shared responsibility’ in international law developed by Nollkaemper and Jacobs,<sup>1</sup> which defines responsibility as referring to *ex post facto* responsibility for contributions to injury,<sup>2</sup> has a number of distinct features in the context of international criminal tribunals.

<sup>1</sup> P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *MJIL* 359.

<sup>2</sup> *Ibid.*, at 365.

First, the shared responsibility problems in this field involve, by definition, an international organisation (or an organ thereof), namely an international criminal tribunal. This is a complicating factor, particularly where it concerns the relationship between the organisation and its members. Shared responsibility involving an international criminal tribunal may eventually impact upon a triangular relationship: the international organisation, its member states, and the state(s) (or other subject of international law) contributing to wrongdoing.

Second, international criminal tribunals are, in terms of their internal structure and organisation, complex actors. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), for example, consist of several organs (chambers, prosecutor, and registrar) and are fully dependent on the United Nations Security Council for their legislative framework (Statute) and budget. In practice this means, among other things, that judges have been unable to award remedies – financial compensation – to a person who was acquitted after having been detained for many years, because there was no budget available to do so.<sup>3</sup> Likewise, the ICC consists of a court – again including chambers, prosecutor, and registrar – and a controlling legislative body, the assembly of states parties.<sup>4</sup> Each of the organs may contribute to eventual wrongdoing by the court/tribunal as such. Harm may be the result of (in)action by a court/tribunal, but may also be caused by the legislative/controlling body.

Third, the mandates of international criminal tribunals are restricted to the administration of criminal justice. The nature and type of injury

<sup>3</sup> See ICTR Appeals Chamber in the case of *Rwamakuba*: “The Appeals Chamber can identify no error on the part of the Trial Chamber in finding that it lacked authority to award compensation to Mr *Rwamakuba* for having been prosecuted and acquitted. As the Trial Chamber observed, the Statute and Rules of the Tribunal do not provide a basis for compensation in such circumstances. Nor is any found in the jurisprudence of this Tribunal or of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the past, the Presidents of this Tribunal and the ICTY requested the Security Council to amend the Statutes of the two Tribunals to provide for such authority. These efforts were unsuccessful and underscore the inability of the Tribunal to provide such a remedy in either its express or implied powers’ (footnotes omitted). See ICTR, Decision on Appeal against Decision on Appropriate Remedy, *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, para. 10.

<sup>4</sup> See Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3 (ICC Statute or Rome Statute), Articles 34 and 112. Article 34 sets out the organs of the Court, and Article 112 establishes an assembly of states parties and regulates its functioning.

that can occur in that particular context are thus very limited: in principle, restricted to human rights violations. In that limited field of international law, the tribunal in principle will bear responsibility for violations, irrespective of contributions by (and the responsibility of) other actors. States can contribute to fair trial violations, for example, by denying a suspect detained nationally the right of access to counsel, but the international criminal tribunal carries the responsibility that the trial as a whole remains fair. This is explicitly stated in Article 20(1) of the Statute of the ICTY (and Article 19(1) of the Statute of the ICTR),<sup>5</sup> Article 64(2) of the ICC Statute,<sup>6</sup> and also applies to other international criminal tribunals. As a result, there is a predefined attribution of full responsibility to the trial forum in terms of ensuring that a fair trial takes place, even when the injury may have been occasioned by others.

Fourth, this predetermined attribution of responsibility brings us to the most important distinctive feature of the notion of shared responsibility in the context of international criminal justice. This concerns the fact that contrary to the focus in the conceptual framework of Nollkaemper and Jacobs, here the emphasis lies on the prevention of harm. There is shared responsibility to set up a system that is ultimately capable of delivering a fair trial; there is shared responsibility to prevent individuals being exposed to (serious) human rights violations in other justice systems; there is shared responsibility to prevent individuals being unlawfully and unreasonably detained for long periods, etc. Speaking of shared responsibility in these contexts essentially refers to a set of obligations resting on the relevant actors. Admittedly, also in the realm of international criminal justice, there can be instances in which harm or injury have occurred, but both the doctrine and practice – case law – concentrate much more on scenarios of prevention of harm. The right to a fair trial, which is generally assessed at the end of the proceedings, is capable of being preserved by taking decisions such as exclusion of evidence, dismissal of the case, or an acquittal at the latest stage. No trial chamber will enter a conviction while admitting that the trial

<sup>5</sup> This provision reads as follows: ‘The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused with due regard for the protection of victims and witnesses.’ ICTY Statute: 25 May 1993, UN Doc. S/RES/827 (1993), last amended on 17 May 2002; ICTR Statute: 8 November 1994, UN Doc. S/RES/955 (1994), last amended on 13 October 2006.

<sup>6</sup> Article 64(2) of the ICC Statute, n. 4, reads as follows: ‘The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.’

has not been fair. What one thus frequently notices in the case law is the ruling that no harm or prejudice has been occasioned to the accused, rather than confirming any injury, but denying responsibility. In consequence, these peculiarities of the international criminal justice system compel us to approach issues of shared responsibility much more from an *ex ante* perspective.

Fifth, the relations of actors *inter se* – and scenarios of shared responsibility – may be particularly complex in international criminal justice because actors may play a variety of roles. To give an example, the Netherlands has, as the host state, a unique position, but it is at the same time also an ‘ordinary’ state party to the ICC, and as such is obliged to cooperate with the Court. However, any state party can also ‘control’ (or at least influence) the Court and ‘legislate’ in relation to the Court in its capacity as a member of the assembly of states parties.

More in-depth and extended studies are required to untangle these complex relationships and different roles in, and contributions to, responsibility. The present chapter is just a start. Its underlying assumption, however, is that the scenarios of shared responsibility in the ICC context are unique and may be difficult to embed in one single analytical or conceptual framework.

### 3 The Choice of Where to Exercise Jurisdiction: A Human Rights Dimension?

The ICC is a court of last resort, which means that there is primacy for national justice systems in the investigation and prosecution of international crimes. This is referred to as the so-called principle of complementarity, which imposes strict limitations on cases being admissible at the ICC.<sup>7</sup> The principle of complementarity is critical for the shared responsibility between the Court and states. The practical operation of this principle is governed by Article 17 of the ICC Statute. While the terms of this provision are open to debate, the ICC case law is decisive.

In the *Katanga* case, the admissibility of a case being tried at the ICC was substantively challenged for the first time by an accused.<sup>8</sup> It follows

<sup>7</sup> Many books and articles have been written on complementarity; for a comprehensive analysis see, among others, J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008); and S.M.H. Nouwen, *Complementarity in the Line of Fire – The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

<sup>8</sup> Ultimately this challenge was settled by the ICC Appeals Chamber, in favour of admissibility of the case at the ICC: *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,

from the *Katanga* case law that it is unlikely a case will be declared inadmissible at the ICC when there is not a state – a national jurisdiction – which is claiming that it can provide for national investigations and prosecutions.<sup>9</sup>

Kenya was the first state that challenged the admissibility of a case at the ICC. Its admissibility challenge was, however, rejected on account of there being no ongoing investigations in Kenya against the suspects, who had already been prosecuted before the ICC.<sup>10</sup> It can be inferred that in that situation the case will be admissible at the ICC.

Libya challenged the admissibility of cases at the ICC in respect of suspects Seif Al-Islam Gaddafi and Abdullah Al-Senussi, who were detained in Libya. Libya claimed it could provide for genuine and adequate investigations and prosecutions.<sup>11</sup> Contrary to the Kenya case, the suspects wished to be tried at the ICC, and urged the Court to declare the cases against them admissible. An intriguing dimension of the Libya admissibility challenge concerns the role of the Court to ensure a fair trial for individuals who have been the subject of an arrest warrant issued by the Court. In fact, the Defence in the Libya case has adopted the position that the suspects would not receive a fair trial in Libya, and that this

Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Case No. ICC-01/04-01/07 OA 8, A. Ch., 25 September 2009.

<sup>9</sup> Cf. *ibid.*, para. 111: 'If, at the time of the admissibility challenge, the State is investigating or prosecuting a case, or has investigated a case and decided not to prosecute, the case will be inadmissible before the Court, subject to the exceptions provided for in article 17(1)(a) and (b). However, as the Prosecutor correctly notes, an accused person does not have a "right" under the Statute to insist that States or organs of the Court behave in a manner that would render a case inadmissible. The admissibility of the case must be determined on the basis of the facts as they are, not on the basis of how they, in the view of the Appellant, should be.'

<sup>10</sup> See the (final) Appeals Chamber judgment: ICC, *Prosecutor v. Francis Kirimi Muthaura, et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Case No. ICC-01/09-02/11 OA, A. Ch., 30 August 2011, paras. 66 and 67: 'Although the information provided in these two annexes reveals that instructions were given to investigate the three suspects subject to the Court's proceedings, the Government of Kenya does not provide the Chamber with any details about the asserted, *current* investigative steps undertaken . . . In the Appeals Chamber's view, this finding of the Pre-Trial Chamber does not reveal a clear error.'

<sup>11</sup> See the public redacted version of the Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, P-T. Ch. I, 2 April 2013.

engages the responsibility of the ICC under the ‘complementarity scheme’, in the sense that the case before it should be declared admissible.

One may wonder whether complementarity could – or maybe should – develop as a fair trial supervisory mechanism in respect of states that are exercising concurrent jurisdiction over ICC crimes. It is at this stage that the Pre-Trial Chamber will be compelled carefully to identify the underlying values of complementarity. The case law has until now instead concentrated on the technical dimensions of complementarity. To put it simply, cases could be declared admissible because the national investigations did not deal with the same conduct when compared to the investigations by the ICC’s Prosecutor,<sup>12</sup> or there have not yet been any investigations at all.<sup>13</sup> However, in subsequent cases states will have the advantage of knowing this case law; as a result they know that in order to submit a successful admissibility challenge to the Court they should – at least – have (ongoing) investigations in place that fully match the suspicions as laid down in the ICC arrest warrant.

The underlying values of complementarity remain somewhat unclear, however, in spite of the emerging case law. Going back to the drafting history of the Rome Statute, the interests that complementarity first and foremost appear to serve are national sovereignty (respecting national justice systems and according them priority in the fight against impunity) and the effective functioning of the Court (preventing overburdening).<sup>14</sup> Human rights considerations appear to have played no or only a very marginal role in developing the principle of complementarity.

However, human rights considerations appear to be of some relevance for the application of complementarity in practice. A group of experts

<sup>12</sup> See the oral decision of Trial Chamber II of 12 June 2009 on the admissibility of the case (Case No. ICC-01/04-01/07-T-67), T. Ch. II, 12 June 2009; and Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the ICC Statute), *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, T. Ch. II, 16 June 2009, confirmed on appeal in Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, A. Ch., 25 September 2009; Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, P-T. Ch. III, 10 June 2008.

<sup>13</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, Case No. ICC-01/09, P-T. Ch. II, 31 March 2010.

<sup>14</sup> For an analysis of the drafting history, see W.A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), 336–40.



advising the ICC Prosecutor on the practical operation of complementarity indicated that the ICC is not a human rights court, but that compliance with human rights standards could be of relevance in assessing the 'genuine' nature of national proceedings.<sup>15</sup> Also, one cannot deny the reference in Article 17 of the ICC Statute to impartiality and independence as a ground to justify admissibility of a case. Article 21(3) of the ICC Statute, according interpretative weight to human rights, can alter the application of statutory provisions significantly.<sup>16</sup> So, a development in the direction of a human rights-oriented complementarity regime cannot be excluded.

In light of the consecutive stages in the proceedings of the Court, it also appears logical that there is a perception of responsibility for the Court also in human rights terms. In the Libyan situation, both suspects were initially legally within the Court's jurisdiction, and Libya was under the obligation to surrender these suspects to the Court. Only a decision by the ICC denying admissibility could alter that situation and empower Libya under international law to proceed with these cases. If, after a decision from the Court declaring the case inadmissible, Libya was to proceed with the case and then either deliver an unfair trial and/or impose the death penalty, allocation of some degree of responsibility to the Court therefore seems understandable. Such a scenario would be most regrettable, also for the authority and credibility of the ICC. On the other hand, one can also understand that including a stronger human rights component within the application of complementarity may radically transform the role of the Court vis-à-vis states; this would endow the Court with a form of responsibility for which it was not set up, and which it may not be able to fulfil.

The Libya case illustrates the problems that are inherent in a challenge of admissibility *after* the issuance of the arrest warrant. The arrest warrant creates the assumption of a case at the ICC and thereby engages its

<sup>15</sup> Informal expert paper, 'The Principle of Complementarity in Practice', ICC-OTP 2003, available at [www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf](http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf), para. 23: 'The issue is whether the proceedings are so inadequate that they cannot be considered "genuine" proceedings. Of course, although the ICC is not a "human rights court", human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely.'

<sup>16</sup> Article 21(3) of the ICC Statute, n. 4, provides as follows: 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'

responsibility. In inter-state cooperation in criminal matters a similar assumption – and corresponding responsibility – is unlikely to occur, for the simple reason that a state's right domestically to prosecute would not depend on a decision being rendered by the courts of the state requesting the cooperation (transfer of proceedings and extradition). Deviating from the horizontal system of inter-state cooperation in favour of a more efficient vertical cooperation system, such as at the ICC, may thus come at a price: increased responsibility for the Court in respect of the national administration of criminal justice.

There are solutions in the operation of complementarity that may prevent the Court being manoeuvred into the position of the organisation that carries (shared) responsibility for the unfair trial and/or death of suspects like the sons of Gaddafi and Al-Senussi. A first option is a more thorough and critical analysis of possible admissibility concerns at the time the Prosecutor submits her application for an arrest warrant. The decision on the arrest warrant could even be postponed until the Pre-Trial Chamber is better informed, including by the relevant national authorities, of national prospects of investigation and prosecution. Of course, there may be instances where it is important to decide on the arrest warrant on short notice, or when state authorities cannot be involved in the procedure.

A second and related option is to formulate the test for evaluating national investigative and/or prosecutorial activity more expressly in human rights terms. This raises the question of what rules should govern this evaluative task; by definition any evaluation of national proceedings in human rights terms imposes on the ICC responsibility for its outcome and possible consequences for the individuals concerned. At present, the ICC Statute appears to set a standard of impartial and independent national administration of criminal justice (Article 17(2)(c)). However, it could be more appropriate to make an inadmissibility determination dependent upon the standard that has long applied to inter-state cooperation in criminal matters when it comes to exposing an individual to a foreign justice system. That standard can be found in a real and foreseeable risk of being subjected to violations of Article 3 of the European Convention on Human Rights (ECHR)<sup>17</sup> and flagrant denial of Article 6 of the ECHR if a person is extradited or expelled to another

<sup>17</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).

justice system.<sup>18</sup> Incorporating this standard in the complementarity regime need not require an amendment of the ICC Statute. It could very well be that Chambers will use Article 21(3) of the Statute in the future in favour of an interpretation of Article 17 (setting out the conditions for admissibility) that would exclude a decision in favour of admissibility, if it would result in exposing an individual to a real and foreseeable risk of being subjected to (serious) human rights violations. This does not necessarily have to mean the end to any prospect of a domestic trial like that for Gaddafi and Al-Senussi. Comparable to the practice in extradition, a case could be declared inadmissible under certain conditions. The most important of them could be the assurance that the death penalty will not be imposed.

Whether the ICC will take the review of human rights issues in admissibility proceedings one step further remains to be seen. The decisions of the ICC Chambers on the admissibility challenges made by Libya in the cases of Gaddafi and Al-Senussi are illustrative in this respect.

On 31 May 2013, the Pre-Trial Chamber ruled that the admissibility challenge in the *Gaddafi* case by Libya was rejected, and that Gaddafi thus had to be tried at the ICC.<sup>19</sup> Decisive in the reasoning of the Chamber was that Gaddafi was being detained outside the reach of the Libyan justice system and that he appeared therefore not to be available for trial. In light of all the facts and circumstances there was thus an inability on the part of Libya, and the case was declared admissible at the ICC.<sup>20</sup> Given these rather factual determinations, there was little attention paid to possible human rights problems if Gaddafi were to be tried in Libya.<sup>21</sup>

<sup>18</sup> On the risk of being exposed to violations of Article 3 ECHR, see the landmark judgment *Soering v. the United Kingdom*, App. No.14038/88 (ECtHR, 7 July 1989); on flagrant denial of Article 6 ECHR in cases of extradition/expulsion, see *Othman (Abu Qatada) v. the United Kingdom*, App. No. 8139/09 (ECtHR, 17 January 2012).

<sup>19</sup> ICC, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Prosecutor v. Gaddafi and Al-Senussi*, Case No. ICC-01/11-01/11, PTC, 31 May 2013.

<sup>20</sup> *Ibid.*, para. 215: 'In light of the above, although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr Gaddafi. As a consequence, Libya is, in the view of the Chamber, unable to secure the transfer of Mr Gaddafi's custody from his place of detention under the Zintan militia into State authority and there is no concrete evidence that this problem may be resolved in the near future.'

<sup>21</sup> *Ibid.*, para. 218: 'Given that the case is admissible before the Court and that Libya's challenge to the admissibility of the case is herewith rejected, the Chamber does not need

Remarkably, on 11 October 2013, the same Pre-Trial Chamber granted the admissibility challenge by Libya in the case against Al-Senussi.<sup>22</sup> It ruled that Libya was able and willing to conduct and complete national proceedings against Al-Senussi. Part of the Chamber's analysis dealt with the human rights situation in Libya, especially the expected treatment of the accused. However, the analytical parameters were not very clear, as the Chamber repeatedly stated that the ability and willingness of the Libyan justice system were to be measured in light of Libyan national law.<sup>23</sup> But the Chamber also stated that human rights law was part of Libyan national law, and there was attention in the further analysis to (some of) the fair trial rights of Al-Senussi. The objections by the Defence appear to have been dismissed not so much on a matter of principle – that there is no mandate for the Court to review national human rights compliance – but rather on account of the failure on the part of the Defence to meet the standard of proof that 'domestic proceedings against Mr Al-Senussi are tainted by departures from, or violations of, the Libyan national law such that they would support, in accordance with Article 17 of the Statute, a finding of unwillingness or inability on the part of Libya to carry out the proceedings against Mr Al-Senussi'.<sup>24</sup> The *Al-Senussi* judgment offers food for thought. There is on the part of the Pre-Trial Chamber no overt acceptance of potential responsibility for violation of human rights norms that Al-Senussi might face when delivered into the hands of the Libyan justice system. At the same time, there is significant discussion about a variety of human rights problems, but all against the backdrop of Libyan law and the progress of Libyan criminal proceedings.

Both admissibility rulings were subjected to appeal. The Appeals Chamber confirmed the decisions of the respective Pre-Trial Chambers.<sup>25</sup> The *Al-Senussi* judgment is of particular interest, because the case against him being declared inadmissible at the ICC raises

to address the implications of the alleged impossibility of a fair trial for Mr Gaddafi on Libya's willingness genuinely to carry out the investigation or prosecution.'

<sup>22</sup> ICC, Decision on the Admissibility of the Case against Abdullah Al-Senussi, *Prosecutor v. Gaddafi and Al-Senussi*, Case No. ICC-01/11-01/11, PTC, 11 October 2013.

<sup>23</sup> *Ibid.*, paras. 221 and 243. <sup>24</sup> *Ibid.*, para. 243.

<sup>25</sup> ICC, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11 OA 4, A. Ch., 21 May 2014; ICC, Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the Case against Abdullah Al-Senussi', *Prosecutor v. Gaddafi and Al-Senussi*, Case No. ICC-01/11-01/11OA6, A. Ch., 24 July 2014.

potential human rights responsibility. The Appeals Chamber dismissed – in principle – the possibility of making an admissibility determination on the basis of serious risks of human rights violations in national systems. There is one exception: when ‘violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be “inconsistent with an intent to bring that person to justice”’.<sup>26</sup>

While apparently a high standard, it is now established case law of the Court that in the event of such egregious violations of the rights of the suspect in the framework of national proceedings the case must be declared admissible. It is, at least, the – implicit – acknowledgement of some degree of responsibility in respect of the fate of ICC suspects in the event of an inadmissibility determination. It is for future case law to determine what this standard of ‘egregious violation’ exactly entails. Instead of trying to reinvent the wheel, it is suggested that the Court should base itself on the existing case law of, for example, the European Court of Human Rights (ECtHR) regarding a real and foreseeable risk of violation of Article 3 of the ECHR and flagrant denial of justice (Article 6 of the ECHR).<sup>27</sup>

#### 4 The Right to Liberty at the Seat of the Court: Finding a Territory for the ICC

Once criminal proceedings at the ICC are ongoing, there are different possible scenarios of shared responsibility. This section will discuss the right to liberty of suspects and other persons detained at the ICC detention unit.

##### 4.1 *Provisional Release of Suspects*

The issue of provisional release has a problematic history in international criminal tribunals.<sup>28</sup> Detention as a rule, and release as the exception, has long been the law and also the practice at the ICTY and

<sup>26</sup> *Al-Senussi* judgment, AC, *ibid.*, at para. 230. <sup>27</sup> For relevant case law, see n. 18.

<sup>28</sup> For a detailed analysis covering all international criminal tribunals, see K. de Meester, K. Pitcher, R. Rastan, and G. Sluiter, ‘Investigation, Coercive Measures, Arrest, and Surrender’, in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, and S. Zappala (eds), *International Criminal Procedure – Principles and Rules* (Oxford: Oxford University Press, 2013), 321.

ICTR.<sup>29</sup> In the context of the ICTY, assurances provided by the states of the former Yugoslavia resulted in several instances where provisional release was eventually granted. In the context of the ICTR, however, no accused was released pending trial. Interestingly, in the entire history of the ICTY and the ICTR, no accused was released directly on the territories of the host states, the Netherlands and Tanzania respectively.<sup>30</sup>

The ICC suffers, like the ICTY and the ICTR, from a lack of territory where it could directly execute decisions of provisional release. It is dependent upon whether states parties are willing to accept provisionally released persons. The matter was neglected when the Rome Statute and the Headquarters Agreement were drafted.<sup>31</sup> Neither of these instruments contains provisions regulating the acceptance of persons whom the Court believes should be released pending trial. Yet, the Court has the responsibility – and should be able – to decide when a person needs to be provisionally released. The absence of provisions on this matter may have limited its ability to carry out these responsibilities. This can be illustrated by two examples.

In the *Bemba* case, the Pre-Trial Chamber, acting through the Single Judge, decided that the accused should be conditionally released pending trial.<sup>32</sup> It ruled that for the execution of this decision a state needed to be found that would accept Mr Bemba on its territory. The Single Judge's decision was overturned on appeal.<sup>33</sup> The Appeals Chamber, among other things, decided that no person could be released from ICC custody

<sup>29</sup> Rule 65(B) of the ICTY and ICTR Rules of Procedure and Evidence [ICTY: UN Doc. IT/32/Rev.7 (1996), in force 14 March 1994, amendments adopted 8 January 1996; ICTR: UN Doc. ITR/3/Rev.1 (1995), in force 29 June 1995] stipulated for a considerable number of years that '[r]elease may be ordered by a Trial Chamber only in exceptional circumstances', turning human rights law, according to which liberty is the rule and detention the exception, on its head.

<sup>30</sup> The exception may have been the accused Blaškić, who was put under house arrest in the Netherlands in 1996 for a short period of time, but this 'experiment' has, to the author's knowledge, never been repeated since.

<sup>31</sup> Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, in force 1 March 2008.

<sup>32</sup> ICC, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-475, P-T. Ch. II, 14 August 2009.

<sup>33</sup> ICC, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal

without a state being prepared to accept him or her.<sup>34</sup> There was no discussion in the Appeals Chamber Decision as to whether this condition would render it impossible fully to respect the right to liberty; nor was there any discussion on the possibility of obliging states to accept provisionally released persons, taking into account their responsibility as parties to the Statute for the fair and effective functioning of the Court, as well as their obligation to cooperate with the Court in the investigation and prosecution of crimes. In relation to the responsibility of the host state, the question arises whether it may be obliged under Article 5 of the ECHR to accept a person who is to be provisionally released, if this is the only way of ensuring that Article 5 of the ECHR can be observed by an international organisation operating on its territory.

The Appeals Chamber took a different position in respect of Mr Ngudjolo, who was acquitted on 18 December 2012.<sup>35</sup> In spite of a submission by the Prosecutor that Mr Ngudjolo should be detained pending appeal and the *Bemba* precedent, the Appeals Chamber ordered the immediate release of the acquitted person.<sup>36</sup> It must be pointed out that Article 81(3)(c) of the ICC Statute provides for the immediate release of an acquitted person, unless there are exceptional circumstances justifying detention during appeal; none of these exceptional circumstances was found to be present. The Appeals Chamber did not deal with the question of where Mr Ngudjolo should be released, and nor did it repeat the condition enunciated in the *Bemba* case that a state willing to accept Mr Ngudjolo should be found first.<sup>37</sup> At the time of writing, no state has been prepared to accept Mr Ngudjolo, who has remained in the Netherlands awaiting his appeal proceedings.

The examples of the *Bemba* and, to a lesser degree, *Ngudjolo* cases illustrate how the Court, the states parties, and the host state can share responsibility in respect of protection of individual rights when states refuse to assist the Court in finding solutions. From the perspective of states parties one can, however, also argue that the drafters of the ICC Statute failed to put in place a proper legal framework dealing with these

Republic of Germany, the Italian Republic, and the Republic of South Africa', *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-631, A. Ch., 2 December 2009.

<sup>34</sup> *Ibid.*, at para. 106.

<sup>35</sup> *Prosecutor v. Ngudjolo*, Judgment pursuant to article 74 of the Statute, Case No. ICC-01/04-02/12, T. Ch. II, 18 December 2012.

<sup>36</sup> *Prosecutor v. Ngudjolo*, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, Case No. ICC-01/04-02/12 OA, A. Ch., 20 December 2012.

<sup>37</sup> *Ibid.*

issues. It is clear that, for example, the transfer of sentenced persons has been regulated in significant detail, with a residual role for the host state when no state can be found to accept sentenced persons.<sup>38</sup> It has been suggested that when faced with this 'bystander's dilemma', i.e., that no state party can be found to accept a provisionally released or an acquitted person, there should be a similar residual role for the host state where the ICC is located. Until now, such a role for the host state has been met with resistance by the Netherlands, however.<sup>39</sup>

In 2014, there was a breakthrough that could facilitate provisional release. Belgium concluded an agreement with the ICC in which it accepts on its territory provisionally released persons, on a temporary basis and under conditions to be established by the competent Chamber.<sup>40</sup> Although the precise content of the agreement was unknown at the time of writing, this was a great step forward. However, from a perspective of burden-sharing, it would be unfair if Belgium were the only state party to accept provisionally released persons on its territory, and it is hoped that other states will follow, comparable to the practice with agreements regulating the enforcement of sentences.

On 21 October 2014, an ICC Single Judge ordered the provisional release of four detained persons suspected of having committed offences against the administration of justice.<sup>41</sup>

It is noteworthy that the Single Judge proceeded with the release of the four suspects without explicit consent from the relevant states. The Single Judge identified the states where the suspects sought to be released, and where they had been arrested and lawfully resided (either as a national or on the basis of a residence permit), and ordered the suspects to be released to four states: the Democratic Republic of the Congo, Belgium, France, and the United Kingdom.<sup>42</sup> As release was organised

<sup>38</sup> See Article 103(4) of the ICC Statute, n. 4: 'If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.'

<sup>39</sup> For further analysis of this matter, see section 5, below.

<sup>40</sup> See ICC press release of 10 April 2014, 'Belgium and ICC Sign Agreement on Interim Release of Detainees', ICC-CPI-20140410-PR993, available at [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr993.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr993.aspx).

<sup>41</sup> ICC, Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, P-T. Ch. II, 21 October 2014.

<sup>42</sup> *Ibid.*, at 5.



immediately following the decision, three of the four states accepted the return of the suspects on their territory. The United Kingdom, however, revoked the residence permit of one of the suspects at the last moment, as a result of which the suspect's detention has continued for some time.<sup>43</sup>

This first instance of the ICC granting provisional release raises further questions. In particular, the position adopted by the United Kingdom shows that states parties' contributions to shared responsibility for the right to liberty of ICC suspects is by no means self-evident.

#### 4.2 *Right to Liberty of Detained ICC Witnesses Who Have Applied for Asylum*

In addition to the above examples of sharing responsibility for effectuating the right to liberty, there is also the scenario of ICC witnesses who have applied for asylum in the Netherlands.<sup>44</sup> That raises two sets of shared responsibility questions. First, what is the division of responsibility between the Netherlands and the ICC in relation to protection of ICC witnesses seeking asylum? Second, where witnesses are detained at the ICC pursuant to Article 93(7) of the Statute, how is the responsibility for continuation and supervision of that detention distributed between the Netherlands and the ICC, as long as the asylum proceedings are ongoing?

As to the issue concerning ICC witnesses seeking asylum, the Trial Chamber has repeatedly expressed its desire to find a solution with the Netherlands regarding the ongoing detention of the witnesses.<sup>45</sup>

<sup>43</sup> See ICC, Requête extrêmement urgente en vue de la tenue d'une audience avec les représentants des États du Royaume Uni, des Pays Bas et de la Belgique par rapport au manque de coopération en vue de la mise en liberté ordonnée, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Defence, 28 October 2014.

<sup>44</sup> See on this matter G. Sluiter, 'Shared Responsibility in International Criminal Justice – The ICC and Asylum' (2012) 10 *JICJ* 661.

<sup>45</sup> ICC, Decision on the Application for the Interim Release of Detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, T. Ch. II, 1 October 2013, para. 17: 'The Chamber has been confronted with an unprecedented situation for more than two years. It recalls that from the outset its decisions have made manifest its concern to find "urgently" a consensus solution. To this end, it first instructed the Registrar to consult the Dutch and Congolese authorities with a view to determining who should assume custody of the three witnesses during the asylum proceedings. Noting the particularly rigid approach adopted by the Dutch authorities, it put specific questions to them. However, the responses provided did not advance matters. It would therefore appear that all efforts to arrive, by consultation, at a consensus solution to the issues raised by these witnesses' continued detention in The Hague have now failed.'

The solution could be that pending the asylum procedure the witnesses would be transferred from ICC custody to the Netherlands. The Netherlands has insisted that the witnesses continue to be detained at the Court, where, at the time of writing, they have been for three years.<sup>46</sup> The Appeals Chamber ordered, however, on 20 January 2014, that the detained witnesses who have sought asylum in the Netherlands must leave the ICC detention centre:<sup>47</sup> they are to be sent back to the Democratic Republic of the Congo unless their presence on Dutch territory is required for the purpose of asylum proceedings.<sup>48</sup> In early June 2014, the three witnesses were transferred to the Dutch authorities. They spent a few weeks in ‘alien detention’; their asylum claim was rejected in final instance by the Dutch Council of State on 27 June 2014.<sup>49</sup> An application for interim measures, preventing their return to the Democratic Republic of the Congo pending determination of their substantive complaint with the ECtHR, was rejected shortly after the Decision of 27 June 2014.<sup>50</sup> The three witnesses returned to the Democratic Republic of the Congo in the middle of July 2014.

The dilemma in the case of the detained witnesses is that states parties have refused – with the exception of Belgium – to assume their share of the responsibility, and thereby have put the Court in a difficult position. If the Court were to make its rulings on the right to liberty dependent upon voluntary assistance by states, it would probably be criticised for not respecting human rights law. Moreover, it has already been demonstrated in practice that states – in the absence of a clear legal framework containing explicit obligations – are reluctant to provide voluntary assistance. However, if the Court orders the release of persons without having secured the assistance from states, it may risk non-execution of its decisions. That this is by no means an imaginary situation has been

<sup>46</sup> See *ibid.*, for procedural background.

<sup>47</sup> *Prosecutor v. Ngudjolo*, Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded Pursuant to Article 93(7) of the Statute, Case No. ICC01/0402/12 A, A. Ch., 20 January 2014.

<sup>48</sup> See *ibid.*, at para. 29: ‘However, the Appeals Chamber is firmly of the view that the resolution of these conflicting obligations lies with The Netherlands. In this respect, the Appeals Chamber stresses that article 21 (3) of the Statute does not require the Court to interpret its legal texts so as to avoid situations where The Netherlands may consider it necessary to take independent steps in order to fulfil its own legal obligations in relation to the Detained Witnesses.’

<sup>49</sup> Judgment of the Dutch Council of State, 27 June 2014, Case No.: 201310217/V1/1, ECLI: NL:RVS:2014:2427.

<sup>50</sup> On file with the author.

confirmed by the case of Mr Ngudjolo, who after his release by the ICC was put in 'asylum detention' by the Netherlands for a couple of months. This is not only prejudicing the rights of the individual concerned, but also more broadly damages the authority of the Court.

It will be further explored whether the territory of the host state should serve as 'the ICC's territory' until a satisfactory system of shared responsibility has been put in place. Such a role could be modelled along the lines of Article 103(4) of the ICC Statute, namely that the host state carries a residual responsibility for accepting provisionally released persons if no other state that is willing to accept these persons on its territory can be found. One can also consider in this regard the conclusion of agreements between the ICC and states parties regulating the acceptance of released persons. The conclusion of the agreement with Belgium may constitute the important first step in that regard.

## 5 Responsibility for Acquitted Persons: The Situation of Mathieu Ngudjolo

Every reasonable observer would have anticipated the possibility of acquittals by an international criminal court. Yet it seems that the acquittal of Mathieu Ngudjolo has taken the ICC and the host state by surprise. It has resulted in litigation, both before the ICC and Dutch courts, dealing with the question of what should happen to acquitted and released persons. The categories 'acquitted' and 'released' are not necessarily identical. As long as an appeal is pending an acquitted person may continue to be detained, in exceptional circumstances.

Especially with an appeal pending against an acquitted person, but also in case of a final acquittal, there is uncertainty as to where such a person should reside. Because of the acquittal of Mr Ngudjolo, one may – like the host state – be tempted to have him removed from Dutch territory. At the same time, his case is ongoing, on appeals at the ICC, which will necessitate his presence close to the Court. In this respect it must be noted that the ICC Prosecutor, when applying for the detention of Mr Ngudjolo during appeal, expressed her concern that there would be a serious risk of flight.<sup>51</sup> If detention is not possible, which is generally

<sup>51</sup> ICC, Prosecution's Appeal against Trial Chamber II's oral decision to release Mathieu Ngudjolo and Urgent Application for Suspensive Effect, *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, 19 December 2012, para. 12: 'There is thus a clear and present danger that if Mr Ngudjolo were released, but the Appeals Chamber subsequently overturned the Decision on Release, the Court would not be able to regain custody of him.'

the case with acquittals under appeal, residence of Mr Ngudjolo close to the Court would best minimise any risk of flight. From the perspective of the ICC, and in the interests of the administration of justice, it is clear that the presence of Mr Ngudjolo on Dutch territory is to be preferred over any other alternative place of residence.

The ICC Statute, and its drafting history, offers little guidance as to what should happen to acquitted persons. The position of the Court – and its responsibilities – is different when compared to ongoing criminal proceedings. In the case of a final acquittal, the Court has the obligation to ensure release, and also has to make sure that the acquitted person is not exposed to a real and foreseeable risk of being subjected to (serious) human rights violations. This responsibility aims to protect human rights, and can be based on Article 21(3) of the ICC Statute. When the acquittal is subject to appeal proceedings, one has to add the interests in the effective administration of international criminal justice to these underlying human rights considerations.

When we consider the situation of final acquittals at the ICC, there is an interesting paradox between regulation of the legal position of convicted persons and that of acquitted persons. Regarding the former, one notices, notably in Article 106 of the Statute, the far-reaching responsibility of the Court in ensuring treatment of the detained person in accordance with internationally protected human rights.<sup>52</sup> There is no similar responsibility to be found in the Statute concerning the acquitted person. This may seem self-evident, because the acquitted person is no longer under the control of the Court, in a way comparable with the convicted person.

Yet this is not to say that the Court carries no responsibility whatsoever. It is for the ICC to decide where the acquitted person should go – especially where he or she should not go – because of the risk of serious human rights violations in certain states. This responsibility falls to the Court as a result, first, of exercising (physical) control over the acquitted person, and, second, the risks to which the acquitted person has been exposed on account of him or her standing trial before the ICC. If the Court was to decide, after having heard the views of the acquitted

<sup>52</sup> Article 106 of the ICC Statute, n. 4, the relevant part, reads as follows: 'The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.' For a detailed analysis, see C. Kress and G. Sluiter, 'Enforcement', in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 1797.

person, that he or she could not be sent back to his or her state of nationality/residence, it would then seem to be the collective responsibility of the states parties to ensure a safe place of (new) residence for him or her.

That this is easier said than done is demonstrated by the practice of the ICTR. Several acquitted persons, who cannot be sent back to Rwanda, have been living for many years now in a safe house in Arusha, the seat of the ICTR, because no state that was willing to accept them could be found.<sup>53</sup> This is puzzling. Despite the absence of a legal framework regulating cooperation (or sharing responsibility) in respect of acquittals, one would expect states to be more prepared to take over *acquitted* than *convicted* persons. However, the situation of acquitted persons at the ICTR is nowhere near resolution, and there is a risk that acquittals in the context of the ICC may trigger the similar problem of no state being prepared to assume responsibility for an acquitted person. The aforementioned agreement with Belgium<sup>54</sup> does not provide a solution, as it only deals with accepting provisionally released persons on a temporary basis.

In the situation of acquittals subject to appeal, the responsibility of the ICC and states is to ensure that, first, the acquitted person is effectively released, and, second, that the acquitted person can be readily available for appeal proceedings. In this scenario it seems that release in the host state is the best option. Moreover, the Headquarters Agreement provides for an obligation to accept individuals whose presence is necessary for the functioning of the Court on Dutch territory.<sup>55</sup>

## 6 Evaluation: Sharing and Allocating Responsibility

The examples above illustrate the problems in sharing responsibility in relation to international criminal proceedings. These problems involve three categories of actors: the ICC, the host state, and other states parties.

<sup>53</sup> See K.J. Heller, 'What Happens to the Acquitted?' (2008) 21 *LJIL* 663; and B. Henry, 'The Acquitted Accused, A Forgotten Party of the ICTR' (2005) 21 *NEJCIL* 81.

<sup>54</sup> See n. 40.

<sup>55</sup> Headquarters Agreement between the International Criminal Court and the Host State, n. 31, Article 29(1): 'Other persons required to be present at the seat of the Court shall, to the extent necessary for their presence at the seat of the Court, be accorded the privileges, immunities and facilities provided for in article 27 of this Agreement, subject to production of the document referred to in paragraph 2 of this article.' Article 29(5) reads: 'Persons referred to in this article shall not be subjected by the host State to any measures which may affect their presence before the Court.'

Whether these actors carry – or should carry – any type of responsibility cannot be determined in general. It will depend on many factors, such as the phase of the proceedings and the underlying interests and values that need to be protected.

Below, a few observations will be offered that could assist in explaining shared responsibility and which could be the starting point for finding solutions.

### *6.1 Gaps in the Applicable Law*

It is clear from the above examples that there are important gaps in the Rome Statute and other sources of applicable law of the ICC. A number of scenarios were insufficiently anticipated and regulated. This concerns the human rights dimension of complementarity, as well as the implementation of decisions of release and judgments of acquittal. The responsibility for these defects in the Rome Statute lies with all states having negotiated the Statute, just as the responsibility for further improvement of the Statute – and the Rules of Procedure and Evidence (RPE) – lies with the states parties, acting through the assembly of states parties. The political reality is, however, that amendments to the Statute or RPE to improve the ICC's functioning are very difficult to agree upon. That said, it remains puzzling that some of these fundamental problems have not been anticipated properly, and have not resulted in a legal framework in which the responsibilities have been clearly allocated between the respective actors involved.

### *6.2 Territory of the ICC? Relations between the ICC and the Host State*

Until there is a legal framework in place to address these problems of shared responsibility, an intermediary solution has to be found that best serves the underlying values that have to be protected. These are the effective functioning of the ICC and respect for individual rights. It follows from the examples pertaining to provisional release and acquittals that the ICC should have at its disposal a territory where decisions of release and acquittal can in fact be executed. In principle, the assistance could be provided on a voluntary basis by every state party, as is the case with the execution of sentences. Belgium has recognised and accepted its responsibility in this regard, and hopefully other states will follow. If no state is ready to accept a released person, or if Belgium, with

reason, is only prepared to accept a few provisionally released persons, it is inevitable that the host state will carry an important residual function in this respect, if only for the fact that with the physical act of release, after opening the prison doors at the Scheveningen Detention Unit the released person will be on Dutch territory, whether the host state likes it or not.

Two specific reasons make that further reflection on shared responsibility likely to result in the allocation of specific responsibilities for the host state, which serves also as 'the territory of the ICC'. First, the specific role of host state for the ICC entails more responsibilities than for any other state party. This finds a basis in human rights law, especially the case law of the ECtHR, which allocates a certain degree of responsibility to 'host states' to ensure that international organisations operating on their territory respect human rights.<sup>56</sup> Second, the ICC Statute contains a precedent in Article 103(4), dealing with the enforcement of sentences, for turning to the host state for assistance in case there is no alternative. This approach can – and probably should – be broadened to the situations of released and acquitted persons. If the ICC is to mature into a properly functioning criminal justice system, it is inevitable that the territory of the host state will also be regarded as the territory the ICC can use to implement its decisions. This should hold true as long as there is no alternative solution available.

### 6.3 *Fair Burden-Sharing between ICC, Host State, and Other States Parties*

In situations of shared responsibility, burdens may not always be shared fairly among the different actors. This is also the case in relation to the functioning of the ICC. States where the crimes under investigation are committed have to provide more cooperation than other states. Likewise, in respect of voluntary cooperation, such as the enforcement of sentences of imprisonment, some states will accept convicted persons but others

<sup>56</sup> Cf. *Waite and Kennedy v. Germany*, Appl. No. 26083/94 and *Beer and Regan v. Germany*, App. No. 28934/95 (ECtHR, 18 February 1999), para. 67: 'The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.'

will refrain from doing so. Another example is that while certain states may agree to cooperate in the protection of witnesses (by agreeing to relocation in their territory), other states may refuse to provide such assistance. Last, but not least, the financial contribution of certain states to the ICC is far greater than those of others.<sup>57</sup>

A lack of fair burden-sharing is not a direct problem for the Court, but it is a matter to be addressed within the assembly of states parties. The same would apply to the examples above of release and acquittal, if, in the absence of an alternative, sharing responsibility could focus on the relationship between the ICC and the host state, which may – and in practice has already done so – object to this as a matter of unequal burden-sharing among ICC states parties. The host state may then try to persuade the other states parties also to assume a certain degree of responsibility. Whether other states parties may be willing to do so is a different matter. The starting position of the Netherlands appears to be relatively weak. The Netherlands was very keen on becoming the host state at the Rome negotiations, without attaching any conditions to that role. One cannot, indeed, blame other states parties if they take the position that being a host state comes at a price.

## 7 Concluding Remarks

This chapter has illustrated the problems of shared responsibility in international criminal justice for each of the phases of the functioning of the ICC: the phase of deciding where to exercise jurisdiction; the actual criminal proceedings of the ICC; and the post-trial phase. In respect of all these three phases the ICC should be expected to do what is necessary to ensure its own effective functioning and to protect the individual rights of those involved in its criminal proceedings. This implies – in relation to the examples addressed in the chapter – that the ICC may have the responsibility to ensure that a ruling of inadmissibility is not followed by serious human rights violations, and that it does have the responsibility to release persons pending trial and upon acquittal, when so warranted by the circumstances. The ICC should be in a position to fulfil these responsibilities. The Court thereby has to rely on states, with

<sup>57</sup> According to Article 117 of the ICC Statute, n. 4, the UN model of contributions is followed: ‘The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.’ As a result, Germany and Japan are the largest financial contributors to the ICC.



which it shares the responsibility for the Court's overall effective functioning and respect for human rights. The problems encountered in handling this shared responsibility have a number of origins and explanations.

First, the applicable legal framework, the Statute, and secondary ICC law leaves much to be desired. On the basis of ICC law, it is uncertain, for example, if or to what degree human rights are a component of the admissibility standard, and it is also uncertain how decisions of release are to be executed.

Second, when faced with an uncertain legal framework – or when confronted with unforeseen situations – it is nevertheless inevitable in the administration of criminal justice that a decision is taken. A decision of release, for example, must be executed. Execution of such a decision requires that at least one state is prepared to share the responsibility with the Court to respect an individual's right to liberty. Until now only one state, Belgium, has been prepared to do so. Under these circumstances, the host state (still) should be attributed a special residual role of responsibility, to the degree that it may have to serve as the *de facto* territory of the Court.

The scenario where no state is prepared to assist the Court puts the latter in an impossible position. What recommendations could be offered at this stage?

It seems self-evident that the legal framework must be improved. Shared responsibility – in its *ex ante* form of preventing harm – is not a spontaneous phenomenon, but apparently must be structured and organised. This may be done by adopting rules that govern in detail the obligations and responsibilities of states. An alternative approach would be to adopt a number of guiding principles which would regulate how the Court and states parties are to deal with unforeseen matters. These 'guiding principles' could be based on the following three elements: first, effective functioning of the Court; second, protection of individual rights (already embodied in Article 21(3) of the ICC Statute); and, third, a residual responsibility for the host state, in the event that the matter cannot be resolved in consultation with any other state party.

The agreement concluded between the Court and Belgium may be the starting point and a blueprint for strengthening the Court's law and practice, and for solving some of these shared responsibility problems. The success of this initiative will ultimately depend on the number of states that follow Belgium's example and on new legal initiatives, such as agreements dealing with relocation of acquitted persons.