Examining the ICC's Impact on the Rule of Law in Côte d'Ivoire and Libya: Catalysts, Multi-Level Judicial Dialogue and Local Ownership in Prosecuting and Judging International Crimes

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A thesis submitted for the degree of Doctor of Philosophy (PhD)

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August 2020

ABSTRACT

This research consists of an empirically informed analysis of the ICC's impact on the rule of law in Côte d'Ivoire and Libya through the lens of admissibility and co-operation. It first asks how the principle of complementarity has been construed and implemented in practice and considers what this means for local ownership. Secondly, it examines how, and to what extent, the ICC's engagement in Côte d'Ivoire and Libya and approach to co-operation has affected the rule of law. In particular, it analyses "own side" cases where there are allegations that the victors also committed international crimes in the process of overturning an incumbent regime responsible for gross human rights abuses. It compares proceedings against the former regime with the situation in regard to the new authorities and considers whether the ICC has influenced efforts towards equal accountability. The central theme is that of "positive complementarity", the hypothesis being that a greater impact on the rule of law could be achieved through supporting local ownership by recognising investigations and trials at the domestic level and rendering "reverse co-operation" to assist these accountability efforts in even the most difficult cases.

Part One begins with a theoretical analysis. Chapter II considers local ownership, transitional justice, complementarity and its catalytic effects. Chapter III analyses admissibility, while Chapter IV examines co-operation. Part Two consists of a practical analysis of the impact of the ICC's engagement in Côte d'Ivoire and Libya. Chapter V examines the situation in Côte d'Ivoire while Chapter VI examines Libya. Chapter VII provides recommendations for ICC reform. The thesis concludes by considering the ICC's place in relation to national transitional justice processes and further explores local ownership and multi-level dialogue going forward.

ACKNOWLEDGEMENTS

I would like to thank all who supported me during my doctoral studies over the last six years, especially my parents for their unwavering kindness and understanding.

I am grateful to everyone that gave up their time to speak to a PhD student to make this project a success. In particular, thanks go to the Ministry of Justice of Côte d'Ivoire for the permission which made much of this research possible. I am also grateful to those at the Office of the Prosecutor of the International Criminal Court and prosecutors, judges, defence counsel, jurists, victims, witnesses and community activists in Côte d'Ivoire, Kenya and Libya who agreed to participate in this research, whether on the record or not. Your openness, courage and resilience is an inspiration. I promise I am not a spy. To Ray and Marius, my interpreters and friends in Côte d'Ivoire, thank you for going above and beyond.

To my supervisors at the University of Essex, Geoff Gilbert, Clotilde Pégorier, and earlier, Karen Hulme, thank you for keeping me on the right track and your patience in reading through less polished earlier drafts of this thesis. I am also grateful for the support of my managers at the UK's Serious Fraud Office, which enabled me to go on extended field trips to Côte d'Ivoire, Tunisia and The Hague, and to colleagues who reminded me to keep my wits as they needed their Prosecutor back in one piece. Finally, thanks go to my friends and other loved ones for their encouragement and optimism through the hurdles and final write-up.

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LIST OF ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
AU	African Union
ADJL-CI	Agir pour la Démocratie, la Justice et la Liberté en Côte d'Ivoire
AFJCI	Association des Femmes Juristes de Côte d'Ivoire
Al Saiqa	Al Saiqa Brigade/Special Forces Unit
APDH	Actions pour la Promotion et la Defense des Droits de l'Homme
AVMVG – CI	Association des Veuves et Mamans Victimes de Guerre en Côte d'Ivoire
CAR	Central African Republic
CAT	Convention Against Torture
CDA	Constitutional Drafting Assembly
CDVR	Commission for Dialogue, Truth and Reconciliation / Commission Dialogue, Vérite et Réconciliation
CEI	Independent Electoral Commission
CSE	Cellule Spéciale d'Enquête
Cellule	Cellule Spéciale d'Enquête et d'Instruction / Special Investigation and Examination Unit Cellule Spéciale d'Enquête, d'Instruction et de lutte contre le terrorisme / Special Unit for Investigation, Examination and the Fight against Terrorism (same body as that above, save for a change in name)
CID	Criminal Investigation Department
CIV II	Côte d'Ivoire II Investigation

CNDHCI	National Commission of Human Rights in Côte d'Ivoire – Commission Nationale des Droits de l'Homme de Côte d'Ivoire (now the National Human Rights Council – Conseil National des Droits de l'Homme (CNDH))
CNE	National Commission of Inquiry
COJEP	Congrès panafricain des jeunes patriotes
CONARIV	National Commission for Reconciliation and the Reparation of Victims/ Commission Nationale pour la Réconciliation et l'Indemnisation des Victimes des Crises survenues en Côte d'Ivoire
CPC	Criminal Procedure Code
CVQDY	Collectif de Victimes Doukouré Yopougon
DACOT	Deterrence Apparatus for Combatting Organised Crime and Terrorism
DCIM	Department for Combatting Illegal Migration
DRC	Democratic Republic of Congo
DST	Directorate of Territorial Surveillance
FCFA	West African CFA Franc
ECOWAS	Economic Community of West African States
ECMACM	European Convention on Mutual Assistance in Criminal Matters 1959
FDS	Les Forces de Défense et de Sécurité (Defence and Security Forces)
FESCI	Student Federation of Côte d'Ivoire (La Fédération Etudiante et Scolaire de Côte d'Ivoire)

FFRC	Fact-Finding and Reconciliation Commission
FPI	Ivorian Popular Front
FRCI	Forces Républicaines de Côte d'Ivoire
GNA	Government of National Accord
GNC	General National Congress
HJC	Higher Judicial Council
ICTJ	International Center for Transitional Justice
ICERD	International Convention on the Elimination of All Forms of Racial Discriminations
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
JPO	Judicial Police Officer
LMP	Presidential Majority Party
LNA	Libyan National Army
LPA	Libyan Political Agreement
LIDHO	Ligue Ivoirienne des Droits Humains
LRA	Lord's Resistance Army
MACA	Abidjan Detention and Correctional Centre
MIDH	Mouvement Ivorien des Droits Humains
MoI	Ministry of Interior
MoJ	Ministry of Justice

MONUC	United Nations Organisation Mission in the Democratic Republic of Congo
MoU	Memorandum of Understanding
MPCI	Mouvement Patriotique de Côte d'Ivoire
NTC	National Transitional Council
OFACI	Organisation des Femmes Actives en Côte d'Ivoire
OIDH	Observatoire Ivoirien des Droits de l'Homme
OPCV	Office of Public Counsel for Victims
OSCE	Organisation for Security and Co-operation in Europe
OTP	Office of the Prosecutor
PDCI	Democratic Party of Côte d'Ivoire
PEV	Post-Election Violence
PIL	Law on Administrative and Political Isolation
PNCS	National Programme for Social Cohesion
PTC	Pre-Trial Chamber
R2P	Responsibility to Protect
RAIDH	Regroupement des Acteurs Ivoiriens des Droits de l'Homme
RB	Referral Bench
RHDP	La Rassemblement des Houphouétistes pour la Démocratie et la Paix
RPE	Rules of Procedure and Evidence
SDF	Special Deterrent Force/ Radaa Forces
SGBV	Sexual and Gender Based Violence
SJC	Supreme Judicial Council
SRSG	Special Representative of the United Nations Secretary General

UEMOA	Economic and Monetary Union of West Africa
UNHCR	United Nations High Commissioner for Refugees
UNOCI	United Nations Operation in Côte d'Ivoire
UNSC	United Nations Security Council
UNSMIL	United Nations Support Mission in Libya

CHAPTER I - INTRODUCTION

The International Criminal Court (ICC) is part of a wider transitional justice framework for addressing gross human rights violations and establishing the individual criminal liability of those most responsible, providing justice for victims and deterring repetition. However, it is founded on the principle of complementarity which mandates the ICC "shall be complementary to national criminal jurisdictions".[1] This concept recognises that States have the primary responsibility to investigate and prosecute. When national proceedings are ongoing or have been completed for the same case the ICC may only assert jurisdiction if the State is 'unable' or 'unwilling' to bring the accused to justice in a genuine manner.[2]

The ICC may catalyse domestic level action and strengthen national systems to conduct genuine proceedings to close the impunity gap and take ownership of accountability efforts through 'positive complementarity'.[3] This interpretation of complementarity positions the ICC as an enabler of genuine domestic proceedings, as opposed to an institution that simply assumes jurisdiction when there are no such proceedings.[4] It is through these efforts that the ICC could make its greatest impact on the rule of law in situation countries. Positive complementarity could fill the justice gap concerning the work of international tribunals labelled the 'spaceship phenomenon': "they arrive, do their business, and take off, leaving a befuddled domestic population scratching their heads and wondering what, if anything, this had to do with the dire realities on the ground".[5] While not exclusively the task of the Office

[1] Preamble and Article 1 of the Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, in force on 1 July 2002, United Nations Treaty Series Vol. 2187, No. 38544.
[2] Article 17 (1), Rome Statute, supra note 1.
[3] Report of the Bureau on Stocktaking: Complementarity, 'Taking Stock of the principle of complementarity: bridging the impunity gap', ICC-ASP/8/51, 8th session, 18 March 2010.
[4] See Carsten Stahn, 'Complementarity: A Tale of Two Notions', (2008) 19 Criminal Law Forum 87, 91-93. For a further analysis of complementarity, see Chapter II, at Sections 3 and 4.
[5] Jane E. Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 Hague Journal on the Rule of Law 87, 88-89.

of the Prosecutor (OTP), the OTP's engagement with situation countries is at the core of positive complementarity. Yet, with internal problems and limited resources, the extent to which this objective is being achieved requires examination.

1. Problem Statement and Research Objectives

The ICC's ethos of complementing domestic justice systems differs from the primacy of the ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR). Co-operation between the ICC and national judicial authorities may build domestic capacity to bring perpetrators to account through a fair and transparent process. The impunity gap could also be closed through the OTP and national prosecutors working in partnership to investigate and prosecute international crimes – 'burden sharing'.[6] Co-operation may serve as a 'catalyst for compliance', fostering the establishment of the rule of law, democratic governance and a normative culture.[7] The ICC is often an integral part of the transitional justice process in situation countries, alongside institutional and legislative reform, other formal judicial processes, truth and reconciliation mechanisms, victims' reparations and guarantees of non-repetition.[8] Yet, its impact on the transformation of post-conflict societies is underexplored. There is significant interest in complementarity, the ICC's dialogue with the national judiciary and the consequent impact on the rule of law. Much theoretical research addresses the relationship between the ICC and domestic systems.[9]

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[6] William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008)19 Criminal Law Forum 59.

[7] Jann K. Kleffner, 'Complementarity as a Catalyst for Compliance', in Jann .K. Kleffner and Gerben Kor (eds), *Complementarity as a Catalyst for Compliance*, (The Hague: T.M.C. Asser, 2006), 81.

[8] More generally, note Tricia Olsen, Leigh Payne and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, (Washington DC: United States Institute of Peace, 2010).

[9] The seminal work remains Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008). Note also: Christian De Vos, Sara Kendall and Carsten Stahn (Eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (Cambridge: Cambridge University Press, 2015); Nidal Nabil Jurdi, *The ICC and National Courts: A Contentious Relationship*, (London: Ashgate, 2011); Joseph Yav Katshung, 'Prosecution of Grave Violations of Human Rights in Light of Challenges of National Courts and the International Criminal Court: The Congolese Dilemma', (2006) 7 (3) Human Rights Review 5; William W. Burke-White, 'Complementarity in Practice: The

However, an empirically informed analysis is required.[10] While empirical research has grown, it is confined to specific case studies and frequently, a political science perspective.[11] This research addresses a gap concerning Côte d'Ivoire and Libya but also aims to provide a more global set of proposals.

The research develops an analysis of co-operation in situations where both the victors and outgoing regime are accused of international crimes during a political transition. Transitional justice scholars consider international trials too removed from the local population to bring real change or reconciliation. International proceedings may not reflect local socio-cultural norms, including the affected community's concept of 'justice'.[12] It is also queried whether hybrid courts present a better alternative.[13] It is considered that the most effective transitional justice approach is the same for all cases, regardless of the perpetrator's affiliation - there must be local ownership. However, responses to victors' crimes by international tribunals

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International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo', (2005) 18 Leiden J. Int'l. L. 557; Godfrey M. Musila, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions', (2009) 3 Int'l J. of Transitional Justice 445; and Kasaija Phillip Apuuli, The ICC's Possible Deferral of the LRA Case to Uganda', (2008) 6 J. Int'l Criminal Justice 801.

[10] Carsten Stahn, 'Introduction: Bridge Over Troubled Waters?' in Carsten Stahn and Mohamed M El Zeidy (eds), *The ICC and Complementarity: From Theory to Practice*, (Cambridge: Cambridge University Press, 2011), 3. Note also Cedric Ryngaert, *The Effectiveness of International Criminal Justice*, (2009, Antwerp: Intersentia), at xvi (on the need for more empirical research into the effectiveness of international criminal tribunals on the ground generally).

[11] Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the ICC in Uganda and Sudan*, (Cambridge University Press, 2013); Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya*, (London: Springer, 2015); Christian Michael De Vos, 'A Catalyst for Justice? The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo' (PhD Thesis, Leiden University Repository, 16 March 2016); Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, (Oxford: Oxford University Press, 2016) (focused on Uganda and Libya); Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018) (focused on Uganda and the Democratic Republic of Congo); and Marieke Wierda, 'The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries', (PhD Thesis, Leiden University Repository, 9 January 2019) (Uganda, Colombia, Libya and Afghanistan).

[12] Jessica Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings', (2006) *4 J. Int'l Criminal Jus'tice 745*.

[13] Frédéric Mégret, Global or Local Justice: Who Should Try Ousted Leaders?: In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', (2005) 38 Cornell Int'l L. J. 725; and Phillip Rapoza, 'International Criminal Tribunals in the 21st Century: Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?' (2006) 21 Am. U. Int'l. L. Rev. 525.

range from the worst case scenario of inaction,[14] to prosecution internationally, or internationalised courts in the situation country.[15] This research examines the impact of case selection and prioritisation by the ICC, including the use of sequencing due to the need for State co-operation, and how changes to the OTP's prosecution strategy affects domestic processes. It considers whether there has been a 'justice cascade' effect in Côte d'Ivoire and Libya in terms of international accountability efforts inducing further efforts and more rights-compliant practices at the domestic level.[16] Further, it analyses how ICC engagement may catalyse national action towards a balanced justice, the most difficult test for positive complementarity. In this regard, it develops on Kleffner's prognosis that the ICC may achieve a greater impact through "exerting influence on unwilling but able States to conduct domestic proceedings than it will in helping unable but willing States to overcome the underlying cause for their inability, such as the collapse of its national judicial system".[17]

2. Hypothesis and Research Questions

Crimes committed by both sides during a violent political transition must be investigated and justice rendered as part of dealing with the past to achieve national reconciliation and consolidate the rule of law. As such, where there are allegations that the victors may also have committed crimes, the approach to positive complementarity adopted should have catalysing investigations and prosecutions against both sides at its core to be effective. This research

[14] For example, Nouwen describes the relationship between the ICC and Uganda a "marriage of convenience" due to the OTP's lack of attention to allegations against the Ugandan Peoples' Defence Forces after Uganda's self-referral in regard to the Lord's Resistance Army: Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the ICC in Uganda and Sudan*, supra note 11, 118.

[15] For example, the Special Criminal Court in the Central African Republic in the context of the conflict between the anti-Baleka and Seleka rebels; see Peter Fabricius, Institute for Security Studies, Report, 'The Central African Republic's Special Criminal Court is a huge test case in balancing peace and justice', 25 July 2019 and HRW, 'Central African Republic: New Court Should Step Up Effort', 24 July 2019.

[16] Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', (2001) 2 (1) Chicago Journal of International Law 1; and Kathryn Sikkink, *The Justice Cascade – How Human Rights Prosecutions are Changing World Politics*, (New York: W.W. Norton & Co, 2011), 6.

[17] Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, supra note 9, at p.346.

examines the ICC's engagement in Côte d'Ivoire and Libya and how this has affected its impact on the rule of law. The research questions are:

(1) How has the principle of complementarity been construed and implemented in practice and what does this mean for local ownership?

(2) How and to what extent has the ICC's engagement in Côte d'Ivoire and Libya and approach to co-operation impacted the rule of law in these situation countries?

3. Terms, Methodology and Country Selection

The research is limited by subject, geographic reach and timeframe. Specifically, two situations under formal investigation by the ICC, Côte d'Ivoire and Libya, will be scrutinised to assess the impact on the rule of law through complementarity and the approach to co-operation between the OTP and national authorities. Unlike the ICC's early investigations in Uganda,[18] Democratic Republic of Congo (DRC),[19] Central African Republic (CAR),[20] and Mali,[21] based on self-referrals, Côte d'Ivoire and Libya are instances where the basis for intervention differed. Many consider Cote d'Ivoire akin to a self-referral as the State accepted the ICC's jurisdiction through an Article 12 (3) declaration before it became party to the Rome Statute. Nevertheless, like Kenya before it, Côte d'Ivoire is an instance where the Prosecutor exercised proprio motu powers, obtaining authorisation from the Pre-Trial Chamber to investigate. In turn, Libya is one of only two instances concerning a non-party

[18] ICC Presidency, Situation in Uganda, 'Decision Assigning the Situation in Uganda to Pre-Trial Chamber II', ICC-02/04-1, dated 5 July 2004, Annexed Letter from ICC OTP dated 17 June 2004.

[19] ICC Presidency, Situation in the Democratic Republic of Congo, 'Decision Assigning the Situation in the Republic of Congo to Pre-Trial Chamber I', ICC-01/04-1, dated 5 July 2004, Annexed Letter from ICC OTP dated 17 June 2004.

[20] ICC Presidency, Situation in the Central African Republic, 'Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III', ICC-01/05-1, dated 19 January 2005, Annexed Letter from ICC OTP dated 22 December 2004; and Situation in the Central African Republic, 'Referral of the situation in the Central African Republic since August 2012 to the Prosecutor of the ICC', dated 30 May 2014, annexed to Decision Assigning the Situation in the Central African Republic II to Trial Chamber II, ICC-01/14-Anx-1, 18 June 2014.

[21] Republic of Mali, Letter to the Prosecutor of the ICC, ref. 0076/MJ-SG dated 13 July 2012, Referral of the situation in Mali since January 2012 to the Prosecutor of the ICC.

State where the investigation was opened on referral by the United Nations Security Council.[22] However, in contrast to the situation concerning Darfur (Sudan) – at least until the overthrow of Omar Al Bashir in 2019 - Libya has engaged with the Court, even if initially only to challenge admissibility. Côte d'Ivoire and Libya remain the only two situations aside from Kenya where the State has formally challenged admissibility and as such, represent a common challenge for co-operation. They are also fitting comparators to examine how the OTP has changed its strategic approach since the Kenya situation.

Côte d'Ivoire and Libya are also instances where there are indications that crimes were committed by opposition forces in the course of a political transition against a regime implicated in atrocities and the former opposition are now in government and the main stakeholders for co-operation. In this sense too, they represent a common challenge for the OTP. When this research commenced, Kenya was a full comparison country on the same basis as Côte d'Ivoire and Libya. However, it became clear that Kenya did not fit the paradigm of a State with a complete political transition, a central concern of this thesis. Unlike in Kenya, where there was initially a coalition with members of the former Kibaki Government, they are both instances entailing a full political transition. As regards Côte d'Ivoire, this research addresses allegations that the Forces Nouvelles which supported President Alassane Ouattara to come to power committed crimes during the crisis of 2010-2011, examining the ICC's prioritisation of the case against Laurent Gbagbo and Charles Blé Goudé. As regards Libya, it focuses on allegations that revolutionary militias committed crimes against perceived Gaddafi loyalists during the 2011 Revolution and/or its aftermath. The time frame covered by the ICC's investigation in Côte d'Ivoire comprises 2002-2011

[22] UN Security Council Resolution 1970 (2011), 'Decision referring the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court', UN/S/RES/1970 (2011), dated 26 February 2011.

though the focus is on the Post-Election Violence ("PEV") of 2010-2011, while the Libyan investigation concerns February 2011 to the present.

From the circumstances initially applicable, it was widely regarded that both Côte d'Ivoire and Libya represented situations where the State was 'unable' to genuinely investigate or prosecute due to the total or partial collapse of the national judicial system or unavailability of the accused. Many also consider they are instances where the new authorities were 'all too willing' to prosecute the former regime.

Further, in both situations the international community invoked the Responsibility to Protect (R2P) to justify the use of force to protect civilians, though in doing so, foreign powers assisted the opposition to take power.[23] Combined with a history of colonialism, the affected communities in both countries are sceptical of outside involvement. Both are also African Union (AU) members and issues over the prevalence of investigations in Africa also influence perceptions of the ICC. Today, preliminary examinations are ongoing concerning Colombia, Guinea, Iraq/UK, Nigeria, The Philippines, Ukraine and Venezuela while formal investigations have been opened into Uganda, the DRC, Sudan (Darfur), the CAR, Kenya, Libya, Côte d'Ivoire, Mali, Georgia, Burundi, Bangladesh/Myanmar, and Afghanistan, and a jurisdictional ruling sought over Palestine. However, this research commenced while formal investigations almost exclusively concerned Africa.

The research was conducted over five years from October 2014 to December 2019, enabling an examination of events on the ground over different time periods and analysis of how the

[23] Côte d'Ivoire: UN Security Council Resolution 1975 (2011), adopted 30 March 2011; Libya: UN Security Council Resolution 1970 (2011), supra note 22, adopted 26 February 2011 and 1973 (2011), adopted 17 March 2011. See Monica Serrano, 'The Responsibility to Protect: Libya and Côte d'Ivoire', (2011) 3 Amsterdam Law Forum 92; Foluke Ipinyomi, 'Is Côte d'Ivoire a Test Case for R2P? Democratization as Fulfilment of the International Community's Responsibility to Prevent', (2012) 56 (2) Journal of African Law 151.

OTP's strategic approach has adapted. The methodological approach adopted is interdisciplinary and qualitative in nature. This research has relied on discourse analysis and process tracing to look at the relationship between developments in the situation countries and the actions of the ICC, primarily the OTP, and to understand the different explanations for the events. As well as a theoretical study of the texts, including legislation, policy documents and commentary and the works of the ICC, national judiciary, other analysts, international and local organisations and NGOs, I undertook qualitative research interviews with relevant stakeholders – victims, witnesses, prosecutors, judges, defence counsel and representatives of civil society, international and local NGOs and international organisations. This includes 60 interviews with 71 persons conducted in person in London, The Hague, Côte d'Ivoire and Tunisia (concerning Libya) and through video conferencing with interviewees in Libya and Kenya. In most cases these interviews were conducted one-to-one and where necessary, with the assistance of interpreters from the original French and Arabic. However, group interviews were also conducted in Côte d'Ivoire and Tunisia where this facilitated the best engagement of interviewees. The advance consent of participants was obtained in all instances.

Due to the sensitivity, several interviewees spoke on the condition of anonymity. While many interviewees have given consent to state the information and views provided by them in this study and use their names on the record, I have refrained from doing so in most instances after assessing the risks given the changing security environment in Côte d'Ivoire and Libya. Where agreed, interviewees are referred to only by job title and/or organisation, though in all instances interviewees emphasised they only spoke in a personal capacity and their views do not necessarily reflect that of the organisations to which they are affiliated.

This research applies the substantive rule of law definition adopted in the Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.[24] The rule of law is construed as a state of being, a concept of good governance and human rights as opposed to the narrower construct as a system of rules and processes where all persons are answerable to a court. In this regard, the impact analysis is not confined to the consideration of laws and procedural mechanisms but to the practical effect of rules and actions in terms of the human rights of those affected in the situation countries. The indicators used for the impact assessment are discussed in more detail in Chapter II.

4. Overview of Côte d'Ivoire and Libya

4.1 Côte d'Ivoire

Gbagbo's Presidency spanned October 2000 to December 2010 and was marked by civil unrest which escalated in 2002-2003 and 2010-2011. On 19 September 2002, the Mouvement Patriotique de Côte d'Ivoire (MPCI) with its military wing, the Forces Nouvelles under the leadership of Guillaume Soro, attempted a coup d'état. To quell the rebellion, Gbagbo accepted mediation, resulting in the Linas-Marcoussis Accord and a Government of National Reconciliation.[25] This did not make for lasting peace. An opposition rally in March 2004 resulted in 120 dead, leading to the UN Operation in Côte d'Ivoire (UNOCI).[26] France also installed Operation Licorne, a source of further tension as Gbagbo's supporters advocated for

[24] It defines the rule of law as *"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency" (*UN Security Council, Report of the Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', S/2004/616, 23 August 2004, para.6.

[25] See Freedom House and Raidh, 'Côte d'Ivoire: Une decennie de crimes graves non encore punis September 2002 – May 2011' by Regroupement des Acteurs Ivoiriens des Droits Humains CIDDDH, LIDHO, MIDH, CLUB AU-CI, APDH, PLAYDOO, OFACI, dated 21 March 2014, p.15.

[26] UN Security Council Resolution 1528 (2004), adopted 27 February 2004.

non-interference. While Gbagbo's mandate expired in 2005, the UN endorsed postponing elections, with a more comprehensive peace agreement signed in Ouagadougou in 2007. The first election round took place on 31 October 2010 with three main candidates: Gbagbo for the Presidential Majority Party (LMP) derived from the Ivorian Popular Front (FPI), Ouattara for the Rally of Houphouëtists for Democracy and Peace (RHDP), and Henri Konan Bédié for the Democratic Party of Côte d'Ivoire (PDCI). Gbagbo and Ouattara competed in the second round on 27 November 2010, with Ouattara pronounced winner by the Independent Election Commission on 2 December 2010. Gbagbo declined calls by the UN, AU, Economic Community of West African States (ECOWAS) and France to step down, with the security and defence forces (FDS)[27] and youth militias violently suppressing demonstrations by RHDP supporters. On 17 February 2011, Soro called on rebels to rise up.[28] By 23 February 2011, Côte d'Ivoire was in internal armed conflict.[29] As well as the Forces Nouvelles, pro-Ouattara militias during the crisis included the Commando Invisible and traditional hunters, "Dozos".[30]

An Independent Commission of Inquiry established by the UN Human Rights Council concluded that crimes against humanity were committed by both sides.[31] It found evidence of unlawful killing as part of a widespread and systematic attack against the civilian population by the FDS, militias and mercenaries loyal to Gbagbo in the Abobo and Yopougon areas of Abidjan.[32] In turn, unlawful killing and pillaging as crimes against humanity were allegedly committed by opposition forces loyal to Ouattara, the most grave being an attack on Duekoué 28-29 March 2011.[33] At least 200 civilians were massacred in the Carrefour quarter of

[27] Les Forces de Défense et de Sécurité (FDS).
[28] Report of the Independent Commission of Inquiry on Côte d'Ivoire, Report A/HRC/17/48, dated 1 July 2011 (French version), p.13.
[29] Ibid, p.19, para. 88.
[30] Ibid, p.10, para.30.
[31] Ibid, p.20, para 91.
[32] Ibid, p.20, para 91.
[33] Ibid, p.20, para 91.

Duekoué by the Forces Nouvelles, Dozos and paramilitaries.[34] War crimes were also committed by both sides, including torture and other cruel, inhuman or degrading treatment and violations of physical integrity, attacks against persons not directly participating in hostilities and on cultural, religious and humanitarian buildings including hospitals and forced conscription of minors.[35] Further, the Commission highlighted sexual violence committed by pro-Ouattara forces in the West and Abidjan.[36] These conclusions were corroborated by the National Commission of Inquiry of Côte d'Ivoire (CNE) which estimated that more than 3,000 were left dead or injured.[37] Further, 8,222 were forcibly displaced by Gbagbo or Ouattara militias and the FRCI.[38]

Ultimately, Gbagbo was arrested on 11 April 2011 when new regime forces, the Forces Républicaines de Côte d'Ivoire (FRCI)[39], seized the Presidential Palace with French support. However, armed conflict continued until 28 May 2011 as the rebels consolidated control. Revenge attacks by Ouattara loyalists against those perceived as pro-Gbagbo were reported throughout 2011-2012. Most notably, FRCI members, Dozos and armed youths entered a displaced persons camp in Nahibly in July 2012, summarily executing 37 civilians.[40]

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[34] See Amnesty International, '''They Looked at His Identity Card and Shot Him Dead": Six Months of Post-Electoral Violence in Côte d'Ivoire', AFR/31/002/2011, May 2011, 23-24.
[35] Report of the Independent Commission of Inquiry on Côte d'Ivoire, supra note 28, pp.20-21, paras 92-93.
[36] Ibid, pp.22-23, para 104.
[37] National Commission of Inquiry (Commission Nationale D'Enquete (CNE)), Côte d'Ivoire, Summary Report (Résumé), titled 'Rapport d'enquête sur la violations des droits de l'homme et du droit international humanitaire survenues dans la période du 31 octobre 2010 au 15 mai 2011' (Report of the inquiry on the violations of human rights and humanitarian law in the period 31 October 2010 to 15 May 2011), July 2012, (French only), p.1.
[38] Ibid, p.17.
[39] *Ordonnance 2011-002 du 17 mars 2011 portant unification des Forces Armées Nationales et des Forces Armées des Forces Nouvelles* (establishing the FRCI as a permanent official force).
[40] See FIDH, MIDH and LIDHO, Position Paper, 'Côte d'Ivoire - Attaque du camp de Nahîbly: Une occasion du rendre justice', March 2013, pp.3 and 5.

The ICC's jurisdiction is pursuant to an Article 12 (3) declaration, first conferred in 2003[41] and confirmed in 2010.[42] Côte d'Ivoire ratified the Rome Statute on 15 February 2013. While the OTP identified 38 key incidents of crimes committed between 27 November 2010 and 12 April 2011 by pro-Gbagbo forces;[43] it selected just five for prosecution, solely concerning Abidjan.[44]

Gbagbo was transferred to the ICC in November 2011, pursuant to an arrest warrant.[45] Charles Blé Goudé ('General of the Streets'), Minister of Youth, led the FESCI student movement,[46] Young Patriots and Patriotic Galaxy youth militias.[47] Arrested in Ghana in 2012, he was extradited to Côte d'Ivoire before his transfer to the ICC in March 2014.[48] Gbagbo and Blé Goudé were jointly tried[49] 2016-2019, resulting in an acquittal at half time.[50] Simone Gbagbo, former First Lady, allegedly recruited and armed volunteers into the FDS during the 2010-2011 crisis and co-ordinated attacks on the opposition.[51] Despite unsuccessfully challenging the admissibility of her case, Côte d'Ivoire refused to surrender her, trying her in

[41] Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, 18 April 2003.
[42] Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, 14 December 2010.
[43] ICC, Trial Chamber I, *The Prosecutor v Laurent Gbgabo and Charles Blé Goudé*, Transcript of Proceedings, ICC-02/11-01/15-t-9-Eng, 28 January 2016, at p.62.
[44] This narrow focus was criticised by the Victims' Legal Representative: ICC, Legal Representative for Victims, Opening Speech, Trial Chamber I, *The Prosecutor v Laurent Gbgabo and Charles Blé Goudé*, Transcript of Proceedings, ICC-02/11-01/15-t-10, 29 January 2016, at p.44.
[45] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo*, Pre-Trial Chamber III, 'Warrant of Arrest for Laurent Gbagbo', ICC-02/11-26, dated 23 November 2011.
[46] La Fédération Etudiante et Scolaire de Côte d'Ivoire.
[47] Appointed to office by Gbagbo 6 December 2010.
[48] Pre-Trial Chamber III, *The Prosecutor v Charles Blé Goudé*, 'Warrant of Arrest for Charles Blé Goudé', ICC-02/11-01/11-1, dated 21 December 2011, unsealed 30 September 2013.
[49] Trial Chamber I, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, 'Decision to join the Gbagbo and Blé Goudé cases', ICC-02/11-01/11-810, ICC-02/11-02/11-222, ICC-02/11-01/15-1, dated 11 March 2015.
[50] Oral decision of Pre-Trial Chamber I, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, 15 January 2019.
[51] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Simone Gbagbo*, Pre-Trial Chamber III, 'Warrant of Arrest for Simone Gbagbo', ICC-02/11-01/12-1, 29 February 2012, unsealed 22 November 2012.

a national court instead where she was similarly acquitted.[52] In 2015, Alassane Ouattara won a second term in office to serve until the next Presidential elections in October 2020. The OTP opened an investigation into crimes allegedly committed by pro-Ouattara forces, Côte d'Ivoire II ("CIV-II"), in 2016. There are no public arrest warrants to date.

4.2 Libya

Mu'ammar Gaddafi came to power in 1969, suspending the Constitution and governing Libya based on his 'Green Book'.[53] He did not tolerate dissent, incarcerating political prisoners in Abu Salim where many were massacred in 1996. The 'Arab Spring' began in Tunisia in January 2011. The first protest in Libya on 15 February 2011 in Benghazi was catalysed by the arrest of Fathi Terbil and another, representatives of the families of those killed at Abu Salim. Demonstrations continued in Baida and Zintan, with further protests on 17 February 2011, a 'Day of Rage', when demonstrators were met with violence.[54] Similarly, protests in Misrata saw a robust response by the army, Imhammad Imgharif Brigade and 32 Reinforced Brigade.[55] By 24 February 2011, hostilities escalated to an internal armed conflict.[56] The opposition included exiled political groups[57] and others with an Islamic agenda.[58] In early

[52] Judgment of the Court of Assize of Abidjan-Plateau, Côte d'Ivoire, in the case of Simone Gbagbo (Blood Crimes case) of 28 March 2017 – Arrêt No. 36/16 du 28 mars 2017, Cour d'Appel d'Abidjan, Cour d'Assises seant Abidjan 1ère Session d'Annèe 2015-2016, Ministere Public v Ehivet Simone Gbagbo.

[53] For background, see Dirk Vandewalle, *A History of Modern Libya*, Second Edition, (Cambridge: Cambridge University Press, 2012).

[54] Brian McQuinn, Chapter 10, 'History's Warriors: The Emergence of Revolutionary Battalions in Misrata' in Peter COLE and Brian MCQUINN (Eds), *The Libyan Revolution and its Aftermath*, (London: Hurst & Company, 2015), 228-255, 233. This date was symbolic as the fifth anniversary of the death of 12 protestors in Benghazi on 17 February 2006, after a demonstration over cartoons depicting the prophet in Denmark escalated into an anti-Qadhafi march. Planned protests the same date in 2007 resulted in mass arrests, with activists imprisoned for between 6 to 25 years on political grounds such as attempts to overthrow the political system. See also Amnesty International, 'The Battle for Libya: Killings, Disappearances and Torture', Report MDE 19/025/2011, September 2011, at p.13.

[55] See McQuinn, supra note 54, at 230-235.

[56] Report of the International Commission of Inquiry on Libya, Report A/HRC/17/44 , 1 June 2011, at p.4.

[57] For example, the Libyan League for Human Rights, Libyan Constitutional Union, National Front for the Salvation of Libya, National Conference for the Libyan Opposition, the Tebu Front for the Salvation of Libya and the Libyan Tamazight Congress: See International Crisis Group, Middle East and North Africa Report No. 107, 'Popular Protest in North Africa and the Middle East (V); Making Sense of Libya', dated 6 June 2011, pp.19-20.

2011, the opposition, including key defectors, formed a self-declared interim government for liberated areas – the National Transitional Council (NTC).[59] A military committee was set-up with fighters banded together as the 'Free Libya Armed Forces'. However, hundreds of brigades operated on a municipal, city, street and block basis, led by "doctors, mechanics, imams" and others from everyday professions.[60] These fighters are known as 'thuwwar' or revolutionaries, without whom Libya's liberation would not have been achieved. The most prominent are brigades from Zintan, Misrata, Benghazi, Zawiya and Tripoli.[61] While military councils were established to facilitate communication and distribute weapons, groups largely remained autonomous.[62] Cities gradually fell, beginning with Benghazi in February 2011 and, following air support by NATO from 19 March, ending in Sirte on 20 October 2011 with the capture of Gaddafi.[63] On 23 October 2011, the NTC declared Libya fully liberated.[64]

The NTC handed over to the General National Congress (GNC) after the first democratic elections in Libya in four decades in July 2012. However, a governance crisis has beset Libya since the end of 2014. The GNC's mandate expired in February 2014 based on a Constitutional Declaration of 2012. New elections were held in June 2014 for a National Assembly, the House of Representatives (HoR), pursuant to a Constitutional amendment.[65] The HoR was due to convene in August 2014 in Benghazi. However, a decision to meet in Tobruk instead resulted in boycotting by those deeming it unconstitutional. When called to

[58] For example, the Libyan unit of the Muslim Brotherhood, the Libyan Islamic Group and the Libyan Islamic Fighting Group (LIFG) which became the Libyan Islamic Movement for Change. Post-2011 revolution, a political party was established in Libya by the Muslim Brotherhood called the Justice and Construction Party.
[59] For a breakdown of the membership of the NTC, including its Executive Board, see International Crisis Group, Middle East and North Africa Report No. 107, 'Popular Protest in North Africa and the Middle East (V); Making Sense of Libya', supra note 57, pp24-25.
[60] McQuinn, supra note 54, at 246.
[61] McQuinn, supra note 54, at 246. In Misrata alone there were as many as 236 groups at the start, consolidating into 150 groups operating on the ground by March 2011 (pp.230 and 245).
[62] McQuinn, supra note 54, at 239.
[63] See International Crisis Group, Middle East and North Africa Report No. 115, 'Holding Libya Together: Security Challenges after Qadhafi', 14 December 2011, pp.2-6.
[64] Ibid, pp.1-2.
[65] See International Crisis Group (ICG), Middle East and North Africa Report No. 157, 'Libya: Getting Geneva Right', dated 26 February 2015, p.2.

adjudicate, the Supreme Court went further than anticipated, ruling the amendment to the Constitutional Declaration was invalid.[66] Consequently, many consider the HoR lost its democratic mandate. A separate government formed in Tripoli, renewing support for the GNC as the 'legitimate' parliament but the HoR refused to disband.

UN-brokered efforts led to the Libyan Political Agreement (LPA) in December 2015 and establishment of a Government of National Accord (GNA). Nevertheless, there remains significant opposition to the GNA, with the HoR and a parallel Government operating in the East, supported militarily by Khalifa Haftar of the so-called Libyan National Army (LNA).

Gross human rights violations were allegedly committed by both sides during the Revolution and its aftermath. An International Commission of Inquiry on Libya established by the UN Human Rights Council found abuses by regime forces were so widespread and systematic as to amount to crimes against humanity, including unlawful killing, rape, torture and enforced disappearances.[67] It concluded that war crimes and crimes against humanity were also committed by revolutionary fighters, including unlawful killing, arbitrary arrest and the detention and torture of persons suspected to support Gaddafi, in particular, Tawerghans.[68]

The Libyan situation was referred to the ICC by the Security Council on 26 February 2011.[69] The OTP acted expeditiously, with the Prosecutor announcing the decision to open an investigation 3 March 2011. On 27 June 2011, arrest warrants were issued for Mu'ammar Gaddafi, Saif Gaddafi and Abdullah Al-Senussi. Saif, the son, was appointed General Co-

[66] Constitutional Chamber of the Supreme Court of Libya, ruling 17/16 of 6 November 2014.
[67] Report of the International Commission of Inquiry on Libya, 2011, supra note 56, at 7.
[68] Report of the International Commission of Inquiry on Libya, Report A/HRC/19/68 of 8 March 2012, at 12, paras 63 and 64.
[69] UN Security Council Resolution 1970 (2011), supra note 22.

ordinator of the Popular Social Command in 2009, de facto Prime Minister.[70] He was initially seen as a moderate reformist but on 20 February 2011, advocated a violent crackdown. He was captured by the Zintan Brigade in November 2011. Al-Senussi, Qaddafi's brother-in-law and Head of Internal Security, allegedly played a significant role in the violence exerted in 2011. He was arrested in Mauritania in March 2012 and extradited to Libya in September. Saif and Al-Senussi were tried within Libya 2014-2015. While the ICC acknowledged the domestic proceedings concerning Al-Senussi, Libya successfully contesting admissibility; an arrest warrant remains outstanding for Saif.

A further arrest warrant against Khaled Al-Tuhamy, Head of the Internal Security Agency, was made public in April 2017.[71] Al Tuhamy is most likely in Egypt, which has signed but not ratified the Rome Statute.[72] In turn, warrants were publicly issued against Mahmoud Al-Werfalli on 15 August 2017[73] and 4 July 2018.[74] He is wanted for the war crime of murder for the summary execution of civilians or persons hors de combat between 3 June 2016 and 16 July 2017 and a further incident on 24 January 2018, all in Benghazi or surrounding areas. Al-Werfalli is Axes Commander of the Al-Saiqa Brigade/Special Forces Unit, led by Colonel Wanis Abdel Kareem Bukhmada. The Al-Saiqa Brigade joined the Operation Dignity coalition in May 2014,[75] under the overall command and control of the LNA.[76] To date, neither the ICC nor the Libyan authorities have publicly opened investigations against anyone

[70] Report of the International Commission of Inquiry on Libya, 2011, supra note 56, 19-20, para.27.
[71] ICC, Situation in Libya, Pre-Trial Chamber I, *The Prosecutor v Al-Tuhamy Mohamed Khaled*, 'Warrant of Arrest', ICC-01/11-01/13-1, 18 April 2013, unsealed 24 April 2017.
[72] The Libya Observer, 'Source: Egypt is not willing to hand over Libyan fugitive Al Tuhami to ICC', 26 April 2017.
[73] ICC, Situation in Libya, *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, PTC I, 'Warrant of Arrest', issued pursuant to Article 58 (1) of the Rome Statute, ICC-01/11-01/17-2, 15 August 2017 ('Al-Werfalli First Warrant of Arrest').
[74] ICC, Situation in Libya, *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, PTC I, 'Second Warrant of Arrest', issued pursuant to Article 58 (1) of the Rome Statute, ICC-01/11-01/17-13, 4 July 2018 ('Al-Werfalli Second Warrant of Arrest').
[75] International Crisis Group, Middle East and North Africa Report No. 140, 'Trial by Error: Justice in Post-Qadhafi Libya', 17 April 2013, at pp.15-16.
[76] Al-Werfalli First Warrant of Arrest, supra note 73, at paras 6-9.

further up the LNA command structure. There are also no ICC arrest warrants against members of the former opposition for crimes allegedly committed during the Revolution.

5. Structure

Part One begins with a theoretical analysis of local ownership, complementarity, admissibility and co-operation. Chapter II considers the importance of local ownership and situates the ICC within a transitional justice framework. It sets out the background to complementarity and the OTP's strategic approach to date, before analysing the notion of complementarity as catalyst and discussing the expected catalytic effects through an examination of existing empirical research. It also discusses the methodology for tracing impact in this study, including the use of rule of law indicators. Chapter III on admissibility considers how the Court has applied the principle of complementarity and argues that a higher threshold applies to exercising jurisdiction in the place of investigation and prosecution at the national level. Chapter IV on co-operation analyses the framework for reverse co-operation, highlighting how the OTP could do more to assist and encourage domestic action. It also considers other modalities through which the Court may build domestic capacity during ICC proceedings and co-operation after admissibility is contested.

Part Two consists of a practical analysis of the impact of the ICC's engagement in Côte d'Ivoire and Libya, based on empirical research. Chapter V examines the situation in Côte d'Ivoire while Chapter VI examines Libya. These chapters analyse developments concerning the rule of law and assess the extent to which they can be attributed to the ICC. Chapter VII uses the empirical findings from the case studies to critically reflect on the catalytic effects of complementarity and draws lessons from this experience for ICC reform. Chapter VIII

concludes the examination by further considering local ownership, the ICC's place in relation to national transitional justice processes and multi-level dialogue going forward.

CHAPTER II: LOCAL OWNERSHIP, COMPLEMENTARITY AND TRACING IMPACT

This Chapter discusses the importance of local ownership and situates the ICC within a transitional justice framework. It tracks the development of the principle of complementarity and the OTP's related policies, sets out the notion of complementarity as catalyst and discusses its expected catalytic effects through an examination of existing empirical research. Finally, it discusses the methodology for tracing impact applied in this study, including the use of rule of law indicators.

1. The Importance of 'Local Ownership'

The concept of 'local ownership' originally derives from international development and peace studies and reflects the need for 'buy-in' at the local level for a sustainable solution.[1] It denotes responsiveness to local needs, consultation with and participation by local stakeholders, accountability to the affected community, control over the process and national sovereignty.[2] As recognised by Kofi Annan in 2004, local ownership is essential given that "no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable".[3]

First, international law is primarily consent based. The principle of complementarity in the Rome Statute's Preamble entrusting States with the primary responsibility to

[1] See Simon Chesterman, 'Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations', (March 2007) 1 (1) Journal of Intervention and Statebuilding 3-26, at 7-9, citing OECD Development and Assistance Committee (DAC) policy document titled 'Development Partnerships in the New Global Context', dated May 1995 at 2.
[2] Chesterman, ibid, at 10.
[3] UN Security Council, Report of the Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', S/2004/616, 23 August 2004, para.17.

investigate and prosecute international crimes was the cornerstone on which it was agreed.[4] While Libya is a third State, its obligation to co-operate with the ICC ultimately derives from the UN Charter.[5] The imposition of international justice processes which do not meet local demands affects State sovereignty as it would in effect mean curtailing national autonomy.[6]

Moreover, local justice processes may be more responsive to the interests of the affected society. If the intended beneficiaries of the process are the victims or the affected communities within a situation country, a process conducted in their own language and legal culture and with contextual understanding is generally the best option. It may also be the most practical in terms of the location of the evidence, victims, witnesses and defendants. To some extent, even if committed entirely within the bounds of one society, the prosecution of international crimes will be of interest to both a domestic and international audience.[7] However, problems arise if 'ownership' of the process is split such that there is neither popular acceptance of its legitimacy within the relevant community nor sufficient 'buy-in' and accountability for the outcome at either the domestic or international level.[8]

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[4] John Holmes, Chapter 1, 'The Principle of Complementarity', in Roy Lee (Ed), *The ICC: The Making of the Rome Statute, Issues, Negotiations, Results*, (The Hague: Kluwer Law International, 1999), 41-78.

[5] Further to UN Security Council Resolution 1970 (2011), dated 26 February 2011, 'Decision referring the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court', UN/S/RES/1970 (2011) and Articles 25, 103 and Chapter VII of the UN Charter.

[6] Adam Branch, 'International Justice, Local Injustice', (Summer 2004) Dissent Magazine 22, at 25.

[7] Frédéric Mégret, 'Global or Local Justice: Who Should Try Ousted Leaders?: In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', (2005) 38 Cornell Int'l L. J. 725-751, at 739-741 (arguing for a 'representational theory' of the nature of the crimes in issue which results in a 'dual ownership' between the international and domestic realms. As such, hybrid tribunals may be the best option).

[8] Phillip Rapoza, 'International Criminal Tribunals in the 21st Century: Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?' (2006) 21 Am. U. Int'l. L. Rev. 525-540 (examining the serious crimes process in East Timor).

Further, in the process of normative change towards a society governed by the rule of law, internalisation is vital. As Ramji-Nogales states, "internalised compliance is the most effective method of building a law-abiding society, particularly in transitional societies, where enforcement mechanisms are likely to be weak".[9] Internalisation may be legal, political and/or social, with each stage reflective of societal acceptance of an international norm.[10] Legal internalisation occurs when the norm is incorporated into the domestic legal system through executive or legislative action or judicial interpretation; political internalisation reflects its acceptance by political elites and adoption as official policy; and social internalisation is when it acquires public legitimacy including general obedience.[11]

As Ryngaert argues, new norms will only really be internalised when accountability processes take place within the affected society; as such, domestic prosecutions have a greater impact on entrenching the rule of law than those conducted internationally.[12] In the early stages of a transition, "little normative change occurs without significant domestic movements supporting such change".[13] Further, local 'norm entrepreneurs' – civil society, NGOs and other local organisations – are critical for framing the issues and cascading new emerging norms throughout the wider society for internalisation.[14] It may also harm the process of consolidating the rule of law in terms of internalising norms of equal justice and accountability if some members of

[9] Jaya Ramji-Nogales, 'Bespoke transitional justice at the International Criminal Court', Chapter 4 in Christian De Vos, Sara Kendall and Carsten Stahn (Eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (Cambridge: Cambridge University Press, 2015), 106-121 at 113.
[10] Harold Hongju Koh, 'Why Do Nations Obey International Law?', (1996-1997) 106 Yale Law Journal 2599-2659, at 2656-2657.
[11] Koh, ibid, at 2656-2657.
[12] Cedric Ryngaert, *The Effectiveness of International Criminal Justice*, (Antwerp: Intersentia, 2009) at xiii, 146 and 155.
[13] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', (1998) 52 (4) International Organization 887-917, at 896-897.
[14] Finnemore and Sikkink, ibid, at 895.

the community are tried domestically and others internationally with different treatment.[15]

Domestic trials have an educational and symbolic benefit in a transitional society. Bringing perpetrators to justice within their local community would be an expression of that society's condemnation of the conduct in issue and serve to demonstrate a change from widespread impunity to accountability to the law. This may deter future offending. It would also recognise victims' suffering and establish a historical record, albeit a judicialised one. Further, conducting trials in closer proximity to affected communities improves their reach as it enables better attendance by the local population and facilitates the engagement of those who may not follow ICC proceedings, for example, due to having no access to the internet.[16] Moreover, it may build confidence in local judicial institutions if trials are conducted in accordance with minimum standards of due process, even if some flaws remain, especially where there is a history of the opposite under a prior regime.[17]

There is also a need to recognise the diversity of domestic systems and acknowledge different conceptions of what constitutes 'justice'. International proceedings may not reflect local socio-cultural norms, including the affected community's concept of 'justice'.[18] For example, the Acholi in Uganda see accountability as involving more

[15] Harmen Van de Wilt, 'Equal Standards? On the Dialectic between National Jurisdictions and the ICC' (2008) 8 International Criminal Law Review 229.
[16] See Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What Should be Expected of International Criminal Courts?' (2016) 30 (4) Ethics & International Affairs 429-447, at 441-443 (noting that problems of medium and distance from the audience affect the ICC's ability to have expressive impact at the local level).
[17] See Frédéric Mégret and Marika Giles Sampson, 'Holding the Line on Complementarity in Libya: The Case for Flawed Domestic Trials', (2013) 11 Journal of International Criminal Justice 571.
[18] Jessica Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings', (2006) *4 J. Int'l Criminal Justice 745*.

than retribution and formal legal processes.[19] Similarly, concepts of justice in the Arabic world point more towards community reconciliation and rehabilitation and each nation has its own historical and cultural context which affects new transitional justice processes.[20] As Turner emphasises, "it is the local engagement with rights that will lead to the emergence of an embedded human rights culture, not the existence in law of contested international standards."[21]

Further, the international community should be wary of imposing solutions regarded as Western on a growing democracy struggling to address the past. In this regard, it may be that requiring particular judicial structures "elevates (…) international priorities, such as the enforcement of international law, at the expense of more locally appropriate initiatives, which may be equally or more effective in instilling respect for the rule of law."[22] While international law may place some constraints on national choices in terms of the exclusion of amnesty, consideration of victims' rights to participate, to protection and to reparation and in the definition of international crimes, this is not necessarily irreconcilable with an approach favouring local autonomy.[23] The issue is that, as recognised by Drumbl, there is a prevailing problem

[19] See Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention', (2007) 21 (2) Ethics and International Affairs 179-198; and Sverker Finnström, 'Reconciliation Grown Bitter? War, Retribution, and Ritual Action in Northern Uganda', Chapter 7 in Rosalind Shaw and Lars Waldorf (Eds), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence (*Stanford: Stanford University Press, 2010), 135-156.

[20] For more on processes in the Arab world, see Ibrahim Fraihat, *Unfinished Revolutions: Yemen, Libya and Tunisa After the Arab Spring*, (London: Yale University Press, 2016); and Noha Aboueldahab, *Transitional Justice and the Prosecution of Political Leaders in the Arab Region: A Comparative Study of Egypt, Libya, Tunisia and Yemen*, (Oxford: Hart Publishing, 2017).

[21] Catherine Turner, 'Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law', (2008) 2 Int'l J. Transitional Justice 126, 133.

[22] Turner, ibid, at 135 (footnote omitted) (emphasis added).

[23] Godfrey M. Musila, 'Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions', (2009) 3 Int'l J. of Transitional Justice 445.

of "legal mimicry" where processes and reforms being adopted are solely modelled on an international 'one fits all' framework rather than adapted to the local context.[24]

To prioritise local ownership, it is also necessary to recognise that it takes time to implement domestic judicial reform, especially in societies emerging from conflict. Communities emerging from conflict or another transitional event move at a different pace and the direction is not always linear.[25] As highlighted by Clark, giving effect to local ownership means "taking a risk on domestic practices that may not completely fulfil expectations but nevertheless have the inherent value of maintaining national sovereignty, autonomy, longevity, contextual understanding and presence".[26]

2. The ICC in a Transitional Justice Framework

While not universally accepted,[27] this research adopts the broad definition of transitional justice as the "full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[28] The ICC may be seen as a transitional justice mechanism in a trend towards the "normalization of post-conflict law as the global rule of law".[29] However, for Mégret, it is also a question of

[24] Mark A. Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge: Cambridge University Press, 2007) at 123-148. See also Anna Macdonald, ' "Somehow This Whole Process Became So Artificial": Exploring the Transitional Justice Implementation Gap in Uganda', (2019) 13 International Journal of Transitional Justice 225-248.
[25] Harvey M Weinstein, Laurel E Fletcher, Patrick Vinck and Phuong N Pham, 'Stay the Hand of Justice: Whose Priorities Take Priority?' Chapter 2 in Rosalind Shaw and Lars Waldorf (Eds), supra note 19, 27-48 at 36.
[26] Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2018), at 311.
[27] See e.g. Christine Bell, Colm Campbell and Fionnuala Ni Aoláin, 'Transitional Justice: (Re) Conceptualising the Field', (2007) 3(2) International Journal of Law in Context 81.
[28] Report of the Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', supra note 3, para.8. See aslo Ruti Teitel, *Transitional Justice*, (New York: Oxford University Press, 2000).
[29] Ruti Teitel, 'Transitional Justice in a New Era', (2002) 26 (4) Fordham International Law Journal 893, at 903.

in whose name the ICC is acting and for whom, considering that rather than the international community, the dominant message projected by the Court today is that it is working for the societies affected by mass crimes and in particular, victim communities.[30] With this framework, "the goal of international criminal justice is less an international legal goal of reining in States than the transitional justice goal of helping societies shift to forms of governance that minimise the likelihood of recurrence of international crimes".[31]

Ramji-Nogales agrees that the ICC may properly be conceptualised as a mechanism of transitional justice, though the form of transitional justice is necessarily 'bespoke' whereby although the Court is not within the affected society, the focus should remain one of local ownership with local preferences taken into account in determining when and how the ICC should intervene.[32] She recognises difficulties over how to measure local preferences, that often different local stakeholders will have competing preferences over whether an international prosecution should proceed and preferences may shift over time.[33] As such, it is proposed that the Court engages country experts and makes use of empirical population surveys or stakeholder assessments during the lifespan of its intervention, at least during the investigation and prosecution phases and post-verdict.[34]

However, it would be impossible for the ICC alone to perform all the functions expected of a transitional justice process. As an earlier study by Olsen, Payne and

[30] Frédéric Mégret, 'In Whose Name? The ICC and the Search for Constituency', Chapter 1 in Christian De Vos, Sara Kendall and Carsten Stahn (Eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (Cambridge: Cambridge University Press, 2015), 23-45 at 37-38.
[31] Mégret, ibid, at p.38.
[32] Jaya Ramji-Nogales, supra note 9, at 109, 111-113.
[33] Ramji-Nogales, supra note 9, at 111-112.
[34] Ramji-Nogales, supra note 9, at 118.

Reiter concludes, it is the combination and sequencing of trials, truth commissions and other transitional justice mechanisms that leads to a positive outcome.[35] As part of the transitional framework, one of the most important roles for the ICC may be to "create political space for other transitional justice efforts" undertaken at the local level.[36] For example, if the ICC handles the most sensitive prosecutions at the beginning of a transition, it may give States time to build the capacity of their justice systems or provide breathing room for alternative mechanisms. However, this presents an obvious risk of the Court being used by political elites in the affected State to further their own ends, with the possible entrenchment of "societal patterns of domination and exclusion".[37] In this regard, the clearest risk is that of victor's justice if the ICC focuses on one side and nothing is put in place to address potential abuses by the victors.

In the ideal transitional justice scenario, efforts by the ICC at the international level would have a 'justice cascade' effect in catalysing further efforts and more rights-compliant practices at the domestic level.[38] However, this effect may only materialise if the Court is seen as legally and sociologically legitimate. The notion that there is a "unified society speaking with one voice" in ICC situation countries is problematic.[39] The ICC will never be able to please all constituencies. Nevertheless, the ICC's effectiveness as a transitional justice mechanism requires victims, perpetrators and societal elites in the affected State and at least one group of external stakeholders to

[35] Tricia Olsen, Leigh Payne and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, (Washington DC: United States Institute of Peace, 2010).
[36] Ramji-Nogales, supra note 9, at 120.
[37] Ramji-Nogales, supra note 9, at 112.
[38] Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', (2001) 2 (1) Chicago Journal of International Law 1; and Kathryn Sikkink, *The Justice Cascade – How Human Rights Prosecutions are Changing World Politics*, (New York: W.W. Norton & Co, 2011), 6.
[39] Mégret, supra note 30, at 40-41.

consider it legitimate.[40] A society will only internalise new norms if it sees the mechanism that promulgates them as legitimate. Internalisation occurs when "these norms begin to define how societal stakeholders conceive their own interests".[41] Yet, if one of these societal groups feels marginalised, excluded or victimised by the process, such norms are unlikely to be locally internalised. This only reinforces the need to ensure equal justice and accountability, to prevent a perceived lack of independence or impartiality from undermining the Court's credibility.

Further, while the Court may have a role in the transitional justice process of affected States, the approach should not be ICC-centric. Rather, the ICC is just one element of the process and may contribute positively without exercising jurisdiction. For example, Okafor and Ngwaba accept the ICC's role in transitional justice processes in Africa but emphasise the need for it to be used "more sparingly, systematically and thoughtfully than is currently the case".[42] This starts with the OTP exercising more restraint. Most notably, they question the necessity of the ICC taking on cases from Uganda or Côte d'Ivoire on the basis that they could have been handled domestically.[43] They reconceptualise the ICC's transitional justice role in such contexts "to be more like the fourth official in a football match. A fourth official is neither a player nor quite a referee, yet her or his presence reminds all involved, and watching, of the real possibility of alternative justice, providing some level of incentive for fair play on the pitch".[44] Moreover, even if it does become necessary for the ICC intervene, the sequencing of this is crucial so as not to undermine genuine

[40] Ramji-Nogales, supra note 9, at 113.
[41] Ramji-Nogales, supra note 9, at 113.
[42] Obiora Chinedu Okafor and Uchechukwu Ngwaba, "The International Criminal Court as a 'Transtional Justice' Mechanism in Africa: Some Critical Perspectives" (2015) 9(1) International Journal of Transitional Justice 90.
[43] Okafor and Ngwaba, ibid, at 106-107.
[44] Okafor and Ngwaba, ibid, at 106-107.

local efforts.[45] Most notably, circumventing the domestic justice system through asserting jurisdiction could damage attempts to build trust in local institutions in a transitional context.[46]

3. Developing the Concept: From Primacy and Rule 11bis of the ICTY and ICTR to Complementarity at the ICC

The ICTY and ICTR were established under Chapter VII of the UN Charter.[47] They were ad hoc tribunals to hold leaders to account when States with jurisdiction were effectively unable or unwilling to do so. Trials of Ante Gotovina within Croatia;[48] Slobodan Milošević[49] and Vojislav Šešelj[50] within Serbia; or Rasim Delić within Bosnia and Herzegovina;[51] were neither viewed as a realistic possibility, nor would they be considered anything but a 'sham' to shield the accused from justice if conducted nationally. In turn, Bosnia and Herzegovina would be unable to try Radovan Karadžić[52] or Ratko Mladić[53] due to the fragility of the peace settlement; a trial would be seen as victor's justice and unfair or could destabilise the country. While the ICTR and ICTY Statutes provided for concurrent jurisdiction with national courts, the tribunals were accorded primacy.[54] The relationship was vertical, with

[45] Okafor and Ngwaba, ibid, at 107.
[46] See Okafor and Ngwaba, ibid, at 95.
[47] UN Security Council Resolution 827, U.N. Doc. S/RES/827, 25 May 1993; UN Security Council Resolution 955, U.N. Doc. S/RES/955, 8 November 1994.
[48] ICTY, *Prosecutor v Ante Gotovina et al.*, Case No. IT-06-90-T, Amended Joinder Indictment, 12 March 2008.
[49] ICTY, *Prosecutor v Slobodan Milošević*, Case No. IT-02-54-T, Amended Indictment for Bosnia 21 April 2004; Second Amended Indictment for Croatia, 28 July 2004; and Second Amended Indictment for Kosovo, 29 October 2001.
[50] *Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-T, Third Amended Indictment, 7 December 2007.
[51] As Commander of the Main Staff of the Army of Bosnia and Herzegovina (ABiH), referral was denied since his level of responsibility required he be tried by the ICTY; *Prosecutor v Rasim Delić*, Case No. IT-04-83-PT, 'Decision on Motion for Referral of Case Pursuant to Rule 11*bis* (RB)', 9 July 2007, at paras.24-26.
[52] *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-I, Amended Indictment, 31 May 2000.
[53] *Prosecutor v Ratko Mladić*, Case No. IT-95-5/18, Amended Indictment, 11 October 2002.
[54] Updated Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 9(2), UN Security Council Resolution 827, U.N. Doc. S/RES/827, Annex 1, 25 May 1993, (as amended, Feb.

national authorities obliged to defer cases upon request.[55] This relationship would always be contentious given the loss of sovereignty and as such, difficulties securing co-operation were inevitable.[56]

However, Rule 11bis somewhat reversed the traditional concept of primacy by enabling referrals to national courts, thereby according a greater role to the post-conflict States in the accountability process.[57] The Security Council called on the tribunals to concentrate on trying the "most senior" leaders and to transfer intermediate and lower-rank accused to national jurisdictions, pursuant to a Completion Strategy.[58] Rule 11bis of the Rules of Procedure and Evidence (RPE) of each Tribunal was adopted by the plenary of judges to enable the transfer of cases.[59] While the Completion Strategies were undoubtedly founded on the international community's desire to accelerate the end of their financial commitment to the tribunals, engaging the post-conflict States in the solution would significantly facilitate lasting peace and promote justice nationally.[60] Indeed, the Security Council stressed that "the strengthening of national judicial systems is crucially important to

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2008), [hereafter "ICTY Statute"]. Statute of the International Criminal Tribunal for Rwanda, Art. 8(2), UN Security Council Resolution 955, U.N. Doc. S/RES/955, Annex 1, 8 November 1994, (as amended, 2007), [hereafter "ICTR Statute"].

[55] For example, the ICTR Prosecutor monitored the trial of four RPF soldiers arrested in Rwanda and emphasised the power of the Tribunal to retract a case if the prosecution was not conducted in a transparent manner; *see* Hirondelle News Agency, 'ICTR/Transfer – ICTR can retract a trial, says Top Prosecutor', Fondation Hirondelle (Kigali), 12 June 2008.

[56] See Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, (Cambridge: Cambridge University Press, 2008).

[57] *See* Mohamed M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11bis of the Ad Hoc Tribunals', (2008) 57 Int'l & Comp. L.Q. 403, at 405.

[58] UN Security Council Resolution 1503, U.N. Doc. S/RES/1503, 28 August 2003; UN Security Council Resolution 1534, U.N. Doc. S/RES/1534, 26 March 2004.

[59] ICTY Rules of Procedure and Evidence, IT/32/Rev. 41, (as amended, 28 February 2008); ICTR Rules of Procedure and Evidence (as amended, 14 March 2008). The Appeals Chamber held that it was within the Tribunals' inherent jurisdiction to amend Rule 11*bis* to enable transfers to national courts; see *Prosecutor v Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, 'Decision on Rule 11*bis* Referral (AC)', 1 September 2005, at paras.10-17; and *Prosecutor v Željko Mejakić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević*, Case No. IT-02-65-AR11*bis*.1, 'Decision on Joint Defence Appeal against Decision on Referral under Rule 11*bis* (AC)', 7 April 2006, at paras.12-16.

[60] See Sarah Williams, 'ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price?', (2006) 17 Crim. L.F. 177, 215.

the rule of law (…)."[61] This was similarly emphasised by then ICTY President Theodor Meron who recognised that transferring cases to national courts would ultimately bring "reconciliation, justice and the rule of law".[62] Similar thinking, alongside concerns over national sovereignty, gave rise to the principle of complementarity that governs the ICC's relationship with national courts.[63]

The principle of complementarity means national courts have jurisdiction first and foremost.[64] Article 17 (1) of the Rome Statute implements complementarity in providing that a case is inadmissible before the ICC if: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated …and the State has decided not to prosecute …unless the decision resulted from unwillingness or inability; (c) the person concerned has already been tried and a trial by the Court is not permitted under Article 20 (3); or (d) the case is not of sufficient gravity to justify further action by the Court. Further, before initiating a formal investigation, Article 53 (1)(c) of the Rome Statute obliges the Prosecutor to consider whether "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." This presents an opportunity to take into account domestic alternative justice mechanisms.

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[61] UN Security Council Resolution 1503, *supra* note 58, preamble, at para.10; UN Security Council Resolution 1534, supra note 58, at para.9.

[62] The President of the ICTY, 'Assessment and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia', at para.12, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN. Doc. S/2005/343, 25 May 2005.

[63] See Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2001-2002) 23 Mich. J. Int'l Law 869, 869-975.

[64] See Héctor Olásolo, *The Triggering Procedure of the International Criminal Court*, (The Hague: Brill Nijhoff, 2005), 121-171.

Complementarity mirrors R2P, which recognises that the primary duty is with the State though the international community may intervene in the case of inaction or where the State is responsible for gross human rights violations.[65] This is reflected in the Rome Statute's preamble which notes "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", though "the most serious crimes of concern to the international community as a whole must not go unpunished" and to secure against this risk, "effective prosecution must be ensured…by enhancing international cooperation" with the object to end impunity.

Like the statement of the first Prosecutor Moreno-Ocampo,[66] the expert paper on some policy issues before the OTP of 2003 states the ICC's effectiveness "should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success".[67] In the Kampala Declaration of 2010, States Parties reaffirmed their determination to end impunity; and to "continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally recognised fair trial standards, pursuant to the principle of complementarity".[68] The experts foresaw that the extent of the ICC's impact in prompting States to carry out genuine proceedings would depend on engagement and co-operation; the prospect of the ICC exercising jurisdiction; conducting its own "exemplary and standard-setting proceedings"; and

[65] For background, see Cristina Gabriela Badescu, *Humanitarian Intervention and the Responsibility to Protect: Security and Human Rights*, (New York: Routledge, 2011), First Edition.
[66] Luis Moreno-Ocampo, Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, The Hague, The Netherlands, p.3.
[67] ICC, Office of the Prosecutor, 'Paper on some policy issues before the OTP', September 2003, p.4.
[68] Kampala Declaration, RC/Decl.1, adopted at the 4th Plenary meeting, 1 June 2010, at paras. 2, 3 and 5.

through the ICC's "moral presence, which will shape perspectives and strengthen resolve on the need for accountability".[69]

Complementarity was initially conceived only as a jurisdictional principle regulating the relationship between domestic and international courts, overcoming States' reluctance to cede sovereignty as it sits within a policy framework where the international level is to treat national judicial mechanisms with a degree of deference.[70] This 'negative' notion of complementarity envisaged the relationship between the ICC and national authorities as competitive, with the ICC effectively coercing compliance with the States' duty to prosecute international crimes by way of an ongoing threat to exercise jurisdiction.[71] However, an alternative conception of complementarity since promulgated views it as also having a systemic dimension as a relationship principle for managing co-operation between the ICC and national institutions.[72] The 'positive' interpretation of complementarity envisages the relationship as a partnership, with a mutually beneficial division of labour between the ICC and national courts, preventing impunity by prosecuting both high and lower level offending. The idea of 'proactive' complementarity takes this notion further in envisioning the ICC engaging in capacity-building and co-operating with the national

[69] ICC, Office of the Prosecutor, Informal expert paper, 'The principle of complementarity in practice', 2003, pp.4-5.
[70] See Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court', (2006) 19 Leiden Journal of International Law 1095; and Mauro Politi and Federica Gioia, *The ICC and National Jurisdictions* (London: Ashgate, 2008). Mark Drumbl and others have advocated for a 'qualified deference' model in regard to the ICC's approach to complementarity: Drumbl, supra note 24, 187-194. This will be explored in Chapter VII.
[71] See Nidal Nabil Jurdi, *The ICC and National Courts: A Contentious Relationship*, (London: Ashgate, 2011).
[72] See Carsten Stahn, 'Complementarity: A Tale of Two Notions', (2008) 19 Criminal Law Forum 87, 91-93.

judiciary to actively encourage and support local prosecutions.[73] This extends to 'reverse co-operation' through which the ICC may assist States to overcome problems which may otherwise render the national justice system unavailable to investigate, prosecute and adjudicate the cases in concern, including through the exchange of evidence.[74]

All theories embrace the idea of complementarity as a means to prevent impunity through justice and accountability.[75] Taking this at its highest, complementarity is a catalyst in that it encourages domestic prosecutions as well as triggering institutional and legislative reform and a change in normative culture.[76] If it functions optimally, States would be incentivised to reform their national justice systems to satisfy international standards and be considered able and willing and thereby prevent ICC intervention and/or share the burden with the ICC in a mutual accountability effort. Greater dialogue between the ICC and local judiciary accords with understanding the Rome system as a "third way" for regulating the relationship between international and national courts which Delmas-Marty refers to as a 'pluralist system'.[77] In this regard, positive complementarity envisions a system where hierarchical subordination - domestic courts being subordinate to an international tribunal - is replaced by one of

[73] See William Burke-White, 'Proactive Complementarity: The ICC and National Courts in the Rome System of International Justice', (2008) 49 (1) Harvard International Law Journal 53.
[74] See Federica Gioia, 'Complementarity and 'reverse cooperation'', Chapter 25 in Carsten Stahn and Mohamed M El Zeidy (eds), *The ICC and Complementarity: From Theory to Practice*, (Cambridge: Cambridge University Press, 2011), at 807-829.
[75] Mauro Politi and Giuseppe Nesi, *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, (London: Ashgate, 2001). See, however, Nidal Nabil Jurdi, 'The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?' (2010) 10 International Criminal Law Review 73.
[76] See Jan Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Justice' (2003) 1 (1) Journal of International Criminal Justice 86. See, however, Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', supra note 15.
[77] Mireille Delmas-Marty, Chapter 50, 'The ICC and the Interaction of International and National Legal Systems', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Eds), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford University Press, 2002), 1915-1930.

'normative interaction'.[78] The next section will consider how complementarity is reflected in the OTP's strategic approach.

4. OTP Policy and Strategic Approach

The OTP's Prosecutorial Strategy for 2009-2012 cited four principles: applying a positive approach to complementarity; focused investigations and prosecutions; maximising impact; and addressing the interests of victims.[79] The Strategy considered there to be two dimensions of complementarity. First, as an admissibility test concerning the judicial issue of assessing the existence of relevant national proceedings and their genuineness. Second, positive complementarity involved taking a proactive approach to co-operation to promote national proceedings.[80]

The OTP's Strategic Plan for 2012-2015 stated that the OTP's specific mission is "to contribute to ending impunity and to the respect for the rule of law".[81] Positive complementarity is fundamental to ending impunity.[82] As stated in the OTP's Policy Paper on Preliminary Examinations, this is because "a Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice".[83] The Strategic Plan also included the objective of enhancing co-operation "by strengthening the Rome System in support of the ICC and of national efforts in situations under preliminary examination or investigation".[84] The OTP asserted that it would "continue with its policy of investigating and prosecuting Rome Statute crimes no matter which side in

[78] Ibid.
[79] ICC, OTP Prosecutorial Strategy 2009-2012, dated 1 February 2010.
[80] ICC, OTP Prosecutorial Strategy 2009-2012, ibid, pp.4-5.
[81] ICC, OTP Strategic Plan 2012-2015, dated 11 October 2013.
[82] ICC, OTP Policy Paper on Preliminary Examinations, dated November 2013, p.24.
[83] Ibid.
[84] Objective 4, OTP Strategic Plan 2012-2015, supra note 81.

a given conflict may be alleged to have committed them".[85] The OTP put positive complementarity into practice during the preliminary investigation in Kenya in allowing time for domestic investigations to commence.[86] Moreover, when the OTP did intervene, it pursued perpetrators from both sides simultaneously. Yet, this ultimately ended in failure.

The OTP's Strategic Plan for 2012-2015 related a shift in prosecutorial policy in approaching investigations, moving from conducting short, "focused investigations", to "open-ended, in-depth investigations" and expanding and diversifying the sources of evidence and developing the evidential base to be trial-ready no later than the confirmation of charges hearing.[87] While this approach draws on lessons learned from Kenya, it presents a real risk of 'two speed justice' in situations like Côte d'Ivoire. While the Côte d'Ivoire investigation started under the prosecutorial policy of Moreno-Ocampo;[88] the OTP stated it was still able to apply the new strategy to the Gbagbo and Blé Goudé case later.[89] However, with the policy shift to conduct open-ended, in-depth investigations, given the workload from existing cases, the OTP did not have the resources to "fully open a second investigation" in Côte d'Ivoire.[90] It was not opened until 2016, meaning the CIV II investigation has been entirely conducted under the revised approach.

[85] ICC, OTP Strategic Plan 2012-2015, supra note 81, p.12, para.17.
[86] Justine Tillier, 'The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?' (2013) 13 International Criminal Law Review 507-591, at 527-528. See also Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya*, (London: Springer, 2015).
[87] ICC, OTP Strategic Plan 2012-2015, supra note 81, p.6.
[88] ICC, OTP Prosecutorial Strategy 2009-2012, supra note 79.
[89] ICC, OTP Strategic Pan 2016-2018, dated 16 November 2015 p.54, para.2.
[90] ICC, OTP Strategic Plan 2012-2015, supra note 81, at p.14, para.24.

The 2012-2015 Strategic Plan increased the likelihood of competition with local prosecutors as the new policy foresaw adopting a "building-upwards" strategy of assessing the criminal liability of lower-level offenders and working up the chain rather than honing in immediately on those considered the most responsible, including where the initial evidence against the highest level is low due to a lack of co-operation. This strategy of prosecuting "notorious or mid-level perpetrators" rather than exclusively focusing on those most responsible for international crimes, to build stronger cases against the higher level, remains in place today.[91]

In its Strategic Plan for 2016-2018, the OTP maintained the shift in prosecutorial policy from focused to open-ended investigations.[92] Nevertheless, there was a move away from capacity-building based on the continued prioritisation of limited resources into what the OTP – based on a firm steer from donors in the Assembly of States Parties[93] - sees as its core role to investigate and prosecute. Nevertheless, complementarity sat within strategic goal 9 to "develop, with partners, a co-ordinated investigative and prosecutorial strategy to close the impunity gap".[94] The same objective is a key part of the latest Strategic Plan for 2019-2021, with the OTP endeavouring "to further strengthen the ability of the Office and its partners to close the impunity gap" (strategic goal 6).[95] The Strategic Plan makes clear that 'reverse co-operation', the sharing of information by the OTP on request by States, is within

[91] ICC, OTP Strategic Plan 2019-2021, dated 17 July 2019, at pp.19-20, para.24.
[92] ICC, OTP Strategic Pan 2016-2018, supra note 89, p.5, para.2.
[93] Note ICC-ASP/17/34, Report of the Bureau on Complementarity, 17th Session, 29 November 2018, at para. 23 ("The Court does not involve itself directly in building domestic capacity for the investigation and prosecution of the most serious international crimes. From a judicial point of view, complementarity has a specific meaning relating to the admissibility of cases before the Court pursuant to article 17 of the Statute. This remains exclusively a judicial issue").
[94] ICC, OTP Strategic Plan 2016-2018, supra note 89, at p.18.
[95] ICC, OTP Strategic Plan 2019-2021, supra note 91, at pp. 28-31, paras.48-56.

the approach to positive complementarity envisaged by strategic goal 6.[96] Moreover, it necessitates "co-ordinated investigative efforts" to prevent impunity, knowledge sharing and co-operation in the preservation and exchange of evidence.[97]

The next section further considers the notion of complementarity as catalyst and examines existing empirical studies on potential catalytic effects.

5. Catalytic Effects of Complementarity

In developing the idea of complementarity as catalyst, Kleffner highlights its multifaceted nature. Namely, he notes that complementarity may serve as a coercive mechanism –'complementarity as sanction' - for managing the relationship between the ICC and States in the process of norm internalisation.[98] States are incentivised to initiate investigations and prosecute perpetrators in accordance with their international obligations or face being "reprimanded" through the ICC exercising jurisdiction.[99] Second, complementarity is a managerial mechanism which facilitates co-operation between the ICC and States to establish accountability. Accordingly, the ICC may catalyse action by "persuading rather than coercing", with the ICC engaging in a continuous dialogue with States and supervising domestic proceedings.[100] Third, complementarity may trigger domestic reform as the provisions of the Rome Statute are implemented and civil society is inspired to take up the cause of access to justice.[101] Finally, it may provide much needed legitimacy to domestic proceedings if

[96] ICC, OTP Strategic Plan 2019-2021, supra note 91, at p.29, paras.51 and 52 (a).
[97] ICC, OTP Strategic Plan 2019-2021, supra note 91, at pp.29-31, paras 52 (b) and 53-56.
[98] Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008), 309-340, at 311.
[99] Kleffner, ibid, at 311.
[100] Kleffner, ibid, at 326.
[101] Kleffner, ibid, at 332 and 337. See also Mark Ellis, 'The ICC and Its Implication for Domestic Laws and National Capacity Building', (2002) 15 Florida Journal of International Law 215.

the ICC recognises the existence of those proceedings and determines a case is inadmissible because the national authorities are willing and able to genuinely prosecute.[102] However, whether and to what degree complementarity actually fulfils these roles in practice is still debated due to a lack of empirical data.[103]

Most existing literature focuses on whether the ICC has catalysed domestic investigations and prosecutions through coercing or persuading situation countries to comply with their international obligations to investigate gross human rights violations and hold the individuals responsible to account.[104] However, De Vos argues that it is necessary to move beyond the framework of the ICC as a 'catalyst for compliance' in terms of thinking that rule compliance or legalism is all the concept of complementarity may induce in States on the basis that it is "too narrow a lens to capture the complex legal and political alchemy that Court interventions produce, or the diverse ways in which actors have oriented their own objectives around the principle of complementarity".[105] He asserts that the better question to ask "is not merely whether states comply with international norms and duties but if, how, and why these norms are implemented in practice".[106]

Wierda assesses the ICC's impact in terms of its assumed systemic, transformative, reparative and demonstration effects, applying a theory of change model from the

[102] Kleffner, supra note 98, at 315-317.
[103] Kleffner, supra note 98, at 345.
[104] See e.g., Nidal Jurdi, 'The Prosecutorial Implementation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?' (2010) 10 International Criminal Law Review 73-96.
[105] Christian De Vos, 'A Catalyst for Justice? The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo' (PhD Thesis, Leiden University Repository, 16 March 2016) at p.174-175. See also Christian De Vos, *Complementarity, Catalysts, Compliance: The ICC in Uganda, Kenya and the DRC*, (Cambridge: Cambridge University Press, 2020).
[106] De Vos, 2016, ibid, at p.175.

international development field.[107] Systemic effects encompass the impact of the Court's conception of complementarity and internalisation of the Rome Statute though the adoption of domestic implementing legislation, the creation of special investigation or adjudicative mechanisms and genuine local investigations and prosecutions.[108] In turn, transformative effects include the ICC's impact on peace negotiations and agreements and the adoption of amnesties. Reparative effects relate to victims' access to justice, participation and reparations, while demonstration effects relate to societal perceptions of the Court in terms of legitimacy, relevance, and independence and impartiality.[109] However, it is considered that the ICC's overarching 'transformative impact' may also be analysed through the factors that Wierda classifies under systemic, reparative or demonstration effects when assessing what local actions or initiatives were catalysed by the Court's engagement in a situation country. Focusing on intended outcomes may inform policy change on the design and implementation of future inteventions to achieve greater impact.[110]

While confined to case studies, the existing empirical literature indicates that the ICC's impact on situation countries has so far been limited, negative or mixed.[111]

5.1 Triggering a shallow or sham performance

A common critique relates to countries gaming the system, where steps are taken such as the adoption of domestic legislation or investigations opened by the local judiciary

[107] Marieke Wierda, 'The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries', (PhD Thesis, Leiden University Repository, 2019).
[108] Wierda, ibid, at 33-34.
[109] Wierda, Ibid, at 33-34.
[110] Isabelle Vogel, DFID, 'Review of the use of "Theory of Change" in International Development', April 2012, at 3-6, cited in Wierda, ibid, at p.26, fn 37.
[111] See De Vos, Kendall and Stahn (Eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, supra note 9.

but it is a performance to prevent the ICC from intervening.[112] For example in Sudan, although the Sudanese authorities did not engage with the ICC, they "responded to the ICC's movements as if playing a game of ping pong".[113] This triggered the establishment of multiple domestic investigative bodies and courts, such as the Special Criminal Court on the Events in Darfur and Special Prosecutor for Crimes in Darfur, yet Nouwen found that Sudanese judges and prosecutors had "no incentive to operationalise institutions that the Minister of Justice and Chief Justice created for international spectators only".[114]

In the Kenyan situation, rather than refuse co-operation, the Kenyan Government performed "sham compliance"[115] in adopting a tactic of apparent engagement accompanied by "legal and political strategies to delay, halt or undermine the Court's ability to pursue the Kenya cases".[116] Nevertheless, Slye considered that the Truth Justice and Reconciliation Commission (TJRC) may be an example of the success of positive complementarity because it was partly created in reaction to the possibility of ICC intervention.[117] Legal reforms were also introduced such as the International Crimes Act providing for the punishment of genocide, crimes against humanity and war crimes under domestic law.[118] Nichols suggests these efforts were not genuine.[119] Even if they were, the problem was that as the ICC's influence in Kenya diminished,

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[112] See Christopher K. Hall, "Positive complementarity in action", Chapter 32 in Carsten Stahn and Mohamed M. El Zeidy (Eds), *The International Criminal Court and Complementarity: From Theory to Practice*, (Cambridge: Cambridge University Press, 2011), 1014-1051 at 1034.
[113] Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the ICC in Uganda and Sudan*, (Cambridge: Cambridge University Press, 2013), at 279.
[114] Nouwen, ibid, at 283.
[115] Stephen Brown and Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya', (2012) 111/443 African Affairs, 244-260, at 258.
[116] Ronald C Slye, *The Kenyan TJRC: An Outsider's View from the Inside*, (Cambridge: Cambridge University Press, 2018), at 270.
[117] Slye, ibid, at 242.
[118] Kenya International Crimes Act 2008, Law No. 16 of 2008, Article 6.
[119] Nichols, supra note 86, at 155-169 describing a "foreign affairs façade".

so too did the Government's will to allow local accountability efforts.[120] In looking at performance from another angle in terms of the narrative that developed in Kenya, Lynch found that through the use of the media, a narrative emerged which involved the "reinterpretation of the ICC as a performance of neo-colonialism, injustice and threat to the country's peace and stability".[121] The more widespead this perception, the harder it was for the ICC to have an impact on the domestic system. Indeed, Nichols found that while nearly 9,000 post-election violence cases were reported, in fact only some 258 resulted in convictions and this was limited to low-level perpetrators.[122]

Studies also indicate that the ICC's impact has been affected by the approach taken to complementarity. For example, Jurdi concludes that the OTP's interpretation of the principle of complementarity in its early cases in Uganda and DRC in treating self-referrals as cases of inaction had the effect of disincentivising the national systems from prosecuting.[123] In Uganda, Clark found that the International Crimes Division of the Court and adoption of the International Criminal Court Act to enable genocide, crimes against humanity and war crimes to be tried domestically was triggered by self-interest as it meant that the Government could challenge any attempt by the ICC to prosecute members of the Ugandan Peoples' Defence Forced (UPDF).[124] Yet, the Government showed a reluctance to fully commit, with amnesty remaining on the table.[125] He concluded they would not have felt compelled to go further as the ICC

[120] Slye, ibid, at 242.
[121] Gabrielle Lynch, *Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya*, (2018, Cambridge: Cambridge University Press), at 87.
[122] Nichols, supra note 86, at 97-101.
[123] Jurdi, 'The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the Domestic Level?' supra note 75, 73-96.
[124] Clark, supra note 26, at 156-157.
[125] Clark, supra note 26, at 154-157.

"eschewed prosecuting State actors because of its heavy reliance on the Government for the situation referral, on-the-ground security and evidence-sharing".[126] He considers that so far the ICC has shown a "structural inability to prosecute sitting government officials" for these reasons.[127]

Nouwen too found that the OTP's decision on whether to intervene in a situation or encourage domestic proceedings has been based on an assessment which includes the likelihood of co-operation.[128] This gives rise to a 'catalysing effect paradox' whereby "the ICC is most keen to exercise its jurisdiction in precisely those cases where complementarity has the greatest chances of catalysing genuine domestic proceedings" such as in Uganda.[129] She found the relationship between the ICC and Uganda became a "marriage of convenience" due to the OTP's focus on crimes by the Lord's Resistance Army and lack of attention to allegations against the UPDF.[130] At the same time, the Court did little to incentivise domestic proceedings against State officials, meaning allegations were not investigated at either the domestic or international level.[131]

Heller goes further in arguing that complementarity has a 'shadow side' whereby some States have adopted worse or harmful practices due to a literal reading of the admissibility criteria in Article 17 of the Rome Statute whereby cases are only admissible before the ICC for due process reasons if domestic practices make it

[126] Clark, supra note 26, at 173.
[127] Clark, supra note 26, at 303.
[128] Nouwen, supra note 113, at 408.
[129] Nouwen, supra note 113, at 408.
[130] Nouwen, supra note 113, at 118.
[131] Nouwen, supra note 113, at 230-231.

harder to convict.[132] For example, he points to the adoption of practices by courts in Sudan which make it easier to convict, including secret trials, the denial of defence counsel and admission of confession evidence obtained through torture.[133] Negative effects have also been reported in other studies. For example, Nichols found that even where positive complementarity may have catalysed the establishment of local mechanisms in Kenya, he concluded they were not independent institutions but used solely to investigate and prosecute political rivals.[134]

5.2 Hampering local processes

The ICC's exercise of jurisdiction in the place of the domestic judiciary also hampers local accountability processes. For example, Slye considered that the ICC ultimately had a negative impact on domestic access to justice in Kenya, not least because its active pursuit of cases diverted the attention of civil society and local resources away from the TJRC and other domestic efforts.[135] Further, the lack of engagement between the OTP and TJRC despite the overlap of investigations brought a real risk of the "operations of the one interfering with or thwarting the operations of the other".[136] The Kenyan reform agenda may also have been hampered by political divisions caused or exasperated by the OTP's assertion of pressure, especially given the existence of a power-sharing arrangement.[137] Moreover, as Sriram and Brown note, when the ICC asserted jurisdiction, it reinforced public perceptions as to the inability of the local judiciary to hold the powerful to account.[138] Similarly, Clark

[132] Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Criminal Law Forum 255-280.
[133] Heller, ibid, at 256.
[134] Nichols, supra note 86, at 171-176.
[135] Slye, supra note 116, at 242-243.
[136] Slye, supra note 116, at 279.
[137] Nichols, supra note 86, at 216-219 and 224.
[138] Chandra Lekha Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact', (2012) 12 (2) International Criminal Law Review 219, at 242.

determined that the OTP's pursuit of cases against the Ituri rebel leaders despite the existence of domestic investigations and wholesale legislative reforms demoralised and weakened the legitimacy of the Congolese judiciary.[139] National proceedings were further undermined by the OTP not transferring evidence of sexual violence crimes gathered in *Lubanga* to local prosecutors.[140] While the OTP did share material with Ugandan prosecutors to facilitate domestic proceedings against Kwoyelo, such proceedings were hampered by an instruction given to ICC-protected witnesses not to co-operate with other courts.[141] The OTP also did not provide access to the case matrix of the ICC Legal Tools project that would have helped Uganda to prosecute other cases domestically.[142]

Clark argues that the notion of complementarity as a legal framework for determining admissibility has come to dominate ICC practice and that more emphasis should be given to the policy dimensions of positive complementarity, including its expression of deference towards domestic institutions and respect for national sovereignty; a relationship management principle invoking partnership, interdependence and co-operation with domestic institutions; and a developmental notion where the ICC catalyses and provided ongoing support to domestic processes.[143] Characterising the Court's practice in Uganda and the DRC as exhibiting the "complacency of complementarity", Clark argues that the ICC has weakened national institutions while failing to achieve better results in its own proceedings.[144] In turn, he criticises the

[139] Clark, supra note 26, at 166 and 182.
[140] Clark, supra note 26, at 167.
[141] Nouwen, supra note 113, at 239.
[142] Nouwen, supra note 113, at 239.
[143] Clark, supra note 26, at 26-34.
[144] Clark, supra note 26, at 185.

OTP's practice of arguing against in situ trials which would have improved the Court's engagement with affected communities.[145]

The Court's local impact has also been affected by the OTP's choice of counterparts more broadly. For example, Clark concluded that the OTP's approach of predominantly engaging with the executive in Uganda and the DRC rather than the judiciary not only gave the executive "substantial influence over vital legal questions" but also "weakened the role of national judicial actors, with lasting and negative consequences".[146] Moreover, the OTP's choice of partners had repercussions in terms of the perception of the ICC's overall objectivity and neutrality.[147]

However, positive effects catalysed by complementarity asserted include legal reform and changing normative culture more broadly, the empowerment of civil society, an impact on deterrence and peace agreements and the acceptability of amnesties.

5.3 Normative change

While Nouwen concluded that there had been little to no catalytic effect on actual domestic proceedings in Uganda and Sudan, she found that complementarity indirectly triggered the adoption of new laws and increased attention to international standards, the establishment of domestic courts and investigative bodies, debates on transitional justice and the promotion of local traditional justice.[148] Likewise, Wierda highlights the adoption of a new Penal Code in Afghanistan incorporating definitions of genocide, crimes against humanity and aggression and enhanced victims' rights in

[145] Clark, supra note 26, at 300.
[146] Clark, supra note 26, at 64 and 174.
[147] Clark, supra note 26, at 80.
[148] Nouwen, supra note 113, at 141 and 266.

domestic legal reforms, and court judgments in Colombia as indicators of internalisation of the Rome Statute.[149] Similarly, Sriram and Brown considered that the Kenya admissibility process provided "momentum for broader reforms that would reinforce the rule of law and prevent future violence".[150] However, Nichols found that most of the credit for these reform processes should go to other domestic and international initiatives rather than the ICC.[151]

In some contexts, namely, Uganda and Colombia, the process of normative change meant that amnesties were discouraged.[152] However, amnesty remained on the agenda in Afghanistan;[153] while in Sudan, the ICC's involvement appeared to lead to the strengthening of immunities and amnesty, showing no internalisation of norms towards the ending of impunity.[154]

5.4 Empowering civil society and victims

In examining the ICC's impact in Uganda and the Sudan, Nouwen found that many effects were not directly catalysed by complementarity but through advocacy by 'norm entrepreneurs', for example, donors and NGOs.[155] However, this had sometimes led to norm distortion with the promotion of one-size-fits all international standards rather than context-specific solutions.[156] De Vos also found that in Uganda, Kenya and the DRC complementarity has had more profound effects on non-State actors as norm entrepreneurs took up the international justice baton, reorienting their

[149] Wierda, supra note 107, at 129.
[150] Sriram and Brown, supra note 138, at 238.
[151] Nichols, supra note 86, at 204-206, 213-216 and 223-224.
[152] Nouwen, supra note 113, at 206-227; and Wierda, supra note 107, at 172.
[153] Wierda, supra note 107, at 194-197.
[154] Nouwen, supra note 113, at 216-319.
[155] Nouwen, supra note 113, at 141, 236-237.
[156] Nouwen, supra note 113, at 240-241.

own advocacy efforts around the ICC.[157] Most notably, Dancy and Montal found a pattern of civil society reformers in multiple situation countries taking advantage of the opportunities created by an ICC investigation - increased international attention and the chance to hold their Governments to their rhetoric of compliance – and that this led to increased domestic prosecutions for human rights abuses more generally.[158]

However, the impact would have been greater in many contexts if the OTP engaged with civil society more substantively and over a longer-term. For example, in the DRC, many Congolese NGOs claimed that the ICC did little to build rapport but extracted assistance and then left them adrift.[159] While Wierda was unable to conclude if the ICC had given rise to increased awareness of rights amongst communities in Uganda and Kenya, she found that the Court's reparative effect in terms of translating rights awareness into remedies for victims was limited.[160] Moreover, in some instances there was a risk that the ICC was creating "hierarchies of victims" giving rise to additional grievances.[161]

5.5 Deterrent effect / peace agreements /role of communications

Previous empirical studies have also examined the Court's deterrent impact and catalytic effect on peace agreements, especially though statements and other communications by the OTP. For example, Gissel found that the Court's high-level of

[157] De Vos, 2016, supra note 105, 'at p.172.
[158] Geoff Dancy and Florencia Montal, 'Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions' (2017) 111 (3) American Journal of International Law 689-723. While they found Cöte d'Ivoire and Libya to be outliers in this large N study, their dataset for these countries was clearly limited and not uptodate: www.transitionaljusticedata.com.
[159] Clark, supra note 26, at 77 and 131.
[160] Wierda, supra note 107, at 232-237 and 241.
[161] Wierda, supra note 107, at 232-233.

involvement in Uganda during the Juba peace process negatively affected developments as it externalised the process, weakening the negotiators' authority by narrowing the scope for solutions.[162] In contrast, she concluded the Court's involvement during implementation of the Kenyan Dialogue positively impacted the process as the discourse supported it.[163] Looking at Colombia, Wierda found that the ICC had a transformative effect on the Justice and Peace process, in particular, as the ICC's watch meant complete amnesty was no longer possible and accountability was included in the Havana peace agreement.[164] Nevertheless, she noted divergent views as to whether this accorded with local priorities.[165]

Contradictory conclusions have been reached in political science studies on Côte d'Ivoire and Libya. For example, Bocchese argues that a communication issued by the OTP in December 2010 warning Gbagbo and Blé Goudé that the ICC was watching "failed to deescalate the conflict and perhaps even strengthened their resolve to fight until the end" without the possibility of amnesty.[166] In contrast, Malu concluded that the ICC has contributed to general deterrence in preventing a relapse of the conflict by signalling the end of impunity, albeit that its impact on national reconciliation has been negative as local opinion is divided.[167] In turn, from quantitative research on Libya, Hillebrecht concluded that the ICC had a statistically

[162] Line Gissel, 'Justice Tides: How and When Levels of ICC Involvement Affect Peace Processes' (2015) 9 (3) International Journal of Transitional Justice 428-448.
[163] Gissel, ibid.
[164] Wierda, supra note 107, at 172-187.
[165] Wierda, supra note 107, at 267-272.
[166] Marco Bocchese, 'Gbagbo's Lost Bet: When Inviting External Judicial Scrutiny Backfires', (2019) 23 (10) The International Journal of Human Rights 1648-1672, at 1667.
[167] Linus Nnabuike Malu, 'The International Criminal Court and the Complex Road to Peace in Côte d'Ivoire' (2016) 16 International Criminal Law Review 826-855, at 852-855.

significant effect on the number of casualties and deterred government-sponsored civilian casualties during the 2011 conflict.[168] Kersten has argued the contrary.[169]

Existing studies also focus on the risk of polarisation. For example, Kersten argues that the approach to case selection in Libya reflects a wider context which depicts the conflict as good versus evil, resulting in a pursuit of those from the Gaddafi regime and ignoring rebel crimes.[170] He asserts that Libya demonstrates the ICC's limited capacity to positively influence peace and justice in a post-conflict setting.[171] In turn, in examining the OTP's approach to case selection and prioritisation in Côte d'Ivoire, Rosenberg cautions that a perception of partiality may give rise to negative effects domestically.[172]

This research contributes to the international criminal justice field through an empirical assessment of the ICC's impact in Côte d'Ivoire and Libya. It has been said that "[t]he Libyan situation represents the most challenging case for the OTP thus far regarding the interaction between the ICC and the domestic jurisdiction of States".[173] Yet, the difficulties in Côte d'Ivoire should also not be underestimated. In Côte d'Ivoire, the approach to secure compliance appears to be largely, though not exclusively, one of complementarity through coercion where the State is incentivised to take action to avoid the embarrassment of ICC intervention. There is essentially a

[168] Courtney Hillebrecht, 'The Deterrent Effects of the International Criminal Court: Evidence from Libya', 42 (2) Journal of International Interactions 616-643 (2016), at p.632.
[169] Mark Kersten, 'Justice in Conflict: The Effects of the International Criminal Court's Inventions on Ending Wars and Building Peace', Oxford Scholarship Online, 2016, Chapter 6, 'Peace, Justice and the ICC's Intervention in Libya', at p.124.
[170] Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, (Oxford: Oxford University Press, 2016), at 124, 157 and 168.
[171] Kersten, ibid, at 161.
[172] Sophie T. Rosenberg, 'The International Criminal Court in Côte d'Ivoire: Impartiality at Stake?' (2017) 15 Journal of International Criminal Justice 471.
[173] Justine Tillier, 'The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?', (2013) 13 International Criminal Law Review 507-591, at 518.

competition between jurisdictions, the classical model of complementarity. In contrast, the main approach currently applied to Libya relies on complementarity as a managerial framework for co-ordinating investigative activity in a division of labour.

In contrast to most of the existing literature in the field, this study focuses on the ICC's impact on rule of law reform in the selected case studies.[174] It will not examine all the hypothetical catalytic effects of complementarity in Côte d'Ivoire and Libya, save to the extent that other effects, such as deterrence, have a bearing on this. The next section elaborates on the methodology used for tracing the ICC's impact on the rule of law.

6. Measuring Impact Using Rule of Law Indicators

Indicators provide a scientific framework in which to evaluate performance and make comparative assessments, while also having a normative effect in setting a direction to be followed to meet the standards against which performance will be judged. They promote greater transparency and accountability.[175] For the ICC, indicators could also serve as a tool for reflection, to diagnose problems, to generate constructive dialogue with stakeholders, communicate key messages and manage expectations.[176] Potential indicators include: Rome Statute System indicators, measuring State co-operation and assessing willingness and ability to conduct national investigations and trials; impact indicators, measuring the perception of the ICC's legitimacy and credibility among

[174] For the few exceptions, see Tillier, ibid; Christine Bjork and Juanita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya', (2011) Yale Human Rights and Development Law Journal 205-229; and Nichols, supra note 86, at 183-225.

[175] See David Nelken, Chapter 10, 'Conclusion: Contesting Global Indicators', in Sally Engle Merry, Kevin E Davis, and Benedict Kingsbury (Eds), *The Quiet Power of Indicators: Measuring Governance, Corruption and Rule of Law*, (New York: Cambridge University Press, 2015).

[176] James A Goldston, Executive Director/Open Society Justice Initiative (OSJI), 15th session of the ASP, Plenary session – Efficiency and Effectiveness, ICC Performance Indicators, 22 November 2016, at pp.3-4.

affected communities; and operational indicators, measuring case progression, outreach, victim participation, productivity and transparency.[177]

There is clear scope to develop indicators to measure the impact of international criminal justice interventions. However, the parameters are not easy to identify.[178] Some of the key questions that need to be resolved are: (i) What specific aspects of the work of the international court are we interested in assessing? (ii) What are the relevant outputs and expected outcomes of this activity and how can outcomes be distinguished from expected outputs? (iii) What would constitute success and for whom? and (iv) How can we distinguish outcomes that are directly attributable to the activities of the international court from indirect or unintended impacts or outcomes triggered by other actors, for example, civil society?

To assess the impact of complementarity, it is essential to consider the construction of this concept and its purpose. For example, if complementarity is considered purely in terms of a legal construct relevant to the admissibility of cases, and we are interested in looking at its coercive function in catalysing domestic cases, the relevant audience for tracing impact might be limited to the domestic judiciary. In turn, the relevant outputs would be investigations being opened or progressed to trial, with the outcomes dependent on an assessment of the fairness and effectiveness of the domestic procedures. However, if complementarity is considered in a broader sense as a policy tool, including a means for bringing about normative change or the empowerment of civil society, the relevant audience may include politicians or civil society in the situation countries, with the outputs being legislative or policy changes

[177] Open Society Justice Initiative (OSJI), Briefing Paper, 'Establishing Performance Indicators for the International Criminal Court', November 2015, at p.4.
[178] Ryngaert, supra note 12, at xvi.

or advocacy initiatives and the outcome a broader assessment of how the perception of the relevant audience may have changed and the reasons for this.

Further, if we are looking at whether the ICC has had an impact in ending impunity and triggering genuine justice efforts, it is necessary to consider who this 'justice' is for as the perception of success may differ by audience. For example, if the relevant audience is the international community on the basis that it is international crimes in issue, conduct which has violated international norms, that audience may not fully appreciate the value of imperfect domestic trials. However, if the relevant audience is the affected community in the situation country then having trials at all and in accordance with domestic law and the basic norms of due process, even if not fully compliant with some international human rights standards, may be considered a success.

Finally, it is not easy to identify the precise catalyst of events, namely, to distinguish events that are the result of the activities of the ICC as opposed to other institutions or stakeholders. Nevertheless, it is necessary to accept this limitation and recognise the value of assessments which can identify impacts, whether these are direct or indirect, and where the relevant activity was one of many contributing factors.

Building on Court-wide performance indicators;[179] the OTP has developed a set of indicators to assess the OTP's activities in the context of Strategic Plans.[180] However,

[179] ICC, Report to the Assembly of States Parties, 'Report of the Court on the development of performance indicators for the International Criminal Court', dated 12 November 2015; ICC, Report to the Assembly of States Parties, Second Report of the Court on the development of performance indicators for the International Criminal Court, dated 11 November 2016; and ICC, Report to the Assembly of States Parties, 'Third Report of the Court on the development of performance indicators for the International Criminal Court', dated 15 November 2017.

the existing indicators are not conducive to measuring impact qualitatively. For example, the indicators include quantitative values such as the number of arrest warrants granted and charges confirmed or other indicators which measure outputs rather than outcomes, such as the existence of a co-operation protocol.[181] There is a particular gap in terms of assessing quality and the outcomes of intervention on the affected societies. In this regard, the OTP has fallen into the trap of only measuring what is easily measurable or "only what is measurable matters".[182] Further, as highlighted by Kotecha, there is a risk that the current indicators incentivise the OTP to prosecute cases rather than defer to national proceedings when what is needed are positive complementarity performance indicators to measure the OTP's impact on national proceedings, including context-specific outcomes.[183]

Looking beyond criminal justice to the transitional justice and development fields, impact today is again predominantly measured using quantitative tools and indices. For example, studies by Sikkink and Walling and Lutz and Sikkink looked at the impact of human rights trials in Latin America by coding trials in national courts in order to measure impact quantitatively.[184] In turn, Olsen, Payne and Reiter made use of a Transitional Justice Database which pooled data from various sources and other indices.[185] Other relevant indices include the World Bank Rule of Law Index and Worldwide Governance Indicators (WGI), the Bertelsman-Stiftung (BTI) Democracy Index and the Freedom in the World dataset of Freedom House which includes a rule

[180] ICC, OTP Strategic Plan 2012-2015, dated 11 October 2013, 40; OTP Strategic Plan 2016-2018, dated 16 November 2015, 36-39; and ICC OTP Strategic Plan 2019-2021, dated 17 July 2019, 34-38.
[181] Ibid.
[182] Birju Kotecha, 'The ICC's Office of the Prosecutor and the Limits of Performance Indicators', (2017) 15 Journal of International Criminal Justice 543-565, at 552.
[183] Kotecha, ibid, at 557-558 and 560.
[184] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (July 2007) 44 (4) Journal of Peace Research 427-445; Lutz and Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', supra note 38.
[185] Olsen, Payne and Reiter, supra note 35.

of law sub-index looking at civil liberties. However, most of the existing indices lacked any data for Côte d'Ivoire and Libya or the source data was out of date.[186]

Considering existing models, the most useful framework I found for measuring the ICC's impact on the rule of law in these situations qualitatively originates in peace and conflict studies, specifically, the Diehl and Druckman framework for measuring the success of peacebuilding missions.[187] This model provided an organising framework which is conducive to measuring impact beyond a simple success or failure appraisal and making comparative judgements. In order to measure the ICC's impact on the rule of law in the situation countries, I used the indicators for 'judicial coverage' and 'judicial functioning' as an organising framework.[188]

Judicial coverage focuses on developments relating to the legal framework at the national level to address the crimes. It examines the ICC's impact on justice sector reform, considering harmonisation of penal codes with the Rome Statute and the introduction of international crimes into national legislation, the legal framework for international co-operation and the framework for the protection of victims and witnesses.

In turn, judicial functioning includes issues over access to justice, independence and impartiality and fair investigations and trials. It examines access to justice and

[186] E.g. While some data is held for these countries in the databank of the Transitional Justice Research Collaborative between the University of Oxford, University of Minnesota and Harvard University, it is clearly limited and does not go beyond 2011: www.transitionaljusticedata.com.

[187] Diehl-Druckman framework for peacebuilding: Paul F Diehl and Daniel Druckman, *Evaluating Peace Operations*, 2010 (Boulder: Lynne Rienner), Figure 5.1, 120-126. For another study applying this model to Côte d'Ivoire though in the context of assessing the impact of a UN peacebuilding operation, see Alex J Belamy and Paul D Williams, 'Local Politics and International Partnerships: The UN Operation in Côte d'Ivoire (UNOCI)' (2012) 16 J Int'l Peacekeeping 252.

[188] Diehl and Druckman, ibid, Figure 5.1, 120-126.

victims' participation, witness protection in practice, amnesties and co-ordination between formal and transitional justice mechanisms. It also analyses the genuineness of national investigations and prosecutions, the demonstration of willingness and ability, the security situation as it affects judges and prosecutors and arrangements governing the appointment, promotion and removal of judges and prosecutors. Finally, it considers developments concerning the rights of the defence. The affected population's perception of the ICC also feeds into the impact assessment as it relates to procedural fairness and independence and impartiality.

7. Conclusion

This Chapter considered the importance of local ownership and situated the ICC within a transitional justice framework. It set out the background to complementarity and the OTP's strategic approach to date, before analysing the notion of complementarity as catalyst and discussing the expected catalytic effects through an examination of existing empirical research. It also discussed the methodology for tracing impact in this study, including the use of rule of law indicators. The next chapters will analyse the ICC's practice in regard to admissibility and co-operation before assessing the Court's impact on the rule of law in Côte d'Ivoire and Libya. We will return to the theory on catalytic effects in Chapter VII to draw lessons from these case studies for ICC reform.

CHAPTER III: ADMISSIBILITY

This chapter examines admissibility, considering the Rome Statute and the Rules of Procedure and Evidence (RPE), jurisprudence and theory. It analyses admissibility rulings concerning Côte d'Ivoire, Kenya and Libya in exploring the application of the principle of complementarity. It is asserted that the Court has erred in its early interpretation of the 'same conduct' test at the first stage and of the terms 'unwilling' and 'unable' at the second stage, meaning cases have been found admissible before the ICC more often than intended. This negatively affects the ICC's resources and efficacy as its mandate is overstretched, as well as establishment of the rule of law through domestic trials. However, it is asserted that in *Al-Senussi*[1], the Appeals Court set the correct standard to determine the case inadmissible before the ICC and that subsequent developments in Libya do not vitiate the correctness of the ruling.

1. Concurrent Domestic Proceedings? Sequencing and Modalities

Even if the Court has jurisdiction, it is still necessary to assess admissibility. Complementarity is given effect through Article 17 of the Rome Statute. As stated in Article 17 (1), three of the instances resulting in inadmissibility relate to concurrent jurisdiction with domestic courts. Specifically, save for circumstances which vitiate the genuineness of domestic proceedings, a case is inadmissible before the ICC if it is being investigated or prosecuted domestically, has been investigated domestically and a decision made not to prosecute, or has been prosecuted and a new trial is impermissible under ne bis in idem (double jeopardy), pursuant to Article 20 (3) of

[1] ICC, Appeals Chamber, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senus*si, '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'', ICC-01/11-01/11-565, 24 July 2014, (hereafter 'Appeals Judgement on Admissibility of the Al-Senussi Case').

the Rome Statute. The factors taken into consideration differ when considering admissibility at the stage of a 'situation' as compared to a 'case' when a particular suspect(s) and incidents in time, place and subject-matter are identified. While the Chambers' practice at both stages is questionable, it is the jurisprudence over admissibility of a case that is fundamentally flawed.

1.1 Admissibility of a situation

On concluding a preliminary examination, the Prosecutor considers the factors in Article 53 (1)(a) to (c) of the Rome Statute to determine if there is a reasonable basis for a formal investigation. This includes assessing whether a "case" is or would be admissible under Article 17. Articles 17 and 53 (1)(b) of the Rome Statute expressly refer to the admissibility assessment of a "case", compared to Articles 15 and 18 which refer to a "situation".[2] Nonetheless, the admissibility test still applies.[3] This is consistent with the object and purpose of the Rome Statute where the primary responsibility for investigating falls on States. It also accounts for the fact that Articles 17 and 53 (1)(b) were drafted before the "situation" and "case" distinction was introduced and Articles 15 and 18 fully discussed during negotiations.[4]

Further to the OTP's Policy on Case Selection and Prioritisation,[5] alongside gravity, the nature, manner of commission and the impact of the crime, the extent to which

[2] Hector Olasolo, Chapter 2 'The admissibility of situations' in Hector Olasolo, *Essays on International Criminal Justice*, (Oxford: Hart Publishing), 2012, pp.20-40, at 28-29.
[3] Olasolo, ibid, p. 28.
[4] Olasolo, ibid, pp.28-29.
[5] ICC, OTP Policy on Case Selection and Prioritisation, 2016. For the development of the criteria, see: ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, 'Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo', ICC-01/04-01/06-8-Corr, 24 February 2006, paras 51-52 and 63; ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's

cases are already being investigated and prosecuted domestically is significant, along with an assessment of the interests of justice. For example, the OTP continues to actively encourage domestic proceedings in Colombia to address 'false positive' cases rather than opening an investigation, despite the large scale of the crimes. Similarly, the OTP has refrained from opening an investigation in Guinea where the events of September 2009 are already under investigation by a special panel of judges.[6] However, the delays in the Guinean proceedings- with investigations completed after seven years and trials still to commence[7] - are comparable to the situation in Côte d'Ivoire. The same investment in Côte d'Ivoire in encouraging domestic investigations could also have achieved a positive outcome. Undoubtedly, the new Ivorian Government's desire for the ICC to take Laurent Gbagbo expediently pushed the matter into the next phase. Nevertheless, the domestic judiciary could handle the remaining cases adequately if incentivised.

Uncertainty surrounding admissibility assessments remains problematic. If the Court assesses admissibility in terms of the extent to which the domestic investigation mirrors that conducted by the OTP in the conduct and individual suspects identified, it incentivises domestic judicial authorities to frame their investigation in reference to the OTP's developing cases, including in terms of lines of enquiry and resourcing. This could leave hundreds of incidents uninvestigated. As highlighted by Judge Sang-

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Application for Warrants of Arrest' Article 58', ICC-01/04-169, dated 13 July 2006, paras 70-82; and Paul Seils, 'The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court', in Morten Bergsmo (Ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases,* (Oslo: Forum for Interational Criminal and Humanitarian Law Publications, 2009), at 57.

[6] OTP, Report on Preliminary Examination Activities 2018, 5 December 2018, at p.46 , paras.172-173.

[7] OTP, Report on Preliminary Examination Activities 2018, ibid, at pp.46-47 , paras.173-178. See also FIDH, 'Guinée-Conakry, 1 an après le massacre du 28 septembre 2009: Nouveau Pouvoir, Espoir de Justice?', September 2010; and Nour Saadi, 'La Volonté politique et la capacité nationale: Le massacre du 28 septembre et le cour pénale internationale', Vol. 5, no.1, McGill Centre for Human Rights and Legal Pluralism Working Paper Series, Spring 2017.

Hyun Song in his Separate Opinion to the *Gaddafi* Admissibility Appeal Judgment, investigative strategy over such a large docket goes to the heart of State sovereignty.[8] Moreover, this has severe ramifications for 'hot potato' cases. For example, in Libya and Côte d'Ivoire the OTP initially focused on prosecuting the former regime. If State authorities mirror the OTP's case selection and prioritisation strategy, crimes committed by the victors are even less likely to be addressed, with ramifications for transitional justice and the rule of law.

1.2 Admissibility of a case

Following the initiation of an investigation of a case, Article 19 (2) (b) of the Rome Statute provides an opportunity for a State Party to challenge the Court's jurisdiction based on Article 17. As a challenge may also be made by a non-State Party, this avenue was available to Côte d'Ivoire and Libya. An accused subject to an arrest warrant or summons may also contest admissibility under Article 19, as shown by the *Katanga* (DRC)[9] and *Saif Gaddafi* (Libya)[10] challenges. The Prosecutor may also refer a case to the Pre-Trial Chamber for an admissibility determination under Article 19 (3) of the Rome Statute, when victims may submit observations. This allows divergent views to be heard. In the Libyan cases, while the OTP did not refer the

[8] ICC, Appeals Chamber, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 'Separate Opinion of Judge Sang-Hyun Song to the 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 Saif Al-Islam Gaddafi'', ICC-01/11-01/11-565-Anx 1, 24 July 2014, at para.6 (hereafter 'Separate Opinion of Judge Sang-Hyun Song to Appeals Judgment on Admissibility of the Al-Senussi Case').

[9] ICC, PTC, Situation in the Democratic Republic of the Congo, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Defence, 'Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute', ICC-01/04-01/07-949, 11 March 2009 ('Katanga Defence Motion Challenging Admissibility').

[10] ICC, PTC I, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, Defence, 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17 (1)(c) , 19 and 20 (3) of the Rome Statute', ICC-01/11-01/11-640–AnxE, 6 June 2018, ('Gaddafi Admissibility Challenge 2018').

issue to the Pre-Trial Chamber, it supported Libya's Article 19 challenges[11] - initially in both the *Gaddafi*[12] and *Al-Senussi*[13] cases - whereas the victims represented by the Office of Public Counsel for Victims (OPCV) argued in favour of ICC action.[14] Further, notwithstanding the absence of a referral or challenge, the Chambers have inherent competence to determine admissibility.[15] This only applies at the case stage.[16] For example, based on the completion of Simone Gbagbo's local trial, the Pre-Trial Chamber has inherent competence to re-adjudicate admissibility.[17]

1.3 Deferral

There are procedural mechanisms which may catalyse State action. First, except when there is a UN Security Council referral, Article 18 (1) of the Rome Statute obliges the Prosecutor to notify States Parties and "those States which…would normally exercise

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[11] ICC, PTC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Republic of Libya, 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2012, (hereafter 'Libya Admissibility Challenge concerning the Saif Gaddafi case'); and ICC, PTC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Republic of Libya, 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', ICC-01/11-01/11-307-Red2, 2 April 2013, (hereafter 'Libya Admissibility Challenge concerning the Al-Senussi Case').

[12] ICC, PTC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution, 'Prosecution Response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute', ICC-01/11-01/11-167-Red, 5 June 2012, (hereafter 'OTP Response to Libya's Admissibility Challenge on the Gaddafi case').

[13] ICC, PTC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution, 'Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the Rome Statute', ICC-01/11-01/11-321-Red, 2 May 2013, (hereafter 'Prosecution Response to Libya's Admissibility Challenge for Al-Senussi Case').

[14] ICC, PTC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, OPCV, 'Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the ICC Statute', ICC-01/11-01/11-166-Red-Corr, 4 June 2012 (hereafter 'Victims' Observations on Gaddafi Admissibility Challenge'); ICC, PTC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, OPCV, 'Observations on behalf of victims on the Government of Libya's Application relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', ICC-01/11-01/11-353-Red, 14 June 2013 (hereafter 'Victims' Observations on Al-Senussi Admissibility Challenge').

[15] Article 19 (1) Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, in force on 1 July 2002, United Nations Treaty Series Vol. 2187, No. 38544.

[16] ICC, Pre-Trial Chamber II, Situation in Uganda, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, 'Decision on the admissibility of the case under Article 19 (1) of the Statute', ICC-02/04-01/05-377, 10 March 2009, at para.14.

[17] See e.g. ICC, Pre-Trial Chamber II, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, 'Order to the Registrar to Request Information from the Competent National Authorities of the Republic of Côte d'Ivoire', ICC-02/11-01/12-84, 14 September 2018.

jurisdiction" of the investigation. Article 18 (2) then provides an opportunity to challenge admissibility within one month, based on the existence of domestic proceedings, through a preliminary ruling. The State may also seek deferral of the investigation, to which the OTP may be amenable at this stage before substantial resources are invested. In any event, the Prosecutor is obliged to defer to the State's investigation unless the Pre-Trial Chamber authorises the OTP to proceed.[18]

Notwithstanding authorisation, the Rome Statute envisages the OTP making an ongoing admissibility assessment, with Article 19 (11) providing that the Prosecutor may still decide to defer later. The Prosecutor may obtain information on the domestic proceedings from the State on an ongoing basis. This gives States an opportunity to demonstrate their willingness and capacity and presents the potential for the State and the OTP to engage early in a co-operative relationship.

The ongoing assessment of admissibility is further supported by Article 15 of the Rome Statute. Even if the Prosecutor initially concludes there is not a reasonable basis to investigate, an investigation may be opened later if new facts show continued inactivity at the domestic level or that the local proceedings were not genuine.[19] Rule 104 of the ICC's RPE provides that for the purpose of Article 53 (1) of the Statute, information may be obtained from States, international organisations, NGOs or "other reliable sources" and/or the Prosecutor may "receive written or oral testimony at the seat of the Court" under the Rule 47 procedure. This serves as a check on State action as it encourages monitoring by local stakeholders and provides a channel for ongoing

[18] Article 18 (2), Rome Statute, supra note 15.
[19] Article 15 (6), Rome Statute, supra note 15.

dialogue between the OTP and civil society. This could catalyse domestic activity and capacity-building and ensure the OTP makes decisions based on empirical evidence.

The ICTY gave strong emphasis in its approach to State referrals on the Tribunal's ability to revoke a case pursuant to Rule 11bis (F) of the ICTY's Rules of Procedure and Evidence (RPE) in conjunction with the monitoring of proceedings (Rule 11bis (D) (iv) RPE). The OTP entrusted this monitoring to the OSCE.[20] It increased the likelihood that transfer would be revoked upon non-compliance with fair trial standards. In turn, the Prosecutor secured an agreement with the African Commission for Human and Peoples' Rights for monitoring cases from the ICTR to Rwanda.[21] The availability of monitoring significantly altered the conclusions of the Trial Chamber in *Kanyarukiga*,[22] and subsequently, the Appeals Chamber in *Munyakazi*[23] from the previous ICTR approach[24] and facilitated the transfer of the first case to Rwanda. Yet, so far no case has been deferred by the ICC despite the suitability of situations like Uganda.[25]

[20] For the emphasis on monitoring, see e.g., ICTY, *Proscutor v Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, 'Decision on Rule 11*bis* Referral (AC)', 1 September 2005, at para.52; ICTY, *Prosecutor v Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, 'Decision on Appeal against Decision on Referral under Rule 11*bis (AC)*', 4 July 2006, at para.43; *Prosecutor v Milorad Trbić*, Case No. IT-05-88-1-PT, 'Decision on Referral of Case under Rule 11*bis* (RB)', 27 April 2007, at paras. 41, 44-46.

[21] ICTY, *Prosecutor v Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, 'Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC)', 6 June 2008, at para.100.

[22] ICTY, *Prosecutor v Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, 'Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC)', ibid, at paras. 58, 88, 93, 98-103.

[23] ICTY, *Prosecutor v Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, 'Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11*bis* (AC)', 8 October 2008, at para.30 (overturning the ground of a lack of judicial independence) and para. 44 (dismissing appeal on ground relating to the availability and protection of witnesses).

[24] ICTY, *Prosecutor v Gaspard Kanyarukiga*, 'Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC)', supra note 21, at para. 100.

[25] See Kasaija Phillip Apuuli, 'The ICC's Possible Deferral of the LRA Case to Uganda', (2008) 6 Journal of International Criminal Justice 801.

The next section further examines the jurisprudence on the admissibility of a case. It is argued that the Court has taken on more cases than the Rome Statute's drafters intended, contrary to complementarity.

2. Admissibility Step One: Domestic Proceedings?

2.1 Jurisprudence in the context of self-referrals

Uganda, DRC, CAR I and II and Mali are all situations based on self-referrals. The OTP's encouragement of self-referrals reflects the rationale that "the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach" or "groups bitterly divided by conflict may oppose prosecutions at each other's hands and yet agree to a prosecution by a court perceived as neutral and impartial".[26] This was arguably the issue with Uganda while the authorities were unable to secure the custody of Lord's Resistance Army (LRA) members.[27] However, the OTP was criticised for answering the Government's wishes and enabling Uganda to gain sympathy for military action. Similarly, the DRC referred Katanga for political reasons. It is in this context that the Appeals Chamber clarified the principles applicable to assessing admissibility. However, the Court's practice disincentivised States from taking domestic measures to fight impunity, instead encouraging them to send politically inconvenient cases to The Hague.[28] In interviews with OTP officials, it was acknowledged that the Court

[26] ICC, OTP, 'Paper on some policy issues before the OTP', Sept 2003, at p.5.
[27] See Payan Akhavan, 'The LRA case: Uganda's Submission of the First State Referral to the ICC' (2005) 99 (2) AJIL 403.
[28] William Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts', (2008) 19 Criminal Law Forum 7.

took on too many cases which today would be considered differently.[29] It is recognised that as a result, the ICC has effectively become a court of first instance and it is time go back to the original objective of catalysing domestic action.[30]

Where an investigation or prosecution is ongoing or has concluded domestically, a two-stage test applies. First, is the State investigating or prosecuting or has it investigated or prosecuted the same conduct? Secondly, is that State unwilling or unable to do so genuinely?[31] The test of willingness or ability only applies if there are relevant domestic proceedings. In the event of inaction, the case is admissible before the ICC, subject to gravity and the interests of justice.[32] This is consistent with previous caselaw[33] and constitutes a significant rejection of the 'slogan version' of complementarity that a case is inadmissible unless a State which would have jurisdiction is unwilling or unable genuinely to carry out the proceedings.[34]

Katanga asserted the DRC could not be considered 'unable' or 'unwilling' to prosecute since he had been taken into custody, an investigation was underway, and

[29] Interview record 5 – Head of Jurisdiction, Complementarity and Co-operation Division (JCCD), ICC Office of the Prosecutor, 30 November 2017.
[30] Interview record 5 – Head of JCCD, ICC Office of the Prosecutor, 30 November 2017.
[31] ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, 'Judgment on the Appeal of Germain Katanga against the oral decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', ICC-01/04-01/07-1497 OA8, 25 September 2009, at para.78 (hereafter 'Katanga Admissibility Appeals Judgment').
[32] Katanga Admissibility Appeals Judgment, ibid, para.78.
[33] E.g. ICC, Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58 (Lubanga)', ICC-01/04-169, 10 February 2006, para.40; and ICC, Pre-Trial Chamber I, Situation in Darfur, Sudan, *Prosecutor v Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, 'Decision on the Confirmation of Charges', ICC-01/04-520-Anx2, 8 February 2010, para.29.
[34] Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity', (2010) 21 (1) Criminal Law Forum 67, 68. For the contrary view, see Ada Y. Sheng, 'Analysing the ICC Complementarity Principle Through a Federal Court Lens', Berkeley Electronic Press, 2006, Paper 1249, p.5; Mahnoush Arsanjani and W. Michael Reisman, 'The Law in Action of the ICC', (2005) 99 AJIL 385, 389; and William Schabas, 'Prosecutorial Discretion v Judicial Activism', (2008) 6 JICJ 731, 757; all cited by Robinson as examples where the "slogan" version of complementarity is iterated.

the judicial system had the capacity.[35] The Appeals Chamber articulated a path which made it unnecessary to consider willingness or ability – the 'inaction' scenario. It rejected the Defence theory on both a literal reading of Article 17 and a purposive interpretation of the Rome Statute. Specifically, Article 17 (1) (a) of the Rome Statute provides that a case is inadmissible if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". The text contains two parts, the second of which is redundant if the first condition is not fulfilled.[36] It follows that admissibility must be assessed on the circumstances applicable at the time of the challenge rather than determining the potential for a State to be willing and able.[37] If it is not doing so at the time, inaction renders the case admissible.[38]

Given the near automatic admissibility of cases where the Court holds there is a situation of inactivity, it is vital to understand the interpretation of what constitutes a 'case' for the purposes of Article 17 (1)(a) to (c). It is argued that the Chambers have overreached by bringing States in non-referral situations within the technical inactivity bracket when this is contradicted by the facts on the ground.

[35] ICC, Trial Chamber II, Situation in the Democratic Republic of the Congo, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Defence, 'Defence Reply to Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a)', ICC-01/04-01/07-1015, 1 April 2009, at para.18. See also ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Defence, Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber 'Motifs de la decision orale relative à l'exception d'irrecevabilité de l'affaire', ICC-01/04-01/07-1234, 22 June 2009, at para.22 ("Katanga Defence Appeal on Admissibility").
[36] See Robinson, 'The Mysterious Mysteriousness of Complementarity', supra note 34, at p.84.
[37] Ibid, paras 56 and 80.
[38] Ibid, para.78.

2.2 Same person/same conduct

2.2.1 Development of the test

Article 17 (1)(a), (b), and (c) of the Rome Statute only references a 'case', with no guidance as to what constitutes a relevant case. Articles 20 (3) of the Statute on ne bis in idem or double jeopardy, corresponding to Article 17 (1)(c), is more specific in referencing "the person" and "same conduct".[39] Article 90 (1) of the Statute on competing requests for surrender goes further in referencing the "same person" and "same conduct".[40] Accordingly, for the purposes of an ongoing or completed investigation/ prosecution under Article 17 (1), a 'case' has been defined by the accused and the conduct that gives rise to liability.[41] There is only a jurisdictional conflict if the domestic case concerns the 'person' and 'conduct' before the ICC.[42]

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[39] Article 20 (3) of the Rome Statute, supra note 15, states:
"No person who has been tried by another court for conduct also prescribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a)Were for the purpose of shielding the person concerned from criminal responsibility…; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

[40] Article 90 (1) of the Rome Statute, supra note 15, states:
"A State Party which receives a request from the Court for the surrender of a person…shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact".

[41] ICC, Situation in Republic of Kenya, *Prosecutor v. William Samoei Ruto et al.*, Appeals Chamber, 'Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled Decision on Application by the Government of Kenya challenging admissibility in the context of Article 19 (2)(b) of the Statute', ICC-01/09-01/11-307 (OA), 30 August 2011, para. 40 ('Ruto Appeals Judgment on Kenya's Admissibility Challenge')

[42] ICC, Situation in the Republic of Kenya, *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, Appeals Chamber, 'Judgment on the appeal of the Republic of Kenya against the Decision of the 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' ICC-01/09-02/11/274, ICC-01/09-02/11 OA 30 August 2011, at para. 43 (hereafter 'Muthaura Appeals Judgement on Kenya's Admissibility Challenge'); Ruto Appeals Judgment on Kenya's Admissibility Challenge, ibid, para.44.

In the Court's early jurisprudence, the Pre-Trial Chambers interpreted 'case' as necessitating that national proceedings involve the 'same conduct' as that forming the basis of the Prosecutor's arrest warrant application.[43] Thus, there were no relevant investigations or prosecutions in the DRC or Sudan, as any cases against Katanga, Ngudjolo Chui, Harun and Ali Kushayb did not concern the 'same conduct' for which the arrest warrant was sought by the OTP.[44]

In *Ruto*, the Appeals Chamber held that a case is inadmissible if the domestic investigation covers the "same individual and substantially the same conduct" as the ICC investigation.[45] Thus, States were left to determine the parameters of investigations, which would not have to mirror the case framed by the OTP and Pre-Trial Chamber. Nevertheless, its practical application left much to be desired. Unfortunately, the Appeals Chamber completely circumscribed domestic prosecutorial discretion in the case of *Saif Gaddafi* (Libya) in ruling that the

[43] ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Germain Katanga*, Pre-Trial Chamber I, 'Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga', ICC-01/04-01/07-55, 5 November 2007, at para. 20; ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 'Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui', ICC-01/04-02/07-3, 6 July 2007 (unsealed 12 February 2008), para 21; and ICC, Situation in Darfur, Sudan, *Prosecutor v Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb),*Pre-Trial Chamber I, 'Decision on the Prosecution Application under Article 58 (7) of the Statute', ICC-02/05-01/07-1-Corr, 27 April 2007, at para 21. Similarly, in Lubanga, Pre-Trial Chamber I required it to be the "same case", which it practically interpreted in the same way as the Pre-Trial Chambers referenced "same conduct": ICC, Situation in Democratic Republic of Congo, *Prosecutor v Thomas Lubanga Dyilo*, Pre-Trial Chamber I, 'Decision on the Prosecutor's Application for a warrant of arrest, Article 58', ICC-01/04-01/06-8-US-Corr, 10 February 2006 (unsealed 17 March 2006), paras 37-40.

[44] Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ibid, para. 20; Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, ibid, para 21; and ICC, Situation in Darfur, Sudan, *Prosecutor v Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb),* Decision on the Prosecution Application under Article 58 (7) of the Statute, ibid, at para 21.

[45] Ruto Appeals Judgment on Kenya's Admissibility Challenge, supra note 41, para.40.

"conduct" in issue is "both that of the suspect and that described in the incidents under investigation which is imputed".[46] The Appeals Chamber reasoned that:

> "If …the underlying incidents that the Prosecutor and the State are investigating are identical, the case will be inadmissible before the Court (subject to any finding of unwillingness or inability). At the other end of the scale, the Appeals Chamber finds it hard to envisage a situation in which the Prosecutor and the State can be said to be investigating the same case in circumstances in which they are not investigating any of the same underlying incidents. The real issue is, therefore, the degree of overlap required as between the incidents being investigated by the Prosecutor and those being investigated by a State".[47]

As emphasised by Judge Sang-Hyun Song, this renders complementarity redundant as it effectively means that the domestic prosecuting authorities would have to reference incidents defined by the ICC Prosecutor in setting the scope of the domestic investigation to avoid the proceedings being taken over.[48] More concerning is where a domestic investigation is broader in scope than the ICC investigation but the Court goes by specific events, as defined by incident in time, place and locality by the OTP. The domestic investigation will be subjugated to the more limited enquiry at the international level, which might have been developed without country-specific expertise.[49]

The impact of this ruling has been substantial. Whether or not the domestic investigation did match the conduct under investigation by the OTP at the time,

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[46] ICC, Situation in Libya, *Prosecutor* v. *Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, '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'', ICC-01/11-01/11 OA 4, 21 May 2014, para.73 (emphasis added) (hereafter 'Gaddafi Admissibility Appeals Judgment').

[47] Gaddafi Admissibility Appeals Judgement, ibid, para.72 (emphasis added).

[48] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, Separate Opinion of Judge Sang-Hyun Song to the 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', ICC-01/11-01/11-547-Anx1, 21 May 2014, at para.6 (hereafter 'Separate Opinion to Appeals Judgment on Admissibility of the Gaddafi Case').

[49] See Christian M. De Vos, 'Investigating from afar: the ICC's evidence problem', (2013) 1 Leiden J. of Int'l L. 1009, at 1012 and 1021.

Saif Gaddafi was subsequently tried in Libya for what the OTP accepts was "substantially the same conduct" to that before the ICC and his Defence asserts was virtually identical.[50] Similarly, despite a finding by the ICC Pre-Trial and Appeals Chambers that the case against *Simone Gbagbo* in Côte d'Ivoire did not concern the 'same conduct', following her trial in Abidjan, observers unanimously agreed that she was tried and acquitted of the same conduct alleged by the OTP, to the extent that the facts put and many of the witnesses presented were the same.[51]

2.2.2 Ordinary crimes

While an investigation against Saif Gaddafi was first initiated on 23 November 2011 by the Libyan Prosecutor-General concerned financial crime and corruption, this was expanded on 17 December 2011 to encompass crimes against the person from 15 February 2011 and beyond throughout Libya, in particular, Tripoli, Benghazi, Al-Bayda, Bani Walid, Zintan and Misrata.[52] Libyan law did not yet provide the basis to charge the acts involved as international crimes, for example, crimes against humanity. However, it was foreseen that he would be charged with intentional murder, indiscriminate killing, torture, incitement to civil war, misuse of authority, arresting without just cause and unjustified deprivation of liberty as ordinary crimes.[53] Notably, while discriminatory intent – required for persecution as a crime against humanity - was not a material element for any of the Libyan crimes, it could

[50] ICC, PTC, Situation in Libya, *Prosecutor v Saif al-Islam Gaddafi*, Prosecution, Public Redacted Version of 'Prosecution response to 'Admissibility Challenge by Dr Saif al-Islam Gadafi pursuant to Articles 17 (1)(c), 19 and 20 (3) of the Rome Statute' filed on 28 September 2018, ICC-01/11-01/11-753-Red, 11 October 2018, at paras. 7, 135, 139, 141-145. Note also comparison chart at Annex H to Gaddafi Admissibility Challenge 2018, supra note 10.

[51] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018; Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018; Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.

[52] Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11, at paras. 23 and 47.

[53] Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11, at para.75.

be considered as an aggravating factor in sentencing.[54] Further, while some of these crimes only applied to 'public officers', Libya asserted that Gaddafi could be charged if there was proof of his exercising de facto authority.[55]

In turn, an investigation against Al-Senussi was initiated by the Military Prosecutor on 3 April 2012 for attacks on civilians and financial crimes, in relation to his capacity as the Director of Military Intelligence, of Brigadier rank.[56] However, following the Libyan Supreme Court Judgment of 17 July 2012 and by pronouncement of the President of the Libyan Supreme Court of 12 February 2013, Al-Senussi's case was presently also with the Prosecutor-General to be adjudicated before the ordinary courts rather than under military procedure.[57] Al-Senussi was being investigated in Libya not only in relation to crimes allegedly committed in Benghazi between 15 and 20 February 2011 for his command of the Security Forces (the ICC case), but for crimes committed throughout Libya and over a longer time frame from the 1980s.[58] This extended to his responsibility for the Abu Salim massacre of 1996 with an estimated 1,270 victims, which Libya justly emphasised is "of profound national importance to the Libyan people".[59] In this regard, the case brought against him at the ICC - as reflected in the Warrant of Arrest and the Article 58 Decision on its issuance – was "demonstrative only of a small fraction of his overall criminality" whereas the Libyan domestic investigation was "much

[54] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-344-Red, 31 May 2013, at para.111, (hereafter 'PTC Decision on admissibility of the Gaddafi case').
[55] PTC Decision on admissibility of the Gaddafi case, ibid, at para.109.
[56] Libya Admissibility Challenge concerning the Al-Senussi Case, supra note 11, at para. 136.
[57] Ibid, at para.137.
[58] Ibid, at paras 1 and 157.
[59] Ibid, at para.161.

broader".[60] Indeed, Libya noted that Al-Senussi "is suspected of being one of the worst perpetrators of international and national crimes in the region's recent history".[61] Similarly to Gaddafi, but bearing in mind his military office, it was foreseen that Al-Senussi would be charged with ordinary crimes.[62] This included murder, abductions, arrests and the torture of dissidents during the 2011 revolution.[63]

Significantly, the impossibility of charging either Gaddafi or Al-Senussi with international crimes under Libyan law was considered no bar. The Pre-Trial Chamber in both cases, and the Appeals Chamber, found that the key factor for determining the existence of a comparable domestic investigation – with the potential to render the ICC case inadmissible - was not the legal qualification but the underlying conduct.[64] Even the absence of discriminatory intent in domestic law was not decisive, so long as it was covered in sentencing.[65] While an important divergence from the prior jurisprudence of the ad hoc tribunals;[66] it is a necessary implication of complementarity which provides for State jurisdiction first and foremost.

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[60] Ibid, at paras 159-160.
[61] Ibid, at para.158.
[62] Ibid, at para.154.
[63] Ibid, at para.155.
[64] PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras.85 and 88; ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, 'Decision on the admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-466-Red, 11 October 2013, at para.166 (hereafter 'PTC Decision on admissibility of the Al-Senussi case'); and Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, at para.119.
[65] PTC Decision on admissibility of the Al-Senussi case, ibid, at para.166; and Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, at para.119.
[66] See ICTR, *Prosecutor v Michel Bagaragaza*, Case No. ICTR-2005-86-11*bis*, 'Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11*bis* (F) and (G) (TC)', 17 August 2007; and ICTR, *Prosecutor v Michel Bagaragaza*, Case No. ICTR-2005-86-11*bis*, 'Decision on the Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands (TC)', 13 April 2007; and the ICTR's earlier rejection of referral to the Kingdom of Norway: *see* ICTR, *Prosecutor v Michel Bagaragaza*, Case No. ICTR-2005-86-R11*bis*, 'Decision on the Prosecutor's Motion for Referral to the Kingdom of Norway (TC)', 19 May 2006; ICTR, *Prosecutor v Michel Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, 'Decision on Rule 11*bis* Appeal (AC)', 30 August 2006.

2.2.3 "Substantially the same conduct"

In examining the domestic and ICC cases against Gaddafi, the Pre-Trial Chamber considered the applicable test for Article 17 (1)(a) of the Rome Statute was whether they concerned the "same person" and "substantially the same conduct".[67] Rather than defining what is meant by "substantially the same conduct", the Pre-Trial Chamber simply stated this would depend on a "case by case analysis".[68] Yet, in applying this test, the Pre-Trial Chamber focused on the incidents in the Article 58 decision, namely, in Tripoli, Misrata, Benghazi, Al-Bayda, Derna, Tobruk and Ajdabiya from 15 February 2011 until at least 28 February 2011.[69] Nevertheless, the Pre-Trial Chamber adopted a broader approach than that taken in earlier jurisprudence, in considering that these events were merely "samples of a course of conduct of the Security Forces, under Gaddafi's control"[70] and the material factor was whether the domestic investigation could be said to address the same underlying "course of conduct" even if it did not "cover exactly the same acts".[71] Thus, the Court arguably took on the interpretation of conduct suggested by Libya, namely the notion of a 'criminal transaction' as applied by the ad hoc tribunals.[72]

In defining this 'course of conduct', the Pre-Trial Chamber also drew attention to the mode of liability and manner of commission alleged, namely, Gaddafi's role as a co-perpetrator responsible for indirect commission of the criminal acts through his de facto authority rather than as a direct perpetrator. It considered that the domestic investigation would be addressing the same conduct if it entailed

[67] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.76; citing Muthaura Appeals Admissibility Judgment, supra note 42, at para.39.
[68] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.77.
[69] Ibid, at para.81.
[70] Ibid, at para.82 (emphasis added).
[71] Ibid 201, at para.83.
[72] Libya Admissibility Challenge concerning the Al-Senussi Case, supra note 11, at para.73.

examining Gaddafi's "control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians, which started in February 2011 against Muammar Gaddafi's regime; in particular, that Mr Gaddafi activated the Security Forces under his control to kill and prosecute hundreds of civilian demonstrators or alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities from 15 February 2011 to at least 28 February 2011".[73] In this regard, the Pre-Trial Chamber commendably adopted a broader approach than that taken in previous ICC jurisprudence and indeed, the narrower approach later adopted in the *Simone Gbagbo* admissibility proceedings which saw the Court return to a rigid focus on specific incidents.

Nevertheless, the Court unjustifiably found that the Libyan investigation did not cover "substantially the same conduct" as the ICC case, when applying an unduly rigid evidentiary standard to the documents submitted by Libya to demonstrate the subject-matter and scope of the investigation. Specifically, despite finding that information covered in the summaries of witness statements in particular reflected "discrete aspects of the conduct as alleged in the proceedings before the Court";[74] the Pre-Trial Chamber concluded that it was unable "to discern the actual contours of the national case against Gaddafi such that the scope of the domestic investigation could be said to cover the same conduct".[75]

In the *Al-Senussi* case, the Pre-Trial Chamber went even further in departing from a narrow interpretation of 'same conduct' by way of a limited number of specific

[73] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.83.
[74] Ibid, at para.121.
[75] Ibid, at para.135.

incidents as related by the OTP. Again, it adopted the 'substantially the same conduct' test.[76] However, it found that reference to a narrow set of "incidents" or "events" as listed in the Article 58 Decision would be unhelpful in determining whether the Libyan investigation covered "substantially the same conduct" as the ICC case.[77] The Pre-Trial Chamber held that the domestic investigation did not need to cover all of the same "events" as those under investigation by the OTP in order for the case to be inadmissible.[78] Rather, it merely considered such "incidents" or "events" indicators.[79] It defined the 'conduct' in issue in terms of a course of conduct in which Al-Senussi in his role as the Head of Military Intelligence implemented a plan by Gaddafi to deter and quell civilian demonstrations, commanded forces in Benghazi and directly instructed his troops to attack civilians.[80] Accordingly, it again took into account the manner of commission by which criminal responsibility was incurred. Although not all of the incidents covered at the ICC were reflected in Libya's investigation of Al-Senussi; it was sufficient for inadmissibility that Libya's case covered "those events that are described in the Article 58 Decision as particularly violent or that appear to be significantly representative of the conduct attributed to Mr Al-Senussi".[81]

Notably, the Appeals Chamber corrected the Pre-Trial Chamber's legal reasoning in considering that incidents as defined in the Warrant of Arrest and Article 58 Decision do "play a central role" in the comparison of domestic and ICC investigations to

[76] Ibid, at para.66.
[77] Ibid, at paras 76-79.
[78] Ibid, at para.79.
[79] Ibid, at para.79.
[80] Ibid, at para.70.
[81] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.165.

determine whether the conduct covered is substantially the same.[82] It nonetheless upheld the conclusion of inadmissibility on the basis that the Pre-Trial Chamber still in reality took into account the specified incidents when making its assessment.[83] For Judge Sang-Hyun Song, however, the fact that the Pre-Trial Chamber found "all or some of the 'incidents' or 'events" matched up did not alter their original approach which he considered to be correct, that such 'incidents' are not essential as a comparator.[84] In my view, the Pre-Trial Chamber and not the Appeals Chamber got the legal test for admissibility right in this case, though application in practice of the 'course of conduct' approach could still be better refined. The Appeals Chamber failed to take the opportunity to steer the jurisprudence in a new direction which would be more compatible with complementarity.

Indeed, both the interpretation and application of the "same person/(substantially) the same conduct" test are heavily criticised by Judge Ušacka in her Dissenting Opinion to the Appeals Judgment on Admissibility of the *Gaddafi* case; in my view, rightly so. Judge Ušacka recognised that the test itself is "contrary to the express language of the chapeau of article 17 (1) of the Statute" and that it "disregards the principle of complementarity".[85] In particular, she notes that the test "has been developed in the abstract" in the context of self-referrals and does not fit when applied to cases such as those arising out of the Libya situation where the State is actively investigating and

[82] Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, at para.101.
[83] Ibid, at para.110.
[84] Separate Opinion of Judge Sang-Hyun Song to Appeals Judgment on Admissibility of the Al-Senussi Case, supra note 8, at para.2.
[85] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, 'Dissenting Opinion of Judge Anita Ušacka to the 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'', ICC-01/11-01/11-547-Red, 21 May 2014, at para.47 (hereafter 'Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case').

contesting admissibility.[86] In the context of cases like Gaddafi's, applying the same person/(substantially) the same conduct test would see the Court "come to wrong and even absurd results, potentially undermining the principle of complementarity and threatening the integrity of the Court".[87] Indeed, the manner in which the Court has applied the admissibility test limits national prosecutorial discretion, and it is not difficult to see that with it the ICC is one step closer to becoming a "'supervisory authority', checking in detail not only the 'scope' and content of any investigative and prosecutorial steps, but also scrutinising the State's substantive and procedural law and how it relates to the crimes in the Rome Statute".[88] Moreover, the relationship between the ICC and domestic courts is at risk of becoming competitive rather than complementary in nature, contrary to the intentions of the drafters of the Rome Statute.[89]

In any event, as Judge Ušacka highlights, the 'conduct' aspect is just one of three criteria relating to the individual criminal responsibility of an accused before the ICC, the other aspects being the consequences and other circumstances.[90] Further, there are other elements of a case which might be considered for comparing the ICC and the domestic proceedings.[91] For example, it has been suggested that the applicable sentence be used as a comparator for applying the principle of complementarity.[92]

[86] Ibid, at para.48.
[87] Ibid, at para.48.
[88] Ibid, at para.53.
[89] Ibid, at para.52.
[90] Ibid, at para.50.
[91] Ibid, at para.51.
[92] Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity', (2002) 53 (1) Harvard Int. L.J. 85. See in reply, Darryn Robinson, 'Three theories of complementarity: charge, sentence or process? A comment on Kevin Heller's sentence-based theory of complementarity', Chap.16 in Niamh Hayes, Yvonne McDermott and William A. Schabas (Eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, (London: Routledge, 2013), at 369-386; and Carsten Stahn, 'Sentencing horror' or 'sentencing heuristic'? A reply to Hellers's 'sentence-based' theory of complementarity', Chap.15 in Niamh Hayes, Yvonne McDermott and William A. Schabas (Eds), *The*

When considering Libya, the applicable sentencing regime for Gaddafi and Al-Senussi is the death penalty, clearly the most serious penalty available.

Even if the 'conduct' remains the comparator, as considered sensible, it is too onerous a requirement to hold that the domestic investigation must mirror that of the OTP in the acts, material and mental elements of the crimes included within its scope. The object and purpose of the principle of complementarity surely means that the State should have discretion to focus on different acts, as well as different locations and time periods in accordance with a context and country-specific investigative strategy. Indeed, when looking at the Appeals Chamber's undue focus on specific 'incidents' or 'events', it is clear that the domestic authorities are "being obliged to 'copy' the case before the Court",[93] contrary to the very essence of the principle of complementarity. This overlooks the differences between the international and domestic legal systems.[94] In particular, the substantive and procedural law of the State may not enable the domestic investigator to proceed in the same way as the OTP. Further, it renders redundant efforts by the domestic prosecutor to have a focused investigation targeting crimes of most concern to the local community.

As highlighted by Judge Ušacka in her dissenting opinion in *Gaddafi*, the international and domestic investigations may naturally differ, especially due to the availability and willingness of victims and witnesses to testify on certain events.[95] To apply a narrow test of what constitutes the 'same conduct' increases the likelihood of

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Ashgate Research Companion to International Criminal Law: Critical Perspectives, (London: Routledge, 2013), at 357-268.

[93] Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 85, at para.52.

[94] Ibid, at para.54.

[95] Ibid, at para.54.

the ICC's involvement potentially causing harm to affected communities, as it may "have the perverse effect of encouraging that State to investigate only the narrower case selected by the Prosecutor" of the ICC.[96] In this respect, the construction of the 'same conduct' test by the ICC is contrary to the interests of victims given the resulting gap in investigative coverage at both levels, a matter expressly identified by the Appeals Chamber in the *Gaddafi* Admissibility Appeals Judgment as deserving acute attention.[97] Due to jurisdiction and resourcing issues affecting the OTP, the acts investigated domestically may even be more serious in nature.[98] This is indeed the case when considering the Libyan investigation against Al-Senussi which encompasses the Abu Salim massacre which falls outside the ICC's temporal jurisdiction. This was implicitly taken into consideration by the Pre-Trial Chamber in finding Al-Senussi's case inadmissible.

The Court's rulings concerning Kenya also raise concerns as to the standard of review applicable for establishing the existence of relevant domestic proceedings and a conflation of the two stages for determining admissibility in doing so. For example, in the Kenya admissibility challenge it was asserted that following substantial legal reforms Kenya was willing and able to try post-election violence cases.[99] Kenya

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[96] Ibid, at para.55.

[97] See ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, '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'', ICC-01/11-01/11-547-Red, 21 May 2014, at para.74 (hereafter 'Appeals Judgment on Admissibility of the Gaddafi Case'), (stating that the Court must consider why the domestic State is not investigating incidents under investigation by the ICC Prosecutor, the interests of victims and the "impact on them of any decision that a case is inadmissible at the Court despite not all of the incidents being investigated domestically"). The reverse situation applies where neither the domestic State nor the ICC Prosecutor ends up investigating a particular act, locality or time frame - contrary to the interests of victims and of significant impact on them - due to the State moving to effectively 'mirror' the ICC's investigation in an effort to bring about a favourable complementarity ruling.

[98] Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 85, at para.58.

[99] ICC, Situation in Kenya, *Prosecutor v William Ruto, Henry Kiprono Kosgey, Joshua Arap Sang and Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, Application on

asserted its jurisdiction over the 'six Ocampo suspects', William Ruto, Henry Kosgey, Joshua Arap Sang, Francis Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali. A letter of the Attorney General dated 14 April 2011 filed in support of the admissibility challenge was to the effect that the Kenyan police had been entrusted to investigate their involvement in the post-election violence of 2007-2008. A report from the Director of the Criminal Investigation Department provided an overview of investigative activities and specifically referenced a pending case against Ruto, Nakuru CID Inquiry File No. 10/2008, where investigative steps had already been taken and which was "still under investigation".[100] The same report referred to the Kenyan investigators' "surprise" in regards to the allegations against the accused Kosgey, Sang, Muthaura, Kenyatta and Ali as "other than Hon William Ruto, non[e] of the members of the Ocampo six have been mentioned previously during the investigations" but that nevertheless, a team of investigators had now been tasked "to carry out exhaustive investigations relating to the Ocampo six and other high ranking citizens".[101]

Aside from referencing the accused, Kenya further argued that for the purposes of Article 17 (1), 'case' should be more broadly interpreted than 'same person' to encompass "groups of persons that are likely to be the object of an investigation by the ICC" and "crimes that are likely to be the focus", with cases inadmissible before the ICC if national investigations covered "the same conduct in respect of persons at

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Behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute ICC-01/09-02/11-26, ICC-01/09-01/11, and ICC-01/09-02/1, 31 March 2011, at para 2 (hereafter 'Kenya Admissibility Challenge').

[100] ICC, Situation in Kenya, *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, Annex 2 to Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence and OPCV to the Government's application pursuant to Article 19 of the Rome Statute, ICC-01/09-02/11-91-Anx2, 13 May 2011, filed 16 May 2011, Report ref. CID/SEC/2/6/5/VOL.VIII/44 dated 5 May 2011, p.2 (hereafter 'Reply to Responses on Kenya's Article 19 Application').

[101] Annex 2 to Reply to Responses on Kenya's Article 19 Application, ibid, p.3.

the same level in the hierarchy being investigated by the ICC".[102] Kenya argued that a degree of discretion ought to be accorded to States in the approach taken to investigating complex crimes like those arising from the post-election violence. It emphasised that "investigations against low level perpetrators are the foundation for extending investigations to senior leaders (…) for the most serious incidents".[103] Not only is this 'bottom-up' approach utilised by many international tribunals to develop "a sound knowledge of the underlying crimes" before tackling the highest levels of responsibility, but it was considered that adopting such an approach "will be much to the advantage of the rule of law generally".[104] Indeed, a bottom-up approach is adopted in the OTP's Prosecutorial Strategy for 2019-2021.

Pre-Trial Chamber II ruled that both of the Kenya cases, *Ruto, Kosgey and Sang* and *Muthaura, Kenyatta and Hussein Ali*, were admissible before the ICC as there were no relevant domestic investigations or prosecutions for the purpose of Article 17 (1) – a situation of inaction.[105] This was upheld by the Appeals Chamber.[106] In its reasoning, PTC II cited the two-fold test for complementarity as propagated in *Katanga*.[107] However, in my view, PTC II erred in applying the test by

[102] Kenya Admissibility Challenge, supra note 99, para.32.
[103] Ibid, para.34.
[104] Ibid, para.71.
[105] ICC, Pre-Trial Chamber II, Situation in Kenya, *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2)(b) of the Statute', ICC-01/09-02/11-96, 30 May 2011, para 66, (hereafter 'PTC II Decision on Kenya's Admissibility Challenge – Kenyatta'); and ICC, Pre-Trial Chamber II, Situation in Kenya, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2)(b) of the Statute', ICC-01/09-01/11-101, 30 May 2011, para.70 (hereafter 'PTC II Decision on Kenya's Admissibility Challenge – Ruto').
[106] Muthaura Appeals Judgement on Kenya's Admissibility Challenge, supra note 42, at para. 69; Ruto Appeals Judgment on Kenya's Admissibility Challenge, supra note 41, at para.70.
[107] Katanga Admissibility Appeals Judgment, supra note 31, para 78, cited in PTC II Decision on Kenya's Admissibility Challenge - Kenyatta, supra note 105, at para.44.

inappropriately merging findings going towards unwillingness[108] - part of the second step – with factors relevant to the existence of a domestic investigation – part of the first step, to come to the conclusion that it was a case of inaction. The Appeals Chamber failed to correct the misapplication. In this respect, it is agreed that the Court put in place an unduly demanding "hurdle that would… avoid having to apply the second tier of the Article 17 admissibility test".[109]

Brighton argues that in doing so the Court was motivated to by-pass "the potential political fallout" of a finding at the second stage that Kenya was unwilling to genuinely prosecute the accused.[110] However, the Court did not shy away from criticising the processes in Kenya and the decisions still caused significant political uproar in demonstrating little concern for State sovereignty. From the reasoning of the Pre-Trial Chamber, the key finding is that despite the various reports filed by Kenya, the Court was unpersuaded that there were "concrete steps showing ongoing investigations" against the specific accused.[111] In this, it was the lack of sufficient demonstrable progress of the investigations by Kenya which led to the finding of inaction, as opposed to the factual absence of investigations per se which was not the case at least for Ruto.

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[108] See Stephen Brown and Chandra Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya;, (2012) 111 (443) African Affairs 244; and Chandra Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact', (2012) 12 (2) International Criminal Law Review 219, for the view that Kenya was unwilling to the extent that it was not genuinely investigating or prosecuting post-election violence cases and especially not as it concerns those higher up in the political hierarchy.

[109] Claire Brighton, 'Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court', (2012) 12 International Criminal Law review 629, 654-655.

[110] Brighton, ibid, at p.631.

[111] PTC II Decision on Kenya's Admissibility Challenge - Kenyatta, supra note 105, at para 56; PTC II Decision on Kenya's Admissibility Challenge - Ruto, supra note 105, at para.60.

For example, in addressing the DCI report which stated the criminal file number of Ruto and that his case "is still under investigation", the Pre-Trial Chamber focused on the reasons cited for non-completion of the investigation, which included "unreliable and uncooperative witnesses".[112] Namely, it queried the lack of clear information on the dates investigations commenced, whether the suspects or witnesses were already questioned and the absence of transcripts of the questioning by the police or prosecutor.[113] These factors are more suited to the second stage of the complementarity test, namely, whether Kenya was willing and able to genuinely investigate and prosecute.

Further evidence that the Pre-Trial Chamber strayed into the territory of the second stage is the pronouncement in relation to Kenyatta, Muthaura and Hussein Ali that it considered arguments on the broader interpretation to be made of the 'same person' test as persons of the 'same level of hierarchy' to "cast doubt on the will of the State to actually investigate the three suspects, assuming that there are ongoing investigations as asserted".[114] Moreover, it expressed scepticism over the fact that the Attorney General's letter aimed at demonstrating the existence of investigations arrived "two weeks after the Government of Kenya lodged its admissibility challenge".[115] This implies the Court doubted Kenya was acting in good faith.

The Appeals Chmber held that at the stage of the Kenya proceedings, the suspects must be the same persons at both the international and domestic level to enter into a complementarity analysis because there would be no jurisdictional conflict

[112] PTC II Decision on Kenya's Admissibility Challenge - Ruto, supra note 105, at paras.67-68.
[113] PTC II Decision on Kenya's Admissibility Challeng - Kenyatta, supra note 105, at para.65; PTC II Decision on Kenya's Admissibility Challenge - Ruto, supra note 105, at para.69.
[114] PTC II Decision on Kenya's Admissibility Challenge - Kenyatta, supra note 105, at para.56.
[115] Ibid at para.62.

otherwise.[116] The Appeals Chamber correctly highlighted the need to distinguish the determination of willingness or ability (step two) from the determination of the existence of a relevant domestic investigation (step one) and emphasised that "for assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps".[117] This is precisely the distinction the Pre-Trial Chamber failed to apply.

Notwithstanding this pronouncement of the correct legal test, the Appeals Chamber failed to overturn the decision, deferring to the Pre-Trial Chamber's assessment that Kenya had failed to provide "evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case" as opposed to simply asserting the existence of an investigation.[118] It held that for the purposes of Article 17 (1)(a) of the Rome Statute, "is being investigated" is to be interpreted as requiring evidence of "the taking of steps directed at ascertaining whether this individual is responsible for that conduct" and for this, the Court could rightly look at whether the domestic authorities had taken steps such as "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses".[119] In my view, while the Court ought not be expected to merely defer to the pronouncement by domestic authorities that a relevant investigation is in existence and should require evidence, in the Kenya cases it applied an unduly high threshold

[116] Ibid, at para.40.
[117] Muthaura Appeals Judgement on Kenya's Admissibility Challenge, supra note 42, at para. 40; Ruto Appeals Judgment on Kenya's Admissibility Challenge, supra note 41, at para.41.
[118] Muthaura Appeals Judgement on Kenya's Admissibility Challenge, supra note 42, at para. 61; Ruto Appeals Judgment on Kenya's Admissibility Challenge, supra note 41, at para.62.
[119] Muthaura Appeals Judgement on Kenya's Admissibility Challenge, supra note 42, at para.40; Ruto Appeals Judgment on Kenya's Admissibility Challenge, supra note 41, at para.41; citing Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, (Leiden: Martinus Nijhoff, 2008), at 203.

and level of scrutiny in satisfying this basic aspect. This threshold was also adopted by the Appeals Chamber.

In particular, while giving some acknowledgement to the greater evidence before the Court concerning the existence of an investigation against Ruto in that he was specifically named in at least three investigative documents;[120] it still upheld the Pre-Trial Chamber's findings which put him in the same boat as the others - a situation of inactivity. Notably, despite finding that concrete investigative steps had been taken in the *Ruto* case in Kenya, including site visits, the Appeals Chamber applied a heightened degree of scrutiny in lamenting the lack of additional evidence "such as police reports attesting to the time and location of those visits or the cases in which the inquiries took place",[121] despite the fact that such reports had not specifically been required from Kenya by the Pre-Trial Chamber before making its ruling.

Further, the Pre-Trial Chamber's decision not to give Kenya more time to submit additional evidence of the existence of the investigation and investigative steps gave rise to a risk that the Court's ruling might not have reflected the facts on the ground in determining a state of inaction. Similarly, the Court rejected Kenya's request for an oral hearing to elaborate on the current position.[122] Even though empirical evidence indicates the Court got it right as regards the state of the domestic investigations in Kenya, the way it went about it creates a real risk of error, which will be more apparent in other cases where the same type of approach was applied.

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[120] Ruto Appeals Judgment on Kenya's Admissibility Challenge, supra note 41, at para.68.
[121] Ruto Appeals Judgment on Kenya's Admissibility Challenge, supra note 41, at para.69.
[122] ICC, Situation in Kenya, *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, Kenya, 'Application for an Oral Hearing Pursuant to Rule 58 (2)', ICC-01/09-02/11-92, 17 May 2011; PTC II Decision on Kenya's Admissibility Challenge - Kenyatta, supra note 105, at paras. 32-38.

Significantly, Judge Ušacka issued a dissenting opinion strongly critical of the appellate decision of the majority. I agree with her reasoning. In particular, Judge Ušacka highlights the erroneous merging of the two-step test for the complementarity determination in the Kenyan cases and considered that the decision on admissibility should have been reversed and returned to the Pre-Trial Chamber for reconsideration.[123] Moreover, the dissenting opinion recognises the high threshold set by States Parties for determinations of unwillingness and inability before the ICC could assume jurisdiction where a concurrent investigation is ongoing at the domestic level. As stated by Judge Ušacka, "[t]he Court should not circumvent this threshold created by unwillingness or inability by requiring a State to prove e.g. the existence of a full-fledged investigation or prosecution of a case in order to establish that there is no situation of inactivity. It is important to adhere to the spirit of the Statute when giving such interpretations."[124]

In my opinion, the Pre-Trial Chamber and majority appellate judges essentially circumvented the threshold for unwillingness, as implied by Judge Ušacka. The Court went too far in demanding additional evidence from the State to establish the mere

[123] ICC, Situation in Kenya, *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, Appeals Chamber, 'Dissenting Opinion of Judge Anita Ušacka to Judgment on the appeal of the Republic of Kenya against the Decision of the 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'', ICC-01/09-02/11-342, 20 September 2011, at para.30 (hereafter 'Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge – Kenyatta'); ICC, Situation in Kenya, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Appeals Chamber, 'Dissenting Opinion of Judge Anita Ušacka to Judgment on the appeal of the Republic of Kenya against the Decision of the 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'', ICC-01/09-01/11-336, 20 September 2011, at para.30 (hereafter 'Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge – Ruto').

[124] Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Kenyatta, ibid, at para.27; Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Ruto, ibid, at para.27.

existence of domestic investigations. Indeed, despite it being the first State-lodged admissibility challenge and as such, clarification was required over the definitions of a 'case', 'investigation' and 'prosecution', the standard of proof and the type of evidence required to meet the burden, the Court "applied…a high burden of proof and a demanding definition of 'investigation'".[125] It also failed to distinguish the position in regard to Ruto, for whom "there was a considerable degree of detail in the information provided" by Kenya.[126] There is a danger inherent in the application of such a narrow construction of 'investigation' and high standard of proof going forward, as recognised by the dissenting opinion, especially given the different use of the legal terms 'investigation' and 'prosecution' in domestic criminal justice systems, particularly between common and civil law jurisdictions.[127]

3. What is the Correct Standard of Review?

The threshold for admissibility was always envisaged as steep.[128] As indicated in the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court in 1995, the International Law Commission (ILC) Working Group anticipated a very high threshold for intervention by the ICC, reserving cases at the Court to those "in which there was no prospect that alleged perpetrators…would be duly tried in

[125] Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Kenyatta, supra note 123, at para.25; Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Ruto, supra note 123, at para.25.
[126] Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Ruto, supra note 123, at para.26.
[127] Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Kenyatta, supra note 123, at para.27; Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Ruto, supra note 123, at para.27.
[128] For an overview of the procedural history of complementarity, see Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, supra note 119, pp.31-80; and John Holmes, Chapter 1, 'The Principle of Complementarity', in Roy Lee (Ed), *The ICC: The Making of the Rome Statute, Issues, Negotiations, Results*, (The Hague: Kluwer Law International, 1999), pp.41-78.

national courts".[129] As such, the draft Article 35 on admissibility of the ILC's Draft Statute for an International Criminal Court reflected the idea that the principle of complementarity "should create a strong presumption in favour of national jurisdiction".[130] Further, it was emphasised that the ILC did not intend "to establish a hierarchy between the International Criminal Court and national courts" or to allow it to "pass judgement on the operation of national courts in general".[131] This concern continued to be discussed before the Preparatory Committee on the International Criminal Court, with the Tunisian delegation reflecting States' concerns that the "ad hoc tribunals…seemed to be operating in competition with national courts" and highlighting the problem that "national courts in developing countries might be overridden under the pretext that they could not adequately undertake prosecutions".[132]

These concerns influenced the drafting of Article 17, with the criterion of "genuinely" preferred over the initial proposal of "efficiently" or "ineffective" and other options of "sufficient" or "reasonable grounds", "diligently" or in "good faith" which were dismissed as "too subjective".[133] Similarly, "unjustified delay" was preferred as more objective over the initial proposal of "undue delay" which was viewed as setting too low a threshold in determining the unwillingness of a State to investigate or prosecute

[129] Ad Hoc Committee on Establishment of an International Criminal Court, Report of 1995, A/50/22, para.42.
[130] Ibid, para.31.
[131] Ibid, para.43.
[132] Tunisia, UN Press Release L/2773 'Prep Com on ICC continues considering complementarity between national, international jurisdictions' dated 2 April 1996.
[133] John T. Holmes, Chapter 18, 'Complementarity: National Courts versus the ICC', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Eds), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford University Press, 2002), 667-686, at 674.

at the national level.[134] The premise behind the word choice was always the intention of the drafters that:

> "the Court should not take the approach that it could do the job of investigation and prosecution better than the domestic courts, which terms such as 'effectively' might imply. An example cited during the negotiations was that the Court should not assume jurisdiction simply because the national authorities were proceeding more slowly (ie. less efficiently) than other States or the Court itself in handling similar cases. The critical factor…was whether there was a defect in the approach taken by the State which inevitably, if left to its conclusion, would result in a travesty of justice".[135]

In turn, "substantial collapse" of a State's judicial system was preferred over the alternative proposal of "partial" to establish a higher threshold for ICC intervention.[136] As Holmes explains:

> "The reason for the change was to preclude the Court from assuming jurisdiction merely because an armed conflict exists in a State and the judicial system is partially affected. Even in such instances, the State may be able, through shifting resources or transferring the trial to other venues, to effect a genuine prosecution".[137]

The result of the debates in the drafting of the Rome Statute is such that the threshold for admissibility was set deliberately high. As stressed by Holmes in the authoritative commentary, "[u]ndoubtedly, the standards are high. However, the underlying premise of the complementarity regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases".[138]

Taking into account the procedural history concerning the principle of complementarity, Stigen argues that the construction of "genuinely" in Article 17 of the Rome Statute should be such that "the ICC will only interfere when there are clear signs that the State is trying to shield the perpetrator or the State is incapable of carrying out essential investigative steps and not simply because a proceeding stands

[134] Holmes, ibid, at p.676.
[135] Ibid, at p.674.
[136] Ibid, at p.677.
[137] Ibid, at p.677.
[138] Ibid, at p.675.

out as conceptually different from more 'sophisticated' proceedings".[139] For this reason, she suggests the standard of proof for the Prosecutor to demonstrate the non-genuineness of national proceedings should be a "preponderance of the evidence".[140] The high threshold for admissibility is also reflected in the OTP's early policy brainstorming where it emphasised that "as a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only where there is a clear case of failure to act by the State or States concerned".[141] This stance acknowledged that national proceedings would "normally be the most effective and efficient means of bringing offenders to justice" for the pragmatic reason that "States themselves will normally have the best access to evidence and witnesses".[142]

It is considered that the high threshold extends to the first stage of an admissibility assessment as well as the second if the provisions are interpreted in a manner consistent with the intention of the drafters to give the Court a remit complementary to national jurisdictions rather than adopting a system based on international primacy. The ICC significantly departed from this high threshold when determining admissibility in regard to Côte d'Ivoire and Libya.

3.1 Standard of review for the first stage

Rather than simply declaring Libya unable to genuinely investigate and prosecute Gaddafi, the Pre-Trial Chamber - and in turn, the Appeals Chamber - went to elaborate lengths to determine that the cases were not the same under the first step of

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[139] Jo Stigen, Chapter 6, 'Genuine' national proceedings: related concepts of international law' in Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, supra note 119, .215-229 at 217.
[140] Ibid, at p.481.
[141] ICC OTP, 'Paper on some policy issues before the OTP', Sept 2003, p.2.
[142] Ibid, p.2.

the admissibility test. In order to do so, a more exacting evidentiary standard was applied concerning the Gaddafi admissibility determination which is arguably incompatible with complementarity and presents an unwarranted hurdle for a State in the midst of a transitional justice process.[143] Although there is no express provision in the Rome Statute on the burden or standard of proof for the purposes of determining admissibility under Article 17 (1)(a), the Court has logically found that the State challenging admissibility bears the burden of proof for both limbs of the test.[144] However, in determining the existence of a relevant domestic investigation in the Libya cases, the ICC applied an unduly high evidentiary standard. This applies to the *Al-Senussi* admissibility rulings as much as to the *Gaddafi* rulings.

Rather than apply the lower standard of proof suggested by both Libya and the OTP of a "balance of probabilities";[145] the Court opted to follow the standard laid down in the Kenya Admissibility Appeals Judgment concerning *Muthaura, Kenyatta and Ali* of "evidence of a sufficient degree of specificity, admissibility and probative value".[146] Indeed, the standard comes close to the "clear and convincing evidence" test advocated by the OPCV in the *Gaddafi* case, acknowledged as a higher threshold.[147] In turn, the Court applied this standard in a manner incompatible with the principle of complementarity, just like in the Kenya cases. Arguably, the only reason that the Pre-Trial Chamber arrived at a positive conclusion on the first part of

[143] Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 85, at paras.60-62.
[144] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.52.
[145] PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras.44 and 46; ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-258-Red2, 23 January 2013, at para.13 (hereafter 'Libya's Further Submissions on admissibility of the Gaddafi case"); OTP Response to Libya's Admissibility Challenge on the Gaddafi case, supra note 12, at para.16.
[146] Muthaura Appeals Judgement on Kenya's Admissibility Challenge, supra note 42, at para.61; cited in PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.54.
[147] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.49.

the admissibility test concerning *Al-Senussi* is because Libya supplied so much evidence of the domestic investigation that was both substantial in quantity and varied in the type of materials relied upon. In distinction, for the purposes of the earlier *Gaddafi* admissibility challenge, the same material was unavailable, largely, at least according to Libya, due to investigative secrecy provisions in the Libyan Criminal Procedure Code (CPC) which prevented the disclosure of investigative materials prior to charge.[148] In the *Al-Senussi* case, having experienced the implications of this in the failure of the *Gaddafi* challenge, Libya found a means compatible with the CPC to supply a magnitude of investigative material to the ICC, including civilian victim complaints, summaries of witness statements including from insider witnesses, intercepts and real evidence including death certificates, medical notes, photographs and video recordings.[149]

The Pre-Trial Chamber reasoned that 'evidence' for the purposes of admissibility proceedings would carry a broader than usual meaning - encompassing orders, directions, decisions and reports which show the existence of an investigation, as well as actual material evidence collected during the investigation for the purposes of criminal responsibility.[150] Despite this, in practice, the Court was dismissive of anything other than physical evidence or witness statements. For example, in the *Gaddafi* admissibility decision, the Pre-Trial Chamber dismissed reports put forward by Libya, including reports of the Ministry of Justice and the Prosecutor-General's Office on what the domestic investigation covers and orders extending detention, as

[148] Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11, at paras.39-41.
[149] Libya Admissibility Challenge concerning the Al-Senussi Case, supra note 11, at paras 167 and 174; and PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras 112-145.
[150] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para 54; ICC, *Situation in Libya, Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber, 'Decision requesting further submissions on issues relating to the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-239, 7 December 2012, at paras.10-11.

lacking specific information and/or for the reason of being prepared for the purpose of the admissibility challenge.[151] Further, while witness summaries were considered to be of "some probative value", the Pre-Trial Chamber inappropriately disregarded them for lacking such "specificity" as would enable the Court "to draw conclusions as to the precise scope of the domestic investigation".[152]

That the *Gaddafi* Pre-Trial Chamber applied too rigid an approach to the assessment of the evidence submitted by Libya is further apparent from the Separate Opinion of Judge Sang-Hyun Song on appeal, who concluded that "when assessing the evidence as a whole, it is clear that Libya is investigating the same case".[153] In particular, he considered that the witness summaries submitted demonstrated that Libya was conducting an investigation against Gaddafi covering incidents throughout the country and found that "the fact that a number of witness summaries relate to Mr Gaddafi's overall role in the events, as well as specific incidents, sufficiently demonstrates that Libya has taken investigative steps on a broad basis".[154] In contrast, by the time of the *Al-Senussi* admissibility decision, Libya had supplied everything from insider witness statements to medical reports, written orders and death certificates as well as intercepted communications. These enabled the Pre-Trial Chamber to see that "multiple lines of investigation are being followed" and in particular, that the Libyan investigations were making inquiries about potentially exculpatory evidence as well as incriminatory.[155] From this, it concluded that Libya

[151] PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras.116-119.
[152] Ibid, at paras 121 and 123.
[153] Separate Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 48, at para. 1.
[154] Ibid, at para.10.
[155] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.161.

was taking "concrete and progressive steps".[156] Thus, the Court went beyond a prima facie evaluation of the materials submitted to actually assess the quality and results of the domestic investigation.

To require a State to meet such a high evidential burden to successfully contest admissibility risks replacing the concept of complementarity that is at the heart of the Rome Statute, for one of primacy. The evidentiary threshold, as applied by the Court in its admissibility jurisprudence to date, is such that it would be very difficult for a State undergoing a transitional justice process to contest admissibility.[157] Further, due to the high evidential requirements to support the existence of a domestic investigation, there is a clear risk of the ICC admissibility proceedings infringing upon prosecutorial independence and the separation of powers between the judiciary and executive. This necessarily follows in light of Libya's argument that it incurred difficulty in satisfying the ICC's high threshold of proof that the same conduct was under investigation domestically due to the State representatives not having access to the prosecutor's investigative file or evidence pre-charge.[158]

While a State is required to lodge an admissibility challenge at the earliest opportunity, in accordance with Article 19 (5) of the Rome Statute, Libya's doing so in relation to the *Gaddafi* case meant it was effectively hampered in the quantity and quality of the materials it could submit as evidence in support of the existence of a domestic investigation covering the 'same conduct' as the case before the ICC. It is acknowledged that the Pre-Trial Chamber exercised some flexibility in the procedure

[156] Ibid, at para.160.
[157] See Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 85, para.62.
[158] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.105.

adopted, giving Libya the opportunity to make further submissions including through an oral hearing.[159] Nevertheless, this flexibility did not last as the Court moved closer to a decision. Notably, the Pre-Trial Chamber dismissed Libya's request to overcome the challenges it originally faced in presenting evidence due to the confidentiality provisions of the Libyan CPC by way of an on-site inspection of the investigation file in Tripoli or for an additional six weeks to copy the file.[160] By the time of the *Al-Senussi* admissibility challenge, Libya was able to supply case numbers for both the Al-Senussi (file no.630/2012) and the Gaddafi (file no.229/2012) investigations.[161] It also navigated a way to supply a significant amount of evidentiary material to the ICC, notwithstanding the confidentiality restrictions in place, including an additional 16 witness statements and a mass of other documentary evidence.[162]

Notably, the Pre-Trial Chamber in the *Al-Senussi* case recognised that the parameters of an investigation become more defined based on the phase of the investigation, noting that there is even a "significant discrepancy" between cases at the ICC itself in terms of the extent of detail in the description of the factual parameters of the conduct alleged to have been committed by the accused.[163] Indeed, the ICC's Warrant of Arrest against Al-Senussi – looked at by the Pre-Trial Chamber for the purposes of comparison with the Libyan investigation - is itself scant in detail on the scope of the

[159] On this, see Appeals Judgment on Admissibility of the Gaddafi Case, supra note 97, at paras 159-163.
[160] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 'Notification by Libyan Government supplemental to its consolidated reply to the responses of the Prosecution, OPCD, and OPCV, to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-306, 28 March 2013; PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.39.
[161] Libya Admissibility Challenge concerning the Al-Senussi Case, supra note 11, at para.175.
[162] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras 106-111 (dealing with same evidence from Gaddafi case) and 112-145 (additional evidence).
[163] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras 66 (iii) and 75.

case. However, when it came to defining the domestic investigation against Gaddafi in Libya, no margin of appreciation was applied.

In that instance, the Pre-Trial Chamber looked to the more detailed Article 58 Decision for the sake of comparison.[164] That investigations take time before the parameters become more defined is borne out by the fact that the cases of Gaddafi and Al-Senussi were both transferred to the Accusation Chamber in South Tripoli and joined by the time of the ICC Pre-Trial Chamber's decision on admissibility in Al-Senussi.[165] The Court ought to have given Libya a margin of appreciation and allowed for further submissions to be taken into consideration even at a late stage in the admissibility proceedings. This concern as to the timing of the admissibility determination is taken on-board by Judge Ušacka in her dissenting opinion to the Gaddafi Admissibility Appeals Judgment. She notes that depending on the time the admissibility determination is made and the phases of the respective ICC and domestic investigation, one investigation may be more advanced and well-defined in scope and subject-matter than the other.[166] Yet, this should not prevent the State succeeding in an admissibility challenge so long as the domestic judicial authorities are making a genuine effort to investigate. It is important to strike the "right balance" between State sovereignty and the effectiveness of the ICC in this respect.[167]

[164] PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras. 80-81.
[165] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 'Government's Submissions and Response to Defence 'Filing on behalf of Mr. Abdullah Al-Senussi pursuant to 'Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi' of 19 September 2013' and 'Addendum' filed on 5 September 2013'', ICC-01/11-01/11-455, 26 September 2013, at para.5.
[166] Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 85, at para.56.
[167] Ibid, at para.57.

Yet, the Chambers continued to take the same flawed approach in adjudicating on the admissibility challenge by Côte d'Ivoire in the *Simone Gbagbo* case. While Côte d'Ivoire did not lodge any formal challenge to the admissibility of the cases of Laurent Gbagbo and Charles Blé Goudé before the ICC, circumstances on the ground developed since their surrender such that the State decided that further cases could be tried at the domestic level. On 30 September 2013, Côte d'Ivoire challenged the admissibility of the *Simone Gbagbo* case.[168] While not formally joining in the challenge, Simone Gbagbo filed submissions which supported the arguments of Côte d'Ivoire for a finding of inadmissibility before the ICC, stating that she wished to be tried in her own country.[169] The challenge was unsuccessful before Pre-Trial Chamber I[170] and the Appeals Chamber.[171] In my view, these decisions are legally erroneous, with the Court continuing to apply an unduly high threshold and rigid approach to the determination of the existence of a relevant domestic investigation or prosecution, as adopted in the Kenyan cases. Specifically, the Court rendered the case

[168] ICC, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, Request of the Republic of Côte d'Ivoire on the admissibility of the case The Prosecutor v Simone Gbagbo and request for suspensive effect pursuant to Articles 17, 19 and 95 of the Rome Statute, "*Requête de la République de Côte d'Ivoire sur la recevabilité de l'affaire le procureur c. Simone Gbagbo, et demand de la sursis à execution en vertu des articles 17, 19 et 95 du Statut de Rome*", ICC-02/11-01/12-11-Red, 30 September 2013, public redacted version published 1 October 2013, French version, (hereafter 'Côte d'Ivoire's Admissibility Challenge to the Simone Gbagbo case').

[169] See ICC, Pre-Trial Chamber I, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo,* Defence, 'Response on behalf of Simone Gbagbo to the request of the Republic of Côte d'Ivoire on the admissibility of the case of Prosecutor v Simone Gbagbo and request for suspensive effect pursuant to Articles 17, 19 and 95 of the Rome Statute', ICC-02/11-01-12-39, 8 April 2014, at paras.37 and 42 (hereafter 'Simone Gbagbo Defence Response to Admissibility Challenge'); and ICC, Appeals Chamber, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo,* Defence, 'Response on behalf of Simone Gbagbo to the Appeal of Côte d'Ivoire of the decision of the Pre-Trial Chamber on the exception to admissibility rendered by Côte d'Ivoire's seizure of the case concerning Simone Gbagbo', ICC-02/11-01/12-62, 6 February 2015 (hereafter 'Simone Gbagbo Defence Response to Admissibility Appeal').

[170] ICC, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo,* Pre-Trial Chamber I, 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, Decision under Articles 17 and 19', ICC-02/11-01/12-47-Red, 11 December 2014 (hereafter 'PTC Decision on Côte d'Ivoire's Admissibility Challenge').

[171] ICC, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo,* Appeals Chamber, 'Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11/12/2014 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', ICC-02/11-01/12 OA, ICC-02/11-01/12-75, 27 May 2015 (hereafter 'Appeals Judgement on Côte d'Ivoire's Admissibility Challenge').

admissible before the ICC after concluding that the position was one of inactivity, that there were no domestic proceedings against Simone Gbagbo for the purposes of Article 17 (1)(a).[172] Having made this determination under step one of the complementarity test, the Court avoided having to determine the ability or willingness of Côte d'Ivoire to genuinely investigate or prosecute the case against her, step two.

The technical legal determination of inactivity for the purposes of Article 17 admissibility appears almost farcical in light of the position on the ground where not just one, but multiple cases concerning Simone Gbagbo were in fact being investigated and prosecuted at the time. Indeed, in the Defence response to the Victims' Observations, the Irish defence counsel for Simone Gbagbo was so bold as to state "Defence Counsel can confirm that the prosecution of Mme. Gbagbo is most certainly 'ongoing'. She is presently on trial, in public, in Abidjan, Côte d'Ivoire, on charges the same or substantially the same as that before the Court. Counsel briefly attended the trial."[173] The OTP moved[174] to have this observation struck from the record and dismissed in limine by the Appeals Chamber, the latter of which was granted.[175] In contrast to the Kenya cases, the *Simone Gbagbo* case was found admissible on the interpretation of 'same conduct' rather than the identity of the accused. Specifically, it was considered that despite the fact that multiple proceedings

[172] PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 170, at para.79; Appeals Judgement on Côte d'Ivoire's Admissibility Challenge, supra note 171,at paras. 59, 61-62.
[173] ICC, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, Defence, 'Response to Observations of Victims on the Appeal of Côte d'Ivoire of the decision of the Pre-Trial Chamber on the exception to admissibility rendered by Côte d'Ivoire's seizure of the case concerning Simone Gbagbo', ICC-02/11-01/12-65, 5 March 2015, at para.43 (hereafter 'Simone Gbagbo Response to Victims' Observations on the Admissibility Appeal').
[174] ICC, Appeals Chamber, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, Prosecution, 'Prosecution's request to dismiss *in limine* and strike portions of the responses of the Government of the Republic of Côte d'Ivoire and the Defence for Simone Gbagbo', ICC-02/11-01/12-66, 9 March 2015.
[175] Appeals Judgement on Côte d'Ivoire's Admissibility Challenge, supra note 171, at para.44.

against Simone were ongoing in Côte d'Ivoire, none concerned precisely the same subject-matter and scope as the proceedings before the ICC and as such, the Court reasoned that the position was one of inactivity. However, the Court conducted an unduly rigorous assessment of the domestic investigations and applied an unrealistically high threshold for the existence of relevant proceedings.

Three sets of ongoing domestic proceedings were examined by the Pre-Trial Chamber.[176] The first investigation concerned economic crimes, which the Pre-Trial Chamber quite logically concluded related to conduct "clearly of a different nature" from that in issue before the ICC.[177] The second investigation concerned crimes against State security for which - by the time the admissibility challenge reached the ICC Appeals Chamber - she was on trial in the Court of Assize, and indeed, she was convicted and sentenced in Abidjan two months before the Appeals Judgment on the admissibility challenge was rendered on 27 May 2016. It is possible to see some parallels between this and the ICC's case in that Simone Gbagbo was charged with recruiting, supplying and directing members of armed groups to participate in acts of violence, pillage, arson and wilful destruction in and around Abidjan which, as argued by Simone's Defence, was not on the facts significantly different from her accusation before the ICC as a co-perpetrator responsible for organising the military and defence forces and youth militias.[178] However, the Pre-Trial Chamber held that this could not be considered as covering the 'same conduct' as that involved in the ICC's proceedings, when looking at both the factual description in the documentation supplied as well as the legal characterisation, despite acknowledging prior

[176] PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 170, at paras. 47-50.
[177] Ibid, at para.47.
[178] Simone Gbagbo Defence Response to Admissibility Appeal, supra note 169, at paras.41-47; and Simone Gbagbo Response to Victims' Observations on the Admissibility Appeal, supra note 173, para.37.

jurisprudence to the effect that legal qualification of the acts is not relevant in comparing conduct.[179]

The third investigation concerned crimes against humanity committed during the post-election crisis. Notably, the investigation in Côte d'Ivoire was considerably broader than that initiated by the OTP, covering incidents throughout the country. This case called for more probing.

The Pre-Trial looked at the four specific incidents for which Simone Gbagbo was under investigation at the ICC, namely, attacks against demonstrators concerning the RTI 16-19 December 2010, the women's march in Abobo 3 March 2011, the Abobo market shelling 17 March 2011 and the Yopougon massacre of 12 April 2011.[180] It compared these four incidents to procedural orders provided by the domestic authorities and found that there was no conflict of jurisdiction as the orders simply "list or quote in full the relevant provisions of the Ivorian Criminal Code" and did not specifically refer to the four incidents in the facts.[181] From this, the Court made the leap that the factual contours and scope of the investigation in Côte d'Ivoire were unclear.[182] In regards to the burden on Côte d'Ivoire in challenging admissibility, the Pre-Trial Chamber stated that "the State challenging the admissibility of a case, even when the alleged domestic proceedings are still at an early stage of investigation, must be able to show the contours or parameters of that investigation in order to determine the subject-matter of the national investigation. If a State is unable to clearly indicate the contours of its national investigation, the State cannot assert that

[179] PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 170, at para.77.
[180] Ibid, at para.74.
[181] Ibid, at para.74
[182] Ibid, at paras.75-76.

there exists a conflict of jurisdictions with the Court".[183] Yet, Côte d'Ivoire had provided documentation indicating that the scope of the domestic investigation was wider than that before the ICC, encompassing all potential events involving an attack against the civilian population constituting crimes against humanity between November 2010 and April 2011 in the context of the post-election violence. The Court erred in not taking into account the circumstances of the domestic case and the context of the crimes as a whole. For the ICC to have such a narrow perspective as to what concurrent domestic proceedings must entail to give rise to a jurisdictional conflict undermines the principle of complementarity.

Moreover, in analysing the third domestic investigation, the Pre-Trial Chamber again took into account factors which are more apposite to the second stage of the complementarity test, namely willingness and ability to genuinely investigate and prosecute.[184] While for Kenya the key issue was one of willingness; for Côte d'Ivoire the issue was predominantly (though not exclusively) one of ability, given that the justice system was still recovering and was not in a rosy condition even prior to the conflict. This was acknowledged by Côte d'Ivoire in the admissibility challenge, noting that 17 of 37 localities were affected by the post-election crisis with 22 of 33 prisons burned down or pillaged.[185] However, national courts re-opened on 30 January 2012, with significant judicial reform underway.[186]

[183] Ibid, at para.76.
[184] Notably, Pre-Trial Chamber I cited as authority for this the decision by Pre-Trial Chamber I in the Libya case of Abdullah Al-Senussi: PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.210; PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 170, at para.30.
[185] Côte d'Ivoire's Admissibility Challenge to the Simone Gbagbo case, supra note 168, at para.42 ("*Le fonctionnement des institutions judiciaries a été en effet gravement et durablement affecté par la crise politique que a touché la Côte d'Ivoire à partier de 2002 et plus particulièrement, par la crise post électorale de la fin de l'ánnée 2010...")*.
[186] Ibid, at paras 43-45.

Notably, the Pre-Trial Chamber found that there was an ongoing investigation against Simone in Côte d'Ivoire for crimes against individuals in the context of the post-election violence in Abidjan[187] and that this investigation was "still formally opened"[188] at the time of the admissibility challenge. However, the Pre-Trial Chamber then proceeded to criticise the quality of the domestic investigation. For example, it found that Simone was interrogated by the investigative judge on 9 and 10 September 2014 and 2 and 3 October 2014, but commented that the judge only posed "broad and generic questions".[189] Nevertheless, the Pre-Trial Chamber still noted - from minutes of the questioning provided to the Court by the domestic authorities from all the hearings in Côte d'Ivoire - that "the questioning did address some relevant aspects of the factual case against Simone Gbagbo that is before the Court and the questions posed indicate an attempt by the domestic authorities to elicit relevant information on the events [which] occurred between the second round of the presidential elections on 28 November 2010 and Laurent Gbagbo's arrest on 11 April 2011".[190]

The Court's expectation that more information should have come out of the questioning as a result is to some extent unrealistic and in conflict with the accused's right to silence and to protection against self-incrimination, as indeed argued by Simone's Defence in supporting the admissibility challenge.[191] Further, the Court focused on the issue of delay in that the interrogation was previously scheduled for December 2012 then February 2014 but had been unable to proceed further on those

[187] PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 170, at para.71.
[188] Ibid, at para. 65.
[189] Ibid, at para.73.
[190] PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 170, at para.73.
[191] Simone Gbagbo Response to Victims' Observations on the Admissibility Appeal, supra note 173, at paras.63-64.

occasions, the first of which because Simone declined to answer any questions. However, the Court omitted to take into account the reasons for the delay, which included, as highlighted by the Defence, Simone being in pre-trial detention in Odienné, a long distance from Abidjan, at the time and the local travel conditions[192] (she was relocated to Abidjan in December 2014[193]) as well as her need for more time to consult her lawyer before the questioning.

Further, the Pre-Trial Chamber found that other investigative steps were taken specifically in relation to Simone and conducted "with a view to collecting information relevant to determine Simone Gbagbo's responsibility for the alleged crimes".[194] This included a site visit ordered by the investigative judge on 11 May 2012[195] and the interview of a civil party in January 2013.[196] In addition, aside from being questioned by the investigative judge for four days, Simone had appeared at several preliminary hearings and her pre-trial detention originally ordered on 20 April 2012 was duly extended. However, the Pre-Trial Chamber considered the investigative steps "scarce in quantity and lacking in progression" and "disparate in nature and purpose".[197] In particular, it criticised the apparent omission to obtain more witness testimonies.[198] The Court again also focused in on the delay between investigative actions.[199] This was despite finding that the delay was at least partly due to complicated procedural issues out of the hands of the investigators, namely, that based on the extensive geographical scope of the investigation the proceedings were

[192] Simone Gbagbo Defence Response to Admissibility Challenge, supra note 169, at para. 29.
[193] Simone Gbagbo Response to Victims' Observations on the Admissibility Appeal, supra note 173, at para. 67.
[194] PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 170, at para.56.
[195] Ibid, at para.57.
[196] Ibid, at paras. 60 and 66.
[197] Ibid, at para.70.
[198] Ibid, at para.67.
[199] Ibid, at paras.66 and 68.

conducted in accordance with domestic law by three different investigating judges before the cases were joined by decision of the Accusation Chamber on 13 February 2013.[200] As a result of the strained analysis, the Pre-Trial Chamber found that the investigative steps were "not tangible, concrete and progressive".[201]

As a consequence of the assessment of the progress of the concurrent domestic proceedings, the Pre-Trial Chamber and the Appeals Chamber concluded that the position was one of inactivity under step one – no relevant ongoing domestic investigation, when, as the analysis above shows, this is not an accurate reflection of the position on the ground in Côte d'Ivoire. While several of the factors taken into account by the Court are relevant, they are relevant for the purposes of step two – a determination of the willingness and ability of Côte d'Ivoire to genuinely investigate and prosecute and no such determination was made.

In appealing the admissibility decision of the Pre-Trial Chamber, Côte d'Ivoire challenged the legal standard applied and the Court's examination of the facts while also supplying additional evidence of investigative and prosecutorial activities. Côte d'Ivoire asserted that a high threshold should apply to the first limb of the admissibility test as well as the second.[202] As such, the Court erred in interpreting the criteria for inaction and applied unduly rigorous conditions to the State's demonstration of the existence of proceedings against Simone Gbagbo for crimes

[200] Ibid, at paras. 51 and 56.
[201] Ibid, at para.65.
[202] ICC, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, Republic of Côte d'Ivoire, State, 'Document in Support of Appeal of the Republic of Côte d'Ivoire against the decision of the Pre-Trial Chamber on the admissibility of the case concerning Simone Gbagbo', ICC-02/11-01/12-54-Red, ICC-02/11-01/12 OA, 9 January 2015 (French version), at para.27 (hereafter 'Document in Support of Côte d'Ivoire's appeal against the admissibility decision').

parallel to those before the ICC.[203] This was supported by Simone's defence counsel who aptly highlighted that "the continuous refining of the definition of the key elements of Article 17 (1) of 'the case' and of 'is being investigated or prosecuted' – while it may lead to legal purity, is raising the threshold so high, that only in rare and exceptional circumstances will the principle of complementarity be honoured in favour of any State".[204]

The State also challenged the fact-finding of the Pre-Trial Chamber, for example, highlighting that the Court underestimated the role of civil parties in the domestic procedure in Côte d'Ivoire, given that they may make direct complaints.[205] Further, it argued that the Pre-Trial Chamber minimised the importance of Simone's interrogations by the investigating judge and made a subjective assessment of the judge's performance.[206] Nonetheless, the Appeals Chamber upheld the admissibility decision, summarily dismissing many of the arguments.

In ratifying the Pre-Trial Chamber's application of the admissibility test - without comprehensively addressing the arguments raised - the Appeals Chamber too mixed the criteria applicable to the first and second parts of the test. Notably, the Appeals Chamber upheld the Pre-Trial Chamber's rigorous assessment of the domestic proceedings.[207] The Appeals Chamber acknowledged that the principle of complementarity gives rise to a presumption in favour of domestic jurisdictions

[203] Ibid, at paras. 27-28 and 33.
[204] Simone Gbagbo Response to Victims' Observations on the Admissibility Appeal, supra note 173, para.37.
[205] Document in Support of Côte d'Ivoire's appeal against the admissibility decision, supra note 202, para.52.
[206] Ibid, para.123.
[207] Appeals Judgement on Côte d'Ivoire's Admissibility Challenge, supra note 171, at para.29, ft.45; citing Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, para.166.

which means a high threshold applies before a determination that the domestic authorities are unwilling or unable. Nevertheless, it held that this presumption "only applies where it has been shown that there are (or have been) investigations and/or prosecutions at the national level" and not to the first stage of the admissibility test.[208]

Further, Côte d'Ivoire presented new information as to further investigative activities which had been conducted by the time of the appellate proceedings, which included detail to the effect that between October 2014 and February 2015 further witness and suspect interviews and exhumations had been conducted amongst other investigative acts.[209] However, the Appeals Chamber refused to consider this, dismissing Côte d'Ivoire's arguments in limine.[210] This corresponds to the corrective nature and purpose of the appellate process, the Appeals Court ruling that the relevant "time of proceedings" for assessment of a case pursuant to Article 17 (1) of the Rome Statute is the time of the admissibility challenge before the Pre-Trial Chamber, not the time of the appellate proceedings.[211] If Côte d'Ivoire wished to introduce new facts, it would have to bring a fresh admissibility challenge, as exceptionally permitted. Nevertheless, this does not take into account the ongoing nature of complementarity and the corresponding flexibility to do so inherent in the Rome Statute and Rules of

[208] Appeals Judgement on Côte d'Ivoire's Admissibility Challenge, supra note 171, at para. 59.
[209] See ICC, Appeals Chamber, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, Republic of Côte d'Ivoire, 'Response of the Republic of Côte d'Ivoire to Observations of Victims on the Appeal of Côte d'Ivoire of the decision of the Pre-Trial Chamber on the admissibility of the case concerning Simone Gbagbo', ICC-02/11-01/12-64-Red, 5 March 2015, at paras 44-45.
[210] Appeals Judgement on Côte d'Ivoire's Admissibility Challenge, supra note 171, at paras. 43-44.
[211] Appeals Judgement on Côte d'Ivoire's Admissibility Challenge, supra note 171, at para.32; citing ICC, Appeals Chamber, Situation in Kenya, *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, 'Decision on the Filing of an Updated Investigation Report by the Government of Kenya in Appeal against the Pre-Trial Chamber Decision on Admissibility', ICC-01/09-02/11-202 (OA), 28 July 2011, para.9; and ICC, Appeals Chamber, Situation in Kenya, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 'Decision on the Filing of an Updated Investigation Report by the Government of Kenya in Appeal against the Pre-Trial Chamber Decision on Admissibility', ICC-01/09-01/11-234 (OA), 28 July 2011, para.10. For an analysis of the appellate proceedings, see Hannah Kuczynska, 'The Scope of Appeal on Complementarity Issues before the ICC', (2016) 15 Law & Prac Int'l Cts & Tribunals 326.

Procedure and Evidence. Further, the State is more likely to stop co-operating in cases where there are parallel domestic proceedings than file a new admissibility challenge.

3.2 Standard of review for the second stage

The Simone Gbagbo admissibility rulings also display an unduly rigorous evidential standard being applied by the Chambers to the issue of unable or unwilling at the second stage. The Pre-Trial Chamber appears to have doubted the willingness of Côte d'Ivoire to genuinely investigate or prosecute Simone. In particular, the Court noted that more investigative actions were taken after the admissibility challenge was filed on 30 September 2014 and while the matter was pending before the ICC. It specifically highlighted her questioning by the investigating judge in September and early October 2014 took place effectively only after the Pre-Trial Chamber's decision of 28 August 2014 in which it permitted the domestic authorities to provide further evidence in support of the admissibility challenge by 10 October 2014.[212]

Yet, it goes to the heart of complementarity that it is necessarily a flexible process and the Court needs to acknowledge the potential for a change in circumstances, namely, that legitimate investigative actions may be catalysed by complementarity and the contested admissibility proceedings, and adapt its procedure accordingly.[213] To do so would be fully in accordance with Articles 17, 18 and 19 of the Rome Statute and the broad judicial discretion built into Rule 58 (2) RPE. It should not be considered as an indicator of unwillingness on the part of the domestic authorities that

[212] PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 170, at para. 69.
[213] See Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Kenyatta, supra note 123, at para.28; Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Ruto, supra note 123, at para.28.

further investigative actions are undertaken between the filing of an admissibility challenge and its determination by the Court. This is especially relevant in relation to the case of Simone Gbagbo where the investigating judge had already made efforts to question her in December 2012, before the admissibility challenge was lodged. Moreover, as asserted by Côte d'Ivoire in its appeal of the PTC's admissibility decision, the scheduling of further interrogation sessions shows the willingness of the investigating judge to give the accused a further opportunity to provide potentially exculpatory information after the defence strategy changed from silence to declaration.[214] Contrary to the conclusion of the Pre-Trial Chamber, this could actually serve to demonstrate willingness to conduct a genuine procedure, namely an investigation in accordance with due process rather than one with a pre-determined outcome.

Libya asserted that the standard of proof should be a prima facie test, namely, that the State should only have to establish the existence of a domestic investigation or prosecution and that the State exercising jurisdiction should be given the benefit of the doubt that it is doing so in good faith.[215] Specifically, that the State should not have to provide further proof of its ability and willingness to investigate and prosecute other than that tendered to show that there was a relevant ongoing domestic case in existence.[216] This was clearly not accepted by the *Gaddafi* Pre-Trial Chamber which considered that the preference for national proceedings expressed through complementarity did not mean that the State could avoid substantiating its willingness and ability to genuinely prosecute under the second limb of the admissibility test with

[214] Document in Support of Côte d'Ivoire's appeal against the admissibility decision, supra note 202, at para.89.
[215] Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11, at para 92 (iii)
[216] Ibid, at para.92.

evidentiary proof, in addition to that required for satisfaction of the first limb.[217] While the threshold to determine unwillingness or inability is necessarily a high one under Articles 17 (2) and 17 (3) of the Rome Statute, the Pre-Trial Chamber in the *Gaddafi* case misapplied these provisions by going outside the expressly prescribed circumstances vitiating the genuineness of proceedings, undermining the concept of complementarity.

In stark contrast, the Pre-Trial Chamber determining the admissibility of the *Al-Senussi* case gave Libya a margin of appreciation consistent with the high threshold applicable to the second limb of the test in evaluating the evidence submitted. The Court took into account Libya's legal and institutional reforms, including the intended construction of a "purpose-built courtroom complex in Tripoli" for Al-Senussi's trial;[218] the possibility of international legal assistance to build Libya's capacity;[219] the resources allocated to the investigation and progress made, including the referral of Al-Senussi's case to the Accusation Chamber;[220] a Supreme Court decision of 23 December 2012 referring cases against members of the former regime to the ordinary courts;[221] that Al-Senussi was detained in Al-Hadba prison in Tripoli under the control of central governmental authorities, with no substantiated reports of ill-treatment in that specific prison;[222] from a security perspective, indications that the hearing at the accusation stage of 19 September 2013 "occurred without incident notwithstanding certain protests outside the courtroom complex";[223] and information supplied by Libya that defence lawyers had been identified as available and willing to

[217] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.52.
[218] Ibid, at para.215.
[219] Ibid, at para.216.
[220] Ibid, at paras 210 and 229.
[221] Ibid, at para.251.
[222] Ibid, at para.264.
[223] Ibid, at para.303.

represent Al-Senussi.[224] Many of these factors were prospective in nature, for example, Al-Senussi was still awaiting legal representation.[225] Nevertheless, the Court gave Libya the benefit of the doubt that the promises made would be fulfilled. This is comparable to the Rule 11bis jurisprudence of the ICTY concerning the referral of cases to Bosnia and Herzegovina where the construction of the State Court and a secure detention centre facilitated the handover of cases.[226]

Indeed, the high threshold applied by the *Al-Senussi* Pre-Trial Chamber to the second limb of the admissibility test is further illustrated by its handling of concerns over the lack of a specific witness protection programme in Libya. In this regard, while the Pre-Trial Chamber affirmed that such concerns established in the *Gaddafi* admissibility proceedings[227] remained valid[228]; it took into account that there was "no indication…witnesses would deliberately be exposed to, or intentionally left unprotected from, security threats in the country on the part of Libya".[229]

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[224] Ibid, at para.308.

[225] Ibid, at para.292 (The Court notes: "the fact that Mr. Al-Senussi's right to benefit from legal assistance at the investigation stage is yet to be implemented does not justify a finding of unwillingness under article 17 (2)(c) of the Statute, in the absence of any indication that this is inconsistent with Libya's intent to bring Mr Al-Senussi to justice").

[226] In regard to the State Court: ICTY, *Prosecutor v Željko Mejakić, Momčilo Gruban, Dušan Fustar and Duško Knežević*, Case No. IT-02-65-PT, 'Decision on Prosecutor's Motion for Referral of Case pursuant to Rule 11*bis* (RB)', 20 July 2005, at para. 81. Similarly, in regard to Croatia, see ICTY, *Prosecutor v Rahim Ademi and Miri Norac*, Case No. IT-04-78-PT, 'Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11*bis* (RB)', 14 September 2005, at para. 56. In regard to detention facilities: ICTY, *Prosecutor v Radovan Stanković*, Case No. IT-96-23/2-PT, 'Decision on Referral of Case under Rule 11*bis*, (RB)', 17 May 2005, at para. 67; and ICTY, *Prosecutor v Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-AR11*bis*.1 & IT-97-25/1-AR11*bis*.2, 'Decision on Savo Todović's Appeals against Decisions on Referral under Rule 11*bis*, (AC)', 4 September 2006, at para.99. Contrast ICTR, *Prosecutor v Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, 'Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda (TC)', 19 June 2008, at para.77.

[227] See PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras.209 and 211.

[228] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.287.

[229] Ibid, at para.288 (emphasis added).

Opinions diverge over whether the distinctions drawn between the *Gaddafi* and *Al-Senussi* cases by the Pre-Trial Chamber, and in turn the Appeals Chamber, were justified. However, rather than the Court being too lenient in the *Al-Senussi* case, it is considered that the threshold applied in the *Gaddafi* proceedings is erroneous and inconsistent with the Rome Statute. In support of this is the Dissenting Opinion of Judge Ušacka who considers that the Court was forced in *Al-Senussi* into making "far-fetched" and "not particularly convincing" distinctions only because the Pre-Trial Chamber was "too demanding when it considered whether Libya was able genuinely to investigate and prosecute in relation to Mr Gaddafi".[230]

4. Admissibility Step Two: Genuine Proceedings? 'Unable' or 'Unwilling'

The Libyan cases were the first time the ICC expressly considered the willingness or ability of domestic authorities to investigate and prosecute an accused also sought by the OTP as a decisive determination. While the Pre-Trial Chamber in the Kenyan cases addressed aspects of 'unwillingness', its conclusions were drawn in relation to the first limb of the admissibility test as to whether there was a relevant domestic investigation. Moreover, it is the first time the terms 'willingness', 'ability' and 'genuine' were interpreted in any meaningful way and most importantly, the implication of fair trial rights and due process concerns considered.

When Libya challenged the admissibility of the *Gaddafi* and *Al-Senussi* cases at the ICC, there was no concern as to the willingness of the new Libyan authorities to

[230] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, 'Separate Opinion of Judge Anita Ušacka to the Judgment on the appeal of 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'', ICC-01/11-01/11-565-Anx2, 24 July 2014, para.14, (hereafter 'Separate Opinion of Judge Ušacka to Appeals Judgment on Admissibility of the Al-Senussi Case').

prosecute them. To the contrary, some worried they were all too willing. As such, the point was effectively, would the proceedings be genuine? From the outset of the liberation of Libya at the end of 2011, the new transitional authorities indicated the intention to commence domestic criminal proceedings against members of the former regime and contest admissibility before the ICC.[231] On 1 May 2012, Libya filed its first admissibility challenge pursuant to Article 19 of the Rome Statute.[232]

The challenge was brought in relation to Gaddafi,[233] on the basis that Al-Senussi was at that time still in Mauritania.[234] However, Libya was so concerned to have nothing hamper its challenge more broadly that it asked, in the alternative, for the challenge to be considered also as concerning Al-Senussi if the ICC should consider it necessary to bring the admissibility challenge for both immediately and together subject to the interpretation of 'case' for the purpose of Article 17 (1)(a) of the Rome Statute.[235] Pre-Trial Chamber I considered it as an admissibility challenge concerning Saif alone.[236] Thereafter, once Al-Senussi was in the custody of the Libyan authorities following his transfer from Mauritania - and before the decision on the admissibility challenge relating to Gaddafi was issued - Libya filed an admissibility challenge concerning Al-Senussi.[237]

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[231] See e.g. ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Republic of Libya, 'Notification and Request by the Government of Libya in Response to the Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi', ICC-01/11-01/11-82, 22 March 2012.
[232] Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11.
[233] Ibid, at para.73.
[234] Ibid, at para.41.
[235] Ibid, at para.74.
[236] ICC, Pre-Trial Chamber I, *Situation in Libya, Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 'Decision on the conduct of the proceedings following the application on behalf of the Government of Libya pursuant to Article 19 of the Statute', ICC-01/11-01/11-1341, 4 May 2012, at para.8.
[237] Libya Admissibility Challenge concerning the Al-Senussi Case, supra note 11.

The admissibility challenges had very different outcomes. The Pre-Trial Chamber,[238] and in turn, the Appeals Chamber,[239] confirmed the admissibility of the *Gaddafi* case before the ICC. In contrast, Libya succeeded in its challenge in regards to *Al-Senussi*, with the Pre-Trial Chamber ruling that there was an ongoing investigation concerning the same case in Libya and that these proceedings were not vitiated by an exception to admissibility, namely, that Libya was willing and able to genuinely investigate and prosecute.[240] The Defence appeal on behalf of Al-Senussi,[241] primarily grounded on doubts over the accused's ability to receive a fair trial, was controversially dismissed by the Appeals Chamber.[242] While the ICC's stance in *Al-Senussi* caused discontent for its human rights implications, it is considered that this decision was legally correct. The Pre-Trial Chamber's interpretation of 'same conduct' (notwithstanding its appellate treatment[243]) for the first step of determining the existence of a relevant domestic investigation and in turn, the Appeals Chamber's findings over the place of

[238] PTC Decision on admissibility of the Gaddafi case, supra note 54.
[239] Gaddafi Admissibility Appeals Judgment, supra note 46.
[240] PTC Decision on admissibility of the Al-Senussi case, supra note 64.
[241] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Defence, 'Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's Decision on the admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-468-Red, 17 October 2013; ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Defence, 'Document in support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's Decision on the admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-474 (OA 6), 4 November 2013; ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Defence, 'Response on behalf of Abdullah Al-Senussi to the 'Observations on the Document in Support of Appeal on behalf of Abdullah Al-Senussi against the Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'', ICC-01/11-01/11-500 (OA 6), 13 January 2014; ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Defence, 'Response on behalf of Abdullah Al-Senussi to the 'Libyan Government's request for the Appeals Chamber to dismiss *in limine* the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in Support of Appeal' filed on 20 January 2014 and the 'Addendum to the Libyan Government's Request for the Appeals Chamber to disregard the new evidence submitted as part of the Al-Senussi Defence Response to the OPCV's Observations on its Document in support of its Appeal' filed on 27 January 2014', ICC-01/11-01/11-510 (OA 6), 2 February 2014; and ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Defence, 'Further Submissions on behalf of Abdullah Al-Senussi Pursuant to Regulation 28', ICC-01/11-01/11-513-Red, 14 February 2014.
[242] Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1.
[243] Ibid, at paras. 101-103.

due process arguments in admissibility proceedings at the second stage, were legally sound. This conclusion is not negated by subsequent events.

Notably, the *Al-Senussi* admissibility challenge by Libya received the OTP's support, which endorsed the claim that Libya was investigating the same case and was willing and able to genuinely investigate and prosecute.[244] In distinction, the OTP adopted "contradictory positions" regarding *Gaddafi*.[245] While at one point supporting Libya's claim to be investigating the same case – going so far as to state that the *Gaddafi* cases by Libya and the ICC were "almost identical"[246] – the OTP later appeared to assert the contrary[247] and finally opposed Libya's appeal.[248] Nonetheless, this position change by the OTP was justified by the developing situation on the ground, with it becoming ever more apparent that the central authorities were unable to exercise control over the Zintan militia and therefore, Gaddafi was not in their hands. Libya subsequently acknowledged this very fact in responding to a non-compliance motion for his non-surrender.[249] In any event, the success or failure of an admissibility challenge by the situation country should not depend on the OTP's

[244] Prosecution Response to Libya's Admissibility Challenge for Al-Senussi Case, supra note 13, at para.2; and ICC, *Situation in Libya, Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution, 'Prosecution's Response to the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-483, 26 November 2013, at para.3.

[245] Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 85, at para.3.

[246] OTP Response to Libya's Admissibility Challenge on the Gaddafi case, supra note 12, at para.2.

[247] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution, 'Prosecution's Response to 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'', ICC-01/11-01/11-276-Red2, 12 February 2013, at para.2.

[248] ICC, *Situation in Libya, Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution, 'Prosecution Response to the 'Document in Support of the Government of Libya's Appeal against the Decision on admissibility of the case against Saif Al-Islam Gaddafi'', ICC-01/11-01/11-384-Red, 23 July 2013, at para.3.

[249] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Libya, 'Response to Prosecution's 'Request for an Order to Libya to Refrain from executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council'', ICC-01/11-01/11-612, 20 August 2015, paras. 3 and 14-15.

endorsement. In contrast, while Libya asserted that the "vast majority of victims…seek national proceedings in Libya";[250] the OPCV opposed the admissibility challenges for both Gaddafi and Al-Senussi, arguing that they should be tried before the ICC.[251] In turn, Lawyers for Justice in Libya and Redress Trust submitted observations as amicus curiae raising concerns over Libya's ability investigate and prosecute Gaddafi in accordance with international standards of due process, drawing the Court's attention to issues over independence and impartiality and security threats to judges, prosecutors and witnesses.[252]

In the end, the different outcomes in the *Gaddafi* and *Al-Senussi* cases turned on the different interpretations, and application thereof, of the concept of 'same conduct' which defines the scope of a 'case' for the purposes of Article 17 (1)(a) of the Rome Statute by the Pre-Trial Chamber in each instance. Namely, while the Pre-Trial Chamber in *Al-Senussi* found that Libya was currently investigating Al-Senussi for the same case as that of the ICC Prosecutor,[253] the Pre-Trial Chamber in *Gaddafi* – composed of the same judges - arrived at the opposite conclusion.[254] Indeed, despite finding that there was a domestic investigation ongoing against Gaddafi,[255] the judges

[250] Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11, at para.102.
[251] Victims' Observations on Gaddafi Admissibility Challenge, supra note 14; ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, OPCV, 'Observations on behalf of victims on the Government of Libya's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/-11-411-Red (OA 4), 20 August 2013; Victims' Observations on Al-Senussi Admissibility Challenge, supra note 14; and ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, OPCV, 'Observations on the 'Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi'', ICC-01/11-01/11-494, 20 December 2013.
[252] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 'Lawyers for Justice in Libya and Redress Trust's Observations pursuant to Rule 103 of the Rules of Procedure and Evidence', ICC-01/11-01/11-172, 8 June 2012, paras.13-38.
[253] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras.167-168.
[254] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.134.
[255] Ibid, at para.132.

determined this could not be said to be the same case as that before the ICC.[256] However, reading between the lines, it is also clear that the material factor was not in fact the scope of the domestic investigation but rather the view of the panel as to Libya's lack of progress in the Gaddafi investigation and concerns over his being in the custody of the Zintan Brigade, a militia of revolutionary fighters, rather than under the control of the central authorities.[257] Moreover, implicitly, arguably the Court, while giving the benefit of doubt to Libya over Al-Senussi, considered it would be a step too far to do so for the son of Muammar Gaddafi, who was himself allegedly killed shortly after capture by other revolutionary fighters.

The Rome Statute governing the ICC departs from the explicit consideration of fair trial rights for the purpose of admissibility determinations under Article 17, at least to the same extent as accorded to this issue in the Rule 11bis provisions applicable to ICTY and ICTR transfers. As such, there is substantial debate on whether or not fair trial rights come into the picture at all for ICC admissibility determinations. The question was definitively answered in *Al-Senussi* when Libya successfully challenged admissibility. Concerns raised, primarily by the Defence, as to the likelihood of Al-Senussi obtaining a fair trial were insufficient to vitiate exercise of jurisdiction at the domestic level. This is especially as concerns were insufficiently substantiated in reference to the specific case of the accused and may largely be considered difficulties faced by any State in the early days of emerging from an armed conflict

[256] Ibid, at para.134.

[257] Notably, in her Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 85, at para.45, Judge Ušacka highlights that it appears that the Pre-Trial Chamber did not make a definitive conclusion on the first limb of the admissibility test, in moving on to the second limb and rejecting Libya's request to submit further evidence in relation to the scope of the domestic investigation on the basis that it would not make a difference to the outcome in light of its findings on the second limb, namely, Libya's inability to genuinely investigate and prosecute Gaddafi; citing PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.137.

and going through a transitional justice process. I consider that the Court got it right in *Al-Senussi*, when taking into account the text of the Rome Statute, the preparatory works and the object and purpose of the Rome Statute to prevent impunity. Further, the Court must not back down on the stance taken due to developments which may have subsequently materialised unless it entails due process violations so egregious that the trial could be said to amount to a travesty of justice. What is required is a principled approach, with the Court giving a margin of appreciation to the transitional State, albeit conditional, as mandated by the concept of complementarity. This section will first address the theoretical arguments more generally, followed by an analysis of the *Al-Senussi* ruling.

4.1 Pro rights argument – the "due process thesis"

The "due process thesis" is traditionally the most popular among human rights organisations in the international justice field. It holds that national judicial proceedings must comply with international standards of due process or the ICC may exercise its jurisdiction in place of that of domestic courts.[258] Despite the lack of explicit language, some fair trial factors may be considered to fall within the remit of 'due process' in the second stage of an admissibility determination. Specifically, in defining 'unwillingness', Article 17 (2) provides that the Court shall take into account "the principles of due process recognised by international law" in considering whether: (a) the proceedings are designed to shield the accused from responsibility; (b) there is "unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice"; and (c) the

[258] See Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court', (2006) 19 Leiden Journal of International Law 1095, at 1110-1113; and Mark S. Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building', (2002) 15 Florida J. Int'l L. 215.

proceedings are or were conducted “independently or impartially”. While due process is not expressly mentioned in regard to the assessment of ‘unable’ pursuant to Article 17 (3) of the Statute, it may be considered as falling within the criteria of “otherwise unable to carry out its proceedings” if broadly interpreted. Further, in the event an accused has already been tried for the same conduct, Article 20 (3) of the Statute on ne bis in idem prevents the trial of the same person by the ICC unless the domestic proceedings (a) “were for the purpose of shielding the person concerned from criminal responsibility”; or (b) “otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”.

Moreover, it is essential to consider the overarching provision of Article 21(3) of the Statute, which prescribes that the ICC must apply and interpret the law “consistent with internationally recognised human rights” and on the basis of equality without discriminating on grounds of “gender…, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”. This equally applies to admissibility determinations which could result in the accused being tried by the ICC or domestically depending on the outcome.

Finally, general principles also apply when interpreting the Rome Statute. First, as a general principle of criminal law, in the case of ambiguity, the law is to be interpreted in favour of the accused. Secondly, the provisions of the Rome Statute shall be interpreted in accordance with their ordinary meaning and in light of the object and

purpose of the Statute.[259] Further, the preparatory works and circumstances of the conclusion of the Rome Statute may be taken into account in interpreting the law when the ordinary meaning is "ambiguous or obscure" or the result of that interpretation would be "manifestly absurd or unreasonable"[260] On this basis, it is considered that the Rome Statute's provisions on determining admissibility, deferral and co-operation should be interpreted in accordance with international standards of due process concerning the fair trial of the accused because it would be manifestly absurd or unreasonable to countenance the alternative given the goal to "guarantee lasting respect for and the enforcement of international justice" (Rome Statute Preamble, paragraph 11) and to "put an end to impunity" (Preamble, paragraph 5). In support of this position are the authors of the Informal Expert Paper on the Principle of Complementarity in Practice, commissioned by the OTP, who conclude that "human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely".[261] The OTP's recent stance - as argued in the Libya admissibility proceedings - is more nuanced.

4.2 Counter argument

In turn, Heller argues that complementarity has a negative "shadow side" on the basis that failure to guarantee the due process rights of an accused does not result in admissibility under the literal wording of Article 17 of the Rome Statute.[262] Moreover, he asserts that because of this omission the message conveyed to the national judiciary is to design legal proceedings to make it easier to convict, as

[259] Article 31 (1), United Nations, Vienna Convention on the Law of Treaties ("VCLT"), 23 May 1969, 1155 UNTS 331 (1969), in force 27 January 1980.
[260] Article 32, VCLT, ibid.
[261] OTP, Informal Expert Paper, 'The Principle of Complementarity in Practice', 2003, at pp.8-9.
[262] Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Criminal Law Forum 255-280 at 260-265.

opposed to strengthening fair trial rights.[263] The counter-argument focuses on the language in Article 17 and in particular the conjunctive nature of Article 17 (2)(c) of the Rome Statute which provides that a State may only be found 'unwilling' on the basis of due process violations which call into question the "independence or impartiality" of the national proceedings if in the circumstances, the manner in which the proceedings are being conducted is also "inconsistent with an intent to bring the person concerned to justice". Heller asserts that this is limited to the intent to secure a conviction, as opposed to a wider and substantive concept of what constitutes 'justice'.[264] The same rationale is applied to the interpretation of the notion of 'genuine' proceedings.[265] However, this arguably disregards the possibility of ambiguity in the language being interpreted to the benefit of the accused in accordance with common criminal law principles underpinned by fair trial standards and the overarching provision of Article 21 (3).

In turn, deconstructing the wording in Article 17 (3) on when a State may be determined as 'unable' to genuinely investigate or prosecute, namely where the national judicial system has 'collapsed' or is temporarily 'unavailable', leads to the conclusion that only obstacles which hinder a State in "effectively investigating or prosecuting the accused" as opposed to "fairly investigating or prosecuting" give rise to admissibility before the ICC.[266] This is argued as following from the proviso that inability is when "the State is unable to obtain the accused or the necessary evidence and testimony".[267] However, this overlooks the possibility of the "necessary evidence and testimony" equally applying to evidence tending to exculpate the accused or the

[263] Ibid, at pp.277-278.
[264] Ibid, at p.263.
[265] Ibid, at p.265 (in reference to the interpretation of 'genuinely' in Article 17 (1)).
[266] Ibid, at p.264 (emphasis in original).
[267] Ibid, at p.264.

testimony of defence witnesses. Moreover, even if the Court does not follow such reasoning, the final clause of Article 17 (3) of the Rome Statute on a State being "otherwise unable to carry out its proceedings" appears open to a more extensive rights-based interpretation.

Nevertheless, the counter-argument is supported by the preparatory works which document discussions between States in drafting and adopting the Rome Statute. As highlighted by the Appeals Chamber in *Al-Senussi*, an earlier draft proposal by the Italian delegation for an admissibility determination to include consideration of whether domestic proceedings fully respect the due process rights of the suspect was not adopted.[268] In its place, the drafters agreed upon the current provisions which do not accord such importance to fair trial rights.

Further, the nature of admissibility proceedings is to be considered. It is principally a matter of forum choice in the event of concurrent jurisdiction as opposed to an opportunity to air grievances about the violation of individual rights.[269] This is also evident from the apparent lack of possibilities accorded to the defendant to challenge an inadmissibility determination under Article 19 once affirmed by the Appeals Chamber. This is similarly applicable to the follow-up, where it is for the Prosecutor under Article 19 (10) of the Rome Statute to refer the case back to the ICC for a new determination, for example, in the event that monitoring reveals such flaws in the national proceedings or such a fundamental change of circumstances that it could be said the State is no longer able or willing to genuinely investigate or prosecute the accused. There is no possibility for the defendant to have the admissibility of his case

[268] Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, at para.226.
[269] See Appeals Judgment on Admissibility of the Al-Senussi Case, supra note 1, at para.169.

re-heard by the ICC on his own motion, for example, at the conclusion of flawed domestic proceedings.[270]

4.3 Middle ground

Acknowledging the apparent lacuna in Article 17 of the Rome Statute for fair trial rights, yet, at the same time, the seemingly inherent conflict with the provisions in the Preamble and Article 21 (3) and the object and purpose to end impunity, a middle ground has materialised. This is labelled the "qualified due process"[271] "limited due process"[272] or "flawed beyond all recognition" thesis.[273] It posits that while due process violations in the domestic proceedings do not ordinarily give rise to unwillingness or inability such as to render a case admissible before the ICC, the issue is one of threshold.[274]

Notably, this position was adopted by the OTP in supporting Libya's admissibility challenge in *Al-Senussi*. Specifically, the OTP asserted that fair trial considerations are relevant to an admissibility determination "only where the national investigation or proceedings lack fundamental rights and guarantees to such a degree that national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21 (3)".[275] Further, it argued that national proceedings would only be vitiated by reason of a State's unwillingness or inability to genuinely investigate or

[270] See Heller, 'The Shadow Side of Complementarity', supra note 262, at p.268.
[271] Frédéric Mégret and Marika Giles Sampson, 'Holding the Line on Complementarity in Libya: The Case for Flawed Domestic Trials', (2013) 11 Journal of International Criminal Justice 571. See also Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for Shared Responsibility', (2012) 10 Journal of International Criminal Justice 325.
[272] H.J. Van der Merwe, 'The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions', (2015) 15 Int'l Crim. Law Rev. 40, 74-75.
[273] Ibid, at p.52 (describing the argument of Mégret and Giles Simpson as the "flawed beyond all recognition" thesis).
[274] Ibid, at p.68.
[275] Prosecution Response to Libya's Admissibility Challenge for Al-Senussi Case, supra note 13, at para. 73; PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.188;

prosecute grounded on the violation of due process guarantees where there is a "complete absence of even the minimum and most basic requirements of fairness and impartiality" and where "national efforts can only be viewed as a travesty of justice".[276] In contrast, the Defence and OPCV adopted the due process thesis, asserting that the *Al-Senussi* case should be rendered admissible before the ICC because Libya was unwilling or unable to guarantee him a fair trial when considering his lack of legal representation, delays in the proceedings, witness protection shortcomings, concerns as to judicial independence and impartiality and security risks faced by judges and prosecutors as well as lawyers representing members of the former regime.[277] The middle ground won.

In this regard, the *Al-Senussi* Pre-Trial Chamber proclaimed that "violations of the accused's procedural rights are not per se grounds for a finding of unwillingness or inability under Article 17 of the Statute".[278] Rather, due process claims must be linked to the specific scenarios spelt out in Articles 17 (2) and 17 (3) of the Rome Statute.[279] This stance was affirmed by the Appeals Chamber,[280] which reasoned that the ICC was not designed to be a human rights court or to have general supervisory jurisdiction over national courts.[281] For a case to be "admissible merely because domestic proceedings do not fully respect the due process rights of a suspect" would entail "the Court passing judgment generally on the internal functioning of the

[276] Prosecution Response to Libya's Admissibility Challenge for Al-Senussi Case, supra note 13, at para. 73.
[277] See PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras.196-198 and 180-184; Victims' Observations on Al-Senussi Admissibility Challenge, supra note 14, at para.76; ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Defence, 'Defence response on behalf of Mr. Abdullah A-Senussi to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'', ICC-01/11-01/11-356, 14 June 2013, at paras.70, 156 and 172.
[278] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.235.
[279] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.235.
[280] Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, at para.220.
[281] Ibid, at para.219.

domestic legal systems of States in relation to individual guarantees of due process".[282] Accordingly, the Appeals Chamber considered reliance placed by the Defence on the jurisprudence of the Inter-American Court of Human Rights, European Court of Human Rights and UN Human Rights Committee was misplaced as they were "of only very limited relevance" for the purpose of an admissibility determination.[283] It emphasised that whereas human rights courts were concerned with individual rights, admissibility proceedings before the ICC concerned "primarily a question of forum – the relationship between States and the Court".[284]

Nevertheless, adopting the middle ground, the Appeals Chamber found that due process concepts were still relevant to the determination of 'unwillingness' under Article 17 (2)[285] and 'inability' under Article 17 (3).[286] The Court was not required to necessarily turn a blind eye to human rights violations but rather, the threshold was extremely high for due process violations to vitiate domestic proceedings. In this regard, it stressed that "[a]t its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible".[287] It added that "less extreme instances may arise when the violation of the rights of the suspect are so egregious that it is clear that the international community would not accept that the

[282] Ibid, at para.219.
[283] Ibid, at para.169.
[284] Ibid, at para.169.
[285] Ibid, at para.220.
[286] Ibid, at para.229.
[287] Ibid, at para.230.

accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that the State is not genuinely investigating or prosecuting at all".[288]

Notably, the Appeals Chamber extended this reasoning to the interpretation of Article 20 (3) (b) of the Rome Statute concerning ne bis in idem. It stated that since Article 17 (2) and Article 20 (3)(b) of the Rome Statute "contain such similar language it is reasonable to assume that they were intended to have the same meaning".[289] Accordingly, cases already tried nationally would be inadmissible before the ICC unless they are "akin to sham" or "unjustly benefit the accused".[290] As regards violations of due process to the accused's detriment, the threshold is not easily crossed. Thus, the Appeals Chamber emphasised that "[i]t is less easy to imagine that there was an intention for an accused to be tried at this Court for the same conduct that had already been tried nationally on the basis that the domestic trial did not fully comply with international standards of due process".[291] This has direct implications for Al-Senussi, making it very unlikely that violations of his rights in the course of the Libyan trial will render the case once again admissible before the ICC. Similarly, it bears on the *Gaddafi* case subject to the finality of the domestic proceedings.

4.4 Assessing unwillingness

Notably, the Pre-Trial Chamber seized with the *Gaddafi* admissibility determination omitted to address the 'willingness' requirement but limited its findings to Libya's 'inability' to genuinely investigate and prosecute Gaddafi.[292] This may be taken as implicit acknowledgement that the Libyan authorities clearly had a will to bring

[288] Ibid, at para.230.
[289] Ibid, at para.222.
[290] Ibid, at para.222.
[291] Ibid, at para.222.
[292] See PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras.138 and 216.

Gaddafi to account with zeal. In turn, in *Al-Senussi*, the Pre-Trial Chamber emphasised that unjustified delay and violations of the accused's procedural rights indicating a lack of independence and impartiality were only of consequence if it was demonstrated that in the circumstances of the specific case it was "inconsistent with the intent to bring the person to justice" in accordance with Article 17 (2) of the Rome Statute.[293] In this regard, the requirements are conjunctive.

Furthermore, the Court highlighted that 'justice' was not to be construed in the sense of an "abstract ideal" but in the "specific circumstances surrounding the investigation concerned".[294] Notably, 'to bring the person to justice' was interpreted to mean a prosecution, holding the accused accountable, as opposed to proceedings brought merely as a 'sham' or 'shield'. Since it could not be suggested at any stretch that the new Libyan authorities were intending to shield Al-Senussi from criminal responsibility, the Pre-Trial Chamber concluded that they were not 'unwilling' pursuant to Article 17 (2)(a) of the Rome Statute.[295] Any prejudice to Al-Senussi's right to legal representation under Libyan law or other due process violations did not render Libya unwilling[296]; overzealousness to bring him to trial was not a ground to render the case admissible before the ICC.

The Appeals Chamber took a more moderate line in holding that the denial of access to a lawyer or other due process violations may result in a finding under Article 17 (2)(c) that the domestic proceedings "are not being conducted independently or impartially" and are proceeding in a manner "inconsistent with an intent to bring the

[293] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras.223 and 235.
[294] Ibid, at para.223.
[295] Ibid, at para.290.
[296] Ibid, at paras. 235 and 292-293.

person concerned to justice".[297] Notwithstanding this, it was not just any violation that would lead to such an outcome but only where "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".[298] The Appeals Chamber interpreted the threshold strictly, as necessitated by the principle of complementarity and the object and purpose of Article 17 (2) of the Rome Statute. Accordingly, it held that "even if one accepted that the lack of access to a lawyer during the investigation stage violated Mr. Al-Senussi's right to a fair trial and provisions of Libyan law (and may therefore give rise to remedies under both international and national law)…such violations would not reach the high threshold for finding that Libya is unwilling genuinely to investigate or prosecute Mr Al-Senussi".[299] Significantly, this remained the case even though Al-Senussi faced the death penalty as the outcome of the domestic proceedings, despite the need for extra scrutiny in death penalty cases.[300]

4.5 Assessing ability

In construing ability, the *Gaddafi* Pre-Trial Chamber focused on the unavailability of the national justice system pursuant to Article 17 (3) of the Rome Statute. In this regard, it concluded that Libya was "unable to obtain the accused" and was also "otherwise unable to carry out the proceedings" in the *Gaddafi* case.[301] However, rather than apply the criteria provided for in Article 17 (3) which limits unavailability to where the national system is wholly or substantially impaired; the Pre-Trial

[297] Appeals Judgment on Admissibility of the Al-Senussi case, supra note 1, at paras. 190 and 220.
[298] Ibid, at para.230 (emphasis added).
[299] Ibid, at para.191.
[300] Ibid, at para.254.
[301] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.205.

Chamber in the *Gaddafi* case found the national system to be unavailable as it "cannot yet be applied in full in areas or aspects relevant to the case".[302] In distinction, in the *Al-Senussi* case, the Pre-Trial Chamber emphasised that there must be a total or substantial collapse or unavailability specifically impacting upon the case against the particular accused.[303]

The Court found that Libya was "unable to obtain" Saif Gaddafi as he was in the custody of the Zintan militia rather than the central governmental authorities.[304] It further took into account the apparent impermissibility of trial in absentia under Libyan law where the defendant is present on Libyan territory and his whereabouts are known.[305] Yet, it subsequently unfolded that Gaddafi was able to be tried in absentia as he was convicted in his absence by the Tripoli Court of Assize. In so ruling, the Court omitted to give fuller consideration to Libya's argument that the Zintan Brigade was sanctioned by the Government as a local authority with lawful custody of Gaddafi. As pointed out by Judge Ušacka, the principle of complementarity implies that "it is for Libya to decide in which part of the country a trial should take place and where a suspect should be detained".[306] Accordingly, even though Libya initially proposed that Gaddafi's trial would be taking place at a future specially constructed courtroom complex in Tripoli, the Court was not bound by this but could have considered whether Gaddafi could be properly tried at another location within Libya or otherwise by Libyan sanctioned authorities.

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[302] Ibid, at para.205.
[303] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras.295-296, 299-301 and 309.
[304] PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras 206-207.
[305] Ibid, at para.208.
[306] Separate Opinion of Judge Ušacka to Appeals Judgment on Admissibility of the Al-Senussi Case, supra note 230, at para.15.

It is worth recalling the rationale of the drafters of Article 17 in setting the threshold of "unable" so high as to require the State to have 'substantially' collapsed. As explained by Holmes, even where the State is afflicted by armed conflict it was envisaged that the Court would consider the ability of the authorities to transfer the trial to another venue.[307] The Chambers made a fine distinction between the substantially collapsed scenario and unavailability to reach the outcome in *Gaddafi*, albeit to deal with a factual situation that was not exactly as claimed at the time.

It should be considered whether courts operated by non-State organisations on the territory of a situation country may also satisfy the requirements to challenge admissibility.[308] For example, Hassanein asserts that even if the State authorities are unable to prosecute as they cannot capture the accused, collect evidence or carry out proceedings, a non-State organisation could do so if they had already arrested the accused and set-up courts.[309] He argues that "rebel's justice" is contemplated under Article 8(2)(c)(iv) of the Rome Statute which relates to the war crime of passing sentences in internal armed conflict save for by previous judgment by a regularly constituted court with judicial guarantees and the reference in Article 20 (3) to "another court" interpreted broadly.[310] He argues that it would be contrary to complementarity for the ICC to determine a case is admissible if a non-State actor in the situation country is willing and able to deliver justice.[311] It would have been

[307] Holmes, supra note 133, at p.677.
[308] See e.g. Kevin Jon Heller, 'Could a Non-State Actor Challenge Admissibility?', Opinio Juris blog, posted 19 August 2012, available at www.opiniojuris.org/2012/08/19/could-a-non-state-actor-challenge-admissibility/ (last accessed 31 May 2016).
[309] Ahmed Samir Hassanein, 'Physical and Legal Inability under Article 17 (3) of the Rome Statute', (2015) 15 Int. Crim. Law. Review 101, 106.
[310] Ibid, at 106-107.
[311] Ibid, at 108.

valuable to the development of the jurisprudence in this area for the Court to have evaluated the possibility.

Libya argued that for the purpose of the admissibility proceedings the ICC should not apply an overly "exacting and elaborate standard" in evaluating the Libyan legal system "beyond that basically required for a fair trial".[312] Further, it asserted that unless the ICC enabled Libya to conduct its proceedings against Gaddafi at the domestic level under Libyan law and applying Libyan procedural standards, it "would likely mean that no State emerging from conflict could ever benefit from the complementarity principle".[313] While the Pre-Trial Chamber evaluated the capacity of the Libyan authorities to investigate Gaddafi in accordance with the Libyan CPC, Penal Code and Constitution; it also took into account international human rights law on the basis of Libya's ratification of human rights instruments including the International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture (CAT), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the African Charter on Human and Peoples' Rights.[314] In this regard, the Pre-Trial Chamber focused on Gaddafi's right to a lawyer and found that as he still did not have legal representation in place, a trial could not be conducted in accordance with Libyan law.[315] This was despite Libya's arguments concerning efforts made to secure Gaddafi legal representation in co-operation with the Libyan Law Society, the Popular Lawyer's Office and the Bar Associations of

[312] Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11, at para.99.
[313] Ibid, at para.101.
[314] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.217. See, however, Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11, at para. 57 (Libya referencing the ICCPR, CAT, ICERD and African Charter in its submissions).
[315] PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras.213-214.

Tunisia and Egypt, with the possibility for Tunisian or Egyptian counsel to represent him in association with Libyan co-counsel.[316]

In distinction, for *Al-Senussi*, the Pre-Trial Chamber emphasised that the assessment of willingness and ability "must be made with reference to Libya's own national law".[317] Moreover, national proceedings would only be vitiated in the explicit circumstances prescribed by Articles 17 (2) and (3) of the Rome Statute and even then, the threshold is a high one: "it is not just any alleged departure from, or violation of, national law that may form a ground for a finding of unwillingness or inability".[318] Thus, Al-Senussi's lack of access to a lawyer to date in the investigation phase and still pending appointment of a lawyer for the remainder of the proceedings did not render Libya "otherwise unable to carry out its proceedings".[319] Equally important is the Appeals Chamber's emphasis that the objective of the Rome Statute and principle of complementarity "to end impunity", did not necessitate that the trial result in a conviction.[320] Domestic proceedings would still be final in the event of an acquittal, termination or stay of proceedings due to the violation of Libyan law. Specifically, the Appeals Chamber held that "even if the Libyan courts in the further conduct of the proceedings in respect of Mr Al-Senussi must be terminated because of a lack of a lawyer during the early stages of the proceedings, this would not render Libya unable genuinely to prosecute him".

For admissibility assessments, it is not the role of the ICC to evaluate the overall legal system, but rather to only take into consideration the circumstances applicable to the

[316] Ibid, at para.213.
[317] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.221.
[318] Ibid, at para.221.
[319] Ibid, at para.309.
[320] Appeals Judgment on Admissibility of the Al-Senussi case, supra note 1, at para.200.

investigation and trial of the particular accused. As highlighted by Libya in *Al-Senussi*, "due process is to be examined with a view to determining whether the process is designed to shield the person concerned from criminal responsibility, not to ensure that the domestic proceedings accord with a particular ideal as determined by the ICC".[321] The Pre-Trial Chamber and, in turn, the Appeals Chamber, agreed in that case.[322]

However, in *Gaddafi*, the Pre-Trial Chamber nonetheless evaluated the overall Libyan justice system. This can be seen from its affirmation of the relevance of progress made in relation to rebuilding institutions and establishing the rule of law, and submissions relating to a "strategy to improve the effectiveness and accountability of the police service, the security of the courts and participants in the proceedings, to reform the detention centres and to bring practices of torture to an end".[323] Further, rather than only looking at the conditions of the detention centre at which Gaddafi was being held, the Pre-Trial Chamber took into account the central Government's "lack of full control" over other detention facilities throughout Libya as it considered it had a bearing on the Libyan Prosecutor's ability to interview witnesses against Gaddafi who were being held by non-State actors, namely militia groups.[324] Witnesses' reluctance to give evidence even during the investigation phase due to Libya's lack of capacity to provide adequate witness protection was also a core concern.[325] Further, the Pre-Trial Chamber took into account the lack of specific witness protection programmes and immunity provision for witnesses in relation to

[321] Libya Admissibility Challenge concerning the Al-Senussi case, supra note 11, at para.111.
[322] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras.221 and 223; Appeals Judgment on Admissibility of the Al-Senussi case, supra note 1, at paras.222 and 287.
[323] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.204.
[324] Ibid, at para.210.
[325] Ibid, at para.209.

statements made in the course of their trial testimony and noted that it was left to the discretion of the trial judges to continue protective measures for witnesses put in place during the pre-trial phase.[326] Moreover, it noted continued reports of torture or other inhuman treatment in detention facilities[327], although there was no evidence that Gaddafi had been subjected to such mistreatment.

4.6 Other considerations over forum

Notably, in assessing Libya's 'willingness' to genuinely investigate and prosecute Gaddafi, the Court apparently overlooked, or disregarded, the circumstances highlighted by Libya in regards to the availability and willingness of witnesses to give evidence in the respective forums of Libyan domestic prosecution offices and courts and the ICC. Namely, Libya noted in its admissibility challenge that some witnesses interviewed by the Libyan Prosecutor-General had expressed their unwillingness to be interviewed by the OTP.[328] It is also notable that interviews of witnesses already conducted by the Libyan authorities at the time of the admissibility challenge included defence witnesses, as well as insider witnesses from the military and former regime.[329] Moreover, in the event Gaddafi is transferred to The Hague he would be unable to challenge witnesses in the course of the investigation in the same manner as the witness confrontation procedure available in Libya.[330]

However, in *Al-Senussi*, the Pre-Trial Chamber appeared to take such issues on-board. In light of the significant amount of documentary evidence provided by Libya from the domestic investigation, the Court must have been alert to indications that at

[326] Ibid, at para.211.
[327] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.209.
[328] Libya Admissibility Challenge concerning the Saif Gaddafi case, supra note 11, at para.46.
[329] Ibid, at para.45.
[330] Ibid, at para.48.

that stage the Libyan investigation was more developed than that of the OTP. Indeed, the Pre-Trial Chamber justified its different determination as to the ability of Libya to investigate and prosecute Al-Senussi by distinguishing his case from that of Gaddafi on the basis of the quantity of evidence obtained and supplied to the Court. Whereas Libya supplied a "few sparse items" of evidence for the purpose of the *Gaddafi* admissibility challenge[331], the amount of material support filed for *Al-Senussi* was "considerable".[332] It must be recalled that the OTP filed the request for an arrest warrant against Al-Senussi only in relation to a period of two weeks in February 2011 and relatively expeditiously, less than four months following the Security Council referral. Further, the OTP's investigation against Al-Senussi was suspended in April 2013 pending the determination of Libya's admissibility challenge. This was not a long time in which to gather evidence, considering the limitations on the ICC's investigative powers and resources[333] and the security environment on the ground.

5. Burden of Proof for Demonstrating Genuineness

Libya argued for a reverse burden to apply to the second limb of the admissibility determination, namely for the party who asserts that State action is not 'genuine' to bear the burden of proving it.[334] In rejecting this, the Pre-Trial Chamber in the *Gaddafi* case held that the State has the burden under both limbs.[335] This is logical, given that the State could be expected to have access to information not in the hands of the Court, other parties or participants. However, it also puts the State challenging admissibility in difficulty in that it is forced to effectively anticipate any potential concerns regarding its ability and willingness to genuinely investigate and prosecute.

[331] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.297.
[332] Ibid, at para.298.
[333] See De Vos, 'Investigating from afar: the ICC's evidence problem', supra note 49.
[334] Ibid, at para.92 (iv).
[335] PTC Decision on admissibility of the Gaddafi case, supra note 54, at para.52.

It is also unlikely that a State seeking to conduct sham proceedings, or in relation to which valid due process concerns applied, would volunteer information about challenges it faces and efforts made to overcome them. Thus, it is easy to see the benefits of the alternative proposal made by Judge Ušacka to the effect that the burden of proof ought not to be solely imposed on the State but, recognising the sui generis nature of admissibility proceedings, all participants could be required to provide information to enable the Court to make a full and comprehensive assessment.[336]

Notably, while confirming that the burden of proof remained with Libya for the second limb, the Pre-Trial Chamber in *Al-Senussi* introduced an evidentiary burden on the Defence (or the OTP or victims in the event they contest a State's admissibility challenge) in that it required that "any factual allegation raised by any party or participant must be sufficiently substantiated in order to be properly raised".[337] Libya was only required to address specific claims as to its inability or unwillingness to genuinely investigate or prosecute that the Court considered sufficiently substantiated.[338] Further to this requirement, the Pre-Trial Chamber effectively threw out arguments by the Al-Senussi Defence as to the lack of independence or impartiality of the Libyan judicial authorities, inhuman treatment in detention, abductions and abuses by militia groups and the targeting of prosecutors and judges which were based on reports by human rights NGOs on the basis that they were "generic assertions without any tangible proof"[339], "unsubstantiated"[340] and that it

[336] Dissenting Opinion to Appeals Judgment on Admissibility of the Gaddafi Case, supra note 85, at para.61.
[337] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.208.
[338] Ibid, at paras. 208 and 239.
[339] Ibid, at para.239.
[340] Ibid, at para.274.

had not been verified that such circumstances applied specifically to the *Al-Senussi* case.[341] This assessment was upheld by the Appeals Chamber who found it reasonable for the Pre-Trial Chamber to place an evidential burden on the Defence in order to avoid unnecessary delay in admissibility proceedings.[342]

6. Monitoring and Recall

Significantly, Libya relied upon the concept of positive complementarity in alternatively arguing for a temporary finding of inadmissibility "in the event that the Court is not presently minded to declare the case inadmissible unconditionally".[343] Libya argued that the Court could monitor the domestic proceedings on an ongoing basis and require both Libya and the OTP to regularly report on progress, with the consequence that the case could be rendered once again admissible before the ICC in the event that State action was not genuine or did not comply with basic due process.[344] This factor was explicitly taken into account by the Pre-Trial Chamber in *Al-Senussi*, which emphasised the power of the Prosecutor to submit a request for a new review of the admissibility decision if new facts arise which negate the basis on which the case was found inadmissible.[345] In particular, the Court highlighted that, at the time of its admissibility determination, Al-Senussi still had no access to a lawyer and while - in distinction to the *Gaddafi* case[346] - it had deemed the ICC case against *Al-Senussi* inadmissible, this factor still has the "potential to become a fatal obstacle to the progress of the case" in Libya.[347] This consideration was similarly factored into

[341] Ibid, at paras. 274, 281, 299 and 301.
[342] Appeals Judgment on Admissibility of the Al-Senussi case, supra note 1, at para 167 ("otherwise, the proceedings could potentially be significantly delayed by the need to consider and rebut all factual allegations").
[343] See Libya Admissibility Challenge concerning the Al-Senussi case, supra note 11, at para 40.
[344] Ibid, paras 40 and 205.
[345] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.312.
[346] See PTC Decision on admissibility of the Gaddafi case, supra note 54, at paras 213-214.
[347] PTC Decision on admissibility of the Al-Senussi case, supra note 64, at para.307.

the equation by the Appeals Chamber in confirming the inadmissibility of Al-Senussi's case before the ICC.[348]

It is queried why the OTP did not just defer the investigation of Al-Senussi to Libya pursuant to Article 19 (11) of the Rome Statute, also supported by options for monitoring, instead of opting to support Libya's admissibility challenge meaning the parties had to go through the full challenge procedure. There is nothing in Article 19 to suggest deferral is limited to matters arising under articles 13 (a) and (c). While Article 16 specifically covers deferral of an investigation initially referred by the Security Council, this provision may be considered an additional mechanism. Evidently, it was because *Al-Senussi* was the first case in which deferral was realistically contemplated. Further, the importance of the issues in question, particularly Al-Senussi's arguments over the application of human rights standards and his ability to receive a fair trial in Libya meant a cautious approach. This is coupled with the uncertainty caused by the lack of reference to situations referred to the Court pursuant to Article 13(b) in Article 19 (and the alternative deferral route under Article 18 (2)) of the Rome Statute[349]).

7. Substantial Change of Circumstances?

Since Libya's challenge to the admissibility of the *Gaddafi* case was rejected, Saif should have been transferred to the ICC yet Libya failed to do so. For the very

[348] Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, at para.201 ("should it later become clear that the issue of legal representation cannot be resolved, this may be a basis for the Prosecutor to seek, pursuant to Article 19 (10) of the Statute, a review of the decision that the case against Mr Al-Senussi is inadmissible").

[349] While reference to Article 13 (b) situations was taken out of the original draft for article 18, there is no record of why it was removed to explain why it would not apply: Daniel D. Ntanda Nsereko, 'Article 18 Preliminary rulings regarding admissibility', in Otto Triffterer and Kai Ambos (Eds), *Rome Statute of the International Criminal Court: A Commentary*, Third Edition, (London: Hart, 2016), pp.832-848, at p.836, ft.25.

reasons that the central Libyan authorities were found 'unable' to obtain the accused for the purpose of trial in Tripoli, namely, his detention by the Zintan Brigade, they were unable to obtain him for transfer to the ICC. In the absence of its own police or enforcement arm, the ICC is dependent on co-operation to secure the custody of the accused. Unsurprisingly, on 10 December 2014, Pre-Trial Chamber I issued a decision finding Libya non-compliant with requests for co-operation with the ICC under Article 87 (7) of the Rome Statute and referred the matter to the UN Security Council.[350] It is to be queried the extent to which the possibility that Saif may be transferred to the ICC influenced the Zintan Brigade's refusal to release him into the custody of the authorities in Tripoli as they resisted international interference.

Nevertheless, it is necessary to evaluate whether there has been such a substantial change of circumstances on the ground as to render the decision in *Al-Senussi* subject to change. Taking into account the trial proceedings - which will be further analysed in Chapter VI – it is considered that the case of *Al-Senussi* is still inadmissible before the ICC. The standard for overturning a decision on inadmissibility based on an Article 19 challenge is high and appropriately so. Article 19 (10) of the Rome Statute provides that "[i]f the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17". As opined by Hall, Nsereko and Ventura, "the standard of proof should, at the very least, be higher than that for

[350] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, 'Decision on non-compliance by Libya with requests for co-operation by the Court and referring the matter to the United Nations Security Council', ICC-01/11-01/11-577, 10 December 2014.

admissibility determinations under article 19 para. 1, as the Prosecutor must not only be satisfied that new facts have arisen, but must be fully satisfied".[351]

Although there is an element of subjectivity in that it is the conclusion of the Prosecutor, the requirement for there to be 'new facts' is objective in that these facts must not have been known at the time of the initial decision on inadmissibility. Since concerns such as Al-Senussi's access to a lawyer or his exposure to the death penalty upon conviction were already known at the time the Court upheld Libya's admissibility challenge, it is not obvious that new circumstances exist which would negate the basis of the original decision. Moreover, as emphasised by the Appeals Chamber in *Al-Senussi*, violations of the due process rights of the accused do not ordinarily result in the national proceedings being vitiated on the grounds of willingness or ability to genuinely prosecute under Article 17.[352] The Appeals Chamber already spelt out that such due process violations in the course of the domestic trial are unlikely to render Article 20 (3) of the Rome Statute redundant.[353]

8. Conclusion

This chapter demonstrated that a high threshold applies to determining the admissibility of a case before the ICC if a State with concurrent jurisdiction is already investigating or prosecuting. This applies to both determining the existence of domestic proceedings at the first stage and thereafter, assessing the genuineness of those proceedings in terms of willingness and ability at the second stage.

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[351] Christopher Hall, Daniel Ntanda Nsereko and Manuel Ventura, 'Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case', in Otto Triffterer and Kai Ambos (Eds), supra note 349, pp.849-898, at p.895.

[352] Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, at para.220. See also, PTC Decision on admissibility of the Al-Senussi case, supra note 64, at paras. 235 and 292-293.

[353] Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 1, at para.222.

However, the Court has erroneously extended jurisprudence developed in the context of self-referrals to other situations. In the *Simone Gbagbo* (Côte d'Ivoire) and *Saif Gaddafi* (Libya) cases, the Court did not accord the necessary degree of appreciation to the State authorities. Further, the Court applied factors going towards an assessment of ability and willingness to prosecute in determining the very existence of domestic proceedings, finding a state of inactivity as technically construed, in apparent contradiction to the facts on the ground. This confuses both the national judiciary and affected communities. Additionally, the narrow focus on 'incidents' for comparison sake could lead to the domestic judiciary framing investigations in reference to the OTP's developing cases, risking impunity as many victims are left without justice.

Moreover, the Court has indirectly weighed domestic processes to the standard envisaged for international proceedings in determining admissibility, contrary to the legislative intent behind the provisions of Article 17. The ICC is not a human rights court and it undermines its credibility with States if it oversteps its role in making a wholesale assessment of a State's justice system outside the specific contours of the case before it. However, in *Al-Senussi*, the Court got it right as based on the evidence presented by Libya, the State was already investigating him for the same conduct as well as offences beyond the narrow confines of the ICC's case. Further, the position of, in effect, qualified deference adopted in regard to due process considerations gave the necessary benefit of the doubt to the Libyan authorities in accordance with the principle of complementarity while still taking into account minimum fair trial

standards. Countries emerging from conflict going through a transitional period cannot be expected to have perfect laws and procedures.

CHAPTER IV – CO-OPERATION

This chapter addresses co-operation between States and the ICC primarily from the perspective of 'reverse co-operation', where the ICC assists national judicial authorities. This contrasts with the common practice of exclusively examining States' obligation to co-operate with the ICC. It begins by analysing the approach taken in the Côte d'Ivoire and Libya situations, contrasting a mixed but ultimately competitive approach taken with the national authorities in Côte d'Ivoire with partnership and burden-sharing arrangements in Libya. It then further analyses the procedural framework for reverse co-operation, highlighting the ways the OTP could advance domestic proceedings through the transfer of evidence, witness protection and other technical assistance, thereby implementing positive complementarity. Next, the general co-operation framework is examined but the focus remains on how the ICC may increase domestic capacity and ownership even when a case proceeds internationally. It considers on-site investigations and site visits, in situ hearings and testimony by video-link. Finally, it evaluates co-operation following unsuccessful admissibility challenges.

1. Complementarity and Reverse Co-operation

Co-operation sought from the ICC by States - 'reverse co-operation' - is the converse of the obligation on States to co-operate with the ICC in proceedings before the Court.[1] It is an essential component of positive complementarity for the Court to provide legal and technical assistance to facilitate domestic prosecutions. Reverse co-

[1] Federica Gioia, 'Complementarity and 'reverse cooperation', Chapter 25 in Carsten Stahn and Mohamed M. El Zeidy (Eds), *The International Criminal Court and Complementarity: From Theory to Practice*, (Cambridge: Cambridge University Press, 2011), 807-829, at p.808.

operation is an integral component of the Rome system to prevent impunity. Yet, it is still an underutilised mechanism.[2]

There are considerable distinctions between the co-operation regime in Part 9 of the Rome Statute and the vertical co-operation regime of the ICTY and ICTR. Some characterise it as a "weak vertical cooperation regime" as the Court still has the authority to settle disputes.[3] Even the language used is more akin to a reciprocal arrangement – when the Court requires co-operation from a State it is phrased as a "request" rather than an "order".[4] However, there is no strict reciprocity and it is still very different to the approach taken in the UN Model Treaties on Extradition and Mutual Legal Assistance in Criminal Matters, grounded on horizontal State to State co-operation.[5] It is a sui generis regime.[6] This stems from the ICC's foundation on the principle of complementarity and illustrates that despite the minimal provision for reverse co-operation in Article 93 (10) of the Rome Statute, co-operation was still envisaged by the drafters as a two way process set-around the idea that States have the primary responsibility for prosecuting international crimes within their jurisdiction. This should not be ignored but embraced.

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[2] Interview record 5 – Head of JCCD, ICC Office of the Prosecutor, 30 November 2017.

[3] Claus Kress and Kimberly Prost, 'Part 9 International Cooperation and Judicial Assistance', in Otto Triffterer and Kai Ambos (Eds), *Rome Statute of the International Criminal Court: A Commentary*, Third Edition, (London: Hart, 2016), 2003-2013, at 2008-2010. See also Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, 2002, Oxford: Intersentia, at pp.79-88.

[4] See Gioia, supra note 1, at 819.

[5] See Hans-Peter Kaul and Claus Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', Chap. 10 in Olympia Bekou and Robert Cryer (Eds), *The International Criminal Court*, 2004, Hants: Ashgate Publishing, pp.191-223, at p.220.

[6] Bert Swart, Chapter 39 General Problems in Section 7, 'International Cooperation and Judicial Assistance', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Eds), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford University Press, 2002), 1589-1605, at 1594 ("a regime of cooperation that is a mixture of the 'horizontal' and the 'vertical'").

Positive complementarity envisages a partnership, with the OTP spurring domestic action by not just encouraging national proceedings but also providing expertise, for example, by developing "co-operative anti-impunity strategies".[7] The OTP could also provide technical advice on investigative techniques and international legal issues, for example, on crimes, modes of liability and defences.[8] Further, it could identify areas where the domestic authorities would benefit from other capacity-building and encourage third parties to assist, recognising the Court's finite resources.[9] A major area of the OTP's external relations is to "encourage and facilitate States to carry out their primary responsibility",[10] including through exchanging information.[11] Even when the ICC exercises jurisdiction, it is impossible for the Court to conduct proceedings in all cases arising out of a situation. As such, a 'burden sharing' arrangement envisages the OTP co-ordinating action with domestic prosecutors.[12] Accordingly, Regulation 35 (1) of the OTP Regulations mandates that investigative planning shall include devising a co-operation plan.[13]

The co-operation regime should operate in conjunction with the principle of complementarity concerning admissibility. If gaps in a State's ability to genuinely investigate and prosecute may be addressed through international assistance, the State ought to retain jurisdiction, even in high-profile cases. In contrast, unwillingness might materialise in both a general lack of co-operation and reverse co-operation requests being issued in bad faith. A lack of co-operation with the OTP, even at an

[7] ICC, Informal expert paper, 'The principle of complementarity in practice', 2003, pp.3-4.
[8] Ibid, p.6-7.
[9] Ibid, p.6.
[10] ICC, OTP, 'Paper on some policy issues before the Office of the Prosecutor', 2013, at p.5.
[11] Ibid, at p.5.
[12] Ibid, p.7.
[13] Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, in force 23 April 2009.

early stage, may indicate unwillingness.[14] Alternatively, not issuing a request for assistance from the ICC may also suggest unwillingness.[15] However, positive complementarity also requires "vigilance".[16] Before the OTP provides assistance, "a sustained demonstration of good faith" is required as the OTP is alert to the risk that assistance might be "exploited in efforts to legitimise or shield inadequate national efforts from criticism".[17] Domestic authorities may also request information from the ICC when seeking the deferral of an investigation into a situation under Article 18 of the Rome Statute, when a response is mandatory.[18] There is potential for abuse by States acting in bad faith pursuing deferral to block accountability efforts. Nevertheless, the Prosecutor does not have to provide all or any of the additional information sought.

Simultaneously with its admissibility challenge, Kenya filed a request for assistance, asking the ICC to facilitate domestic proceedings by providing evidence gathered in its investigations to Kenya and technical support. However, the Pre-Trial Chamber did not even consider this. The Appeals Chamber also largely skirted over the issue, finding that while the Pre-Trial Chamber had discretion to regulate the admissibility proceedings in a different way and take into account the assistance request, its omission to do so was not such as to amount to an abuse of process which would justify appellate interference.[19] While Kenya's request may have been disingenous, it

[14] Informal Expert Paper, 'The principle of complementarity in practice', supra note 7, p.18, para.57.
[15] See Gioia, supra note 1, at 815.
[16] Informal Expert Paper, 'The principle of complementarity in practice' supra note 7, pp.3-4.
[17] Ibid, pp.6-7.
[18] Rule 52 (2) ICC Rules of Procedure and Evidence (RPE) provides that it "shall be responded to by the Prosecutor on an expedited basis". *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A.
[19] ICC, Situation in the Republic of Kenya, *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the Decision of the Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application

is not satisfactory for the Court to have effectively ignored it. As stressed by Judge Ušacka, "expeditiousness was unduly emphasised in the Pre-Trial Chamber's exercise of discretion and given too much weight, especially in comparison to the Appellant's sovereign right to investigate and prosecute the case itself".[20] The Pre-Trial Chamber should have taken into account the possibility to build the capacity of the domestic authorities in furtherance of the assistance request and recognised the potential for a change in circumstances, namely, that investigative actions may be catalysed.[21] Indeed, while Rules 57, 58(3), 59 (3), 61 and 156 (4) of the ICC's RPE make some reference to time, there is no express requirement that admissibility challenges be resolved expeditiously.[22] While it is not in the interests of justice for admissibility proceedings to be dragged out, the Court ought to be more responsive to the specific needs of the context before it, particularly if a State invites assistance to fulfill its responsibility to investigate.

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by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2)(b) of the Statute, ICC-01/09-02/11/274, ICC-01/09-02/11 OA, 30 August 2011, at paras. 95-96 and 120-121; ICC, Situation in Republic of Kenya, *Prosecutor v. William Samoei Ruto et al.*, Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled Decision on Application by the Government of Kenya challenging admissibility in the context of Article 19 (2)(b) of the Statute, ICC-01/09-01/11-307 (OA), 30 August 2011, at paras. 97-98 and 122-123.

[20] ICC, Situation in Kenya, *Prosecutor v Francis Kirimi Muthaura, Uhuru Kenyatta and Mohammed Hussein Ali*, Appeals Chamber, 'Dissenting Opinion of Judge Anita Ušacka to Judgment on the appeal of the Republic of Kenya against the Decision of the 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'', ICC-01/09-02/11-342, 20 September 2011, at para.29 (hereafter 'Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge – Kenyatta'); ICC, Situation in Kenya, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Appeals Chamber, 'Dissenting Opinion of Judge Anita Ušacka to Judgment on the appeal of the Republic of Kenya against the Decision of the 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'', ICC-01/09-01/11-336, 20 September 2011, at para.29 (hereafter 'Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge – Ruto').

[21] Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Kenyatta, ibid, at para.28; Dissenting Opinion to Appeals Judgement on Kenya's Admissibility Challenge - Ruto, ibid, at para.28.

[22] See Christopher Hall, Daniel Ntanda Nsereko and Manuel Ventura, 'Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case', in Triffterer and Ambos (Eds), supra note 3, at 890.

In distinction, in its *Al-Senussi* admissibility challenge, Libya drew attention to the fact that "the evidence and testimony forming the basis of the Court's arrest warrant is largely based on the product of co-operation with the Libyan authorities at a time when it was not in a position itself to use the evidence due to the Gaddafi regime's continued control and the prevailing state of impunity".[23] Libya asserted that it was now in a position to proceed, based on domestic reform and capacity-building in conjunction with international assistance.[24] No formal request for international assistance was issued by Libya during the admissibility challenge. Nevertheless, the possibility of reverse co-operation by the OTP - which supported Libya's Al-Senussi admissibility challenge - was undoubtedly still a material consideration.

A further issue is the extent to which early OTP involvement in advising national authorities on complementarity may compromise independence and impartiality. As stated by the Group of Experts on Co-operation, advice needs to "be carefully considered so that it does not prejudice the Prosecutor's ability to subsequently request co-operation or any later determination of the State's compliance with the obligations under the Statute".[25] However, these concerns should not mean the OTP refrains from early engagement. It should be prepared to offer advice, especially on implementing legislation for effective co-operation.

[23] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Republic of Libya, 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', ICC-01/11-01/11-307-Red2, 2 April 2013, at para.118 ('Libya Admissibility Challenge concerning the Al-Senussi Case').
[24] Ibid, at para.119.
[25] ICC, OTP, Informal expert paper, 'Fact-finding and investigative functions of the Office of the Prosecutor, including international co-operation', 2003, p.5, para.16.

2. Co-operation with Côte d'Ivoire and Libya: Competition v Partnership

2.1 Côte d'Ivoire

The OTP was granted unrestricted access in Côte d'Ivoire to meet with and obtain statements from victims and witnesses, at least as regards the investigation of crimes allegedly committed by Gbagbo and Blé Goudé. Further, records of testimony given in national proceedings were exchanged with the OTP, as shown by the ICC trial record. Moreover, Gbagbo and Blé Goudé's co-accused in domestic proceedings were interviewed by OTP investigators as 'insider witnesses' with Senegalese lawyers appointed to represent them in the absence of their Ivorian defence counsel. While there may be conflict issues if the same counsel represents others in related proceedings, it still remains a human rights dilemma and further influenced a negative perception of the Court in the Ivorian defence community.[26] Since the reliance on Senegalese lawyers for interviews by OTP personnel, Côte d'Ivoire introduced a provision into the new Ivorian CPC of 2018 permitting defence counsel admitted in another Member State of the Economic and Monetary Union of West Africa (UEMOA)[27] to appear before the courts in Côte d'Ivoire, with other foreign lawyers permitted to appear subject to reciprocity.[28]

[26] Defence counsel asserted: *"The ICC also came to Cote d'Ivoire to interview the pro-Gbagbo without their lawyers present – they came with Senegalese lawyers and imposed these lawyers on them, who do not know the ICC situation. They were in torture camps so they did not have a choice because they were threatened with additional torture. From 2011 to 2017 without stopping, in collaboration with the Ivorian Government, on several occasions, several different people who were pro-Gbagbo [were interviewed]. The Prosecutor's Office did not allow them to call their Ivorian lawyers to have the chance to say no to the DST torturing them or to say I don't agree." (*Interview record 43 – Defence Counsel, 22 October 2018).

[27] Benin, Burkina Faso, Guinée-Bissau, Mali, Niger, Senegal and Togo.

[28] Article 282, Ivorian Code of Criminal Procedure, December 2018.

OTP investigators have also been able to access the Cellule's files with permission granted through the hierarchy.[29] As stated by a representative from the Association des Femmes Juristes de Côte d'Ivoire (AFJCI), "the current Government are really collaborating very well with the ICC so whenever the ICC requests information, the government is giving them the information. Even now in 2018, Cote d'Ivoire is available to them to provide the information."[30] Interviews with OTP staff confirmed that as far as the Gbagbo and Blé Goudé proceedings were concerned, ICC investigators had full access to the local files and in conducting on-site investigations, found the Cellule very helpful despite some 'red tape'.[31]

However, the ICC's impact in Côte d'Ivoire has wavered as the OTP has come to be seen as too close to the current Government from co-operation in the *Gbagbo and Blé Goudé* case; there is a perception that the ICC has taken sides.[32] As a member of Ligue Ivoirienne des Droits Humains (LIDHO) stated, "they have really been associated with the executive here".[33] Similarly, a civil society activist added "I think the political power is so happy that the ICC charged those people who were in power yesterday so the judgement of the ICC does not affect Ivorian justice at all."[34] The perception of bias was compounded by Ocampo's press statement after the 2010 elections;[35] direct meeting with Ouattara prior to Gbagbo's surrender to The Hague;

[29] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[30] Interview record 20 – interviewee, Association des Femmes Juristes de Côte d'Ivoire (AFJCI), 27 March 2018.
[31] Interview record 8 – OTP Official, 5 December 2017.
[32] For an earlier analysis highlighting such concerns around the ICC's impartiality in Côte d'Ivoire, see Sophie T. Rosenberg, 'The International Criminal Court in Côte d'Ivoire: Impartiality at Stake?', (2017) 15 J Int'l Crim Justice 471.
[33] Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018.
[34] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[35] Interview record 43 – Defence Counsel, 22 October 2018.

and letter of congratulations to Guillaume Soro.[36] A direct meeting between Fatou Bensouda and Ouattara more recently creates the impression the OTP has not changed much in this regard.

This perception has deterred some victims and witnesses from coming forward in the CIV-II investigation as the victims "view the ICC as the people sent by Ouattara, not that the ICC is there to protect them."[37] A victim stated that when the OTP investigators come to Duékoué the local prefect takes care to ensure they only get to meet with individuals who would be able to tell them one side of the events, stating "it compromises everyone. The persons they met are false."[38] Similarly, another interviewee from Mouvement Ivoirien des Droits Humains (MIDH) worried that the ICC was only being fed information authorised by the Ministry of Justice, affecting progress.[39] This may be more of a reflection on the level of mistrust by civil society than an accurate depiction of the depth of co-operation. However, views expressed by the *Gbagbo and Blé Goude* Presiding Judge in giving reasons for their acquittal suggest there might be substance to these concerns.[40]

Nevertheless, co-operation is such that there was also an indication that the local judiciary might be holding off certain actions, for example, in relation to the pro-

[36] Interview record 23 – interviewee, Mouvement Ivorien des Droits Humains (MIDH), 28 March 2018.
[37] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[38] Interview record 49 – victim, Plateforme des associations de victims pour la paix et la reconciliation en Côte d'Ivoire (Duekoue), 25 October 2018.
[39] Interview record 23 – Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018.
[40] ICC, Situation in Côte d'Ivoire, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Opinion of Judge Cuno Tarfusser, Annex A to Trial Chamber I, Reasons for the oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, ICC-CPI-02/11-01/15—1263-AnxA, 16 July 2019, at para.92 (hereafter 'Gbagbo and Blé Goude ICC Trial Chamber Decision on Acquittal – Reasons for the oral decision of 15 January 20019').

Ouattara cases, in anticipation that the ICC will be more active in the near future, with one prosecutor noting "the ICC themselves have not finished as arrest warrants are still pending so we are waiting".[41]

Yet, requests sent to the ICC for the exchange of information in the other direction have not been substantively answered: "They have proposed to assist us. They said they would share evidence but when we send the request they don't answer. We have never had an answer".[42] The OTP replied to the most recent request for assistance with an interim reply asking for more specifics on the assistance sought which was then provided but after some months, there was no substantive response.[43] While there may be legitimate witness protection concerns, at least some information ought to be conveyed to local prosecutors and judges as to the obstacles to execution. Indeed, the reason for not sharing information may rather stem from the desire to safeguard the integrity of the ICC's own proceedings by not exchanging evidence save after the appeal stage due to fears its disclosure in domestic investigations could undermine the ICC's case.[44] Nevertheless, Ivorian counterparts would appreciate an indication of the likely timeframe to facilitate case management.

2.2 Libya

A Memorandum of Understanding (MoU) was concluded between the OTP and the Libyan Prosecutor-General's Office in November 2013 on burden sharing regarding investigations and prosecutions in Libya, providing for co-operation, consultation and

[41] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[42] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[43] Interview record 39 – Prosecutor, Côte d'Ivoire, 19 October 2018.
[44] Interview record 8 – OTP Official, 5 December 2017.

co-ordination.[45] It provides for information exchange, subject to confidentiality and witness protection. According to a Statement by the ICC Prosecutor, the MoU is intended to facilitate "collaborative efforts to ensure that individuals responsible for committing crimes in Libya as of 15 February 2011 are brought to justice either at the ICC or in Libya itself".[46] It was initially envisaged that the OTP would prioritise investigating and prosecuting suspects outside the territory of Libya and inaccessible to the Libyan authorities while Libya would investigate those within Libya.[47]

Following the MoU, the OTP reported meeting with then Prosecutor-General Abdul Qader Radwan on 29 January 2014 for "fruitful and constructive discussions" which included "practical aspects of the implementation of this MOU and strategies for further investigations, prosecutions and possible arrests".[48] A working meeting with investigators was scheduled for 15 May 2014.[49] In November 2014, it was reported that due to the deteriorating security situation contact between the OTP and Libya was largely limited to the Libyan Focal Point and that progress had been slow.[50] Nevertheless, OTP and Libyan investigators had held a "constructive meeting" outside Libya to exchange information and co-ordinate the investigation and prosecution of individuals of mutual interest.

[45] Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 10th Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011), 5 November 2015, at para.50.
[46] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 14 November 2013.
[47] Ibid.
[48] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the UN Security Council on the Situation in Libya pursuant to UNSCR 1970 (2011), 12 May 2014, at para.10.
[49] Ibid.
[50] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the UN Security Council on the Situation in Libya pursuant to UNSCR 1970 (2011), 12 November 2014.

Given the current security situation in Libya, many who would otherwise strongly advocate for local ownership of investigations and trials are now calling for the ICC to expand and intensify its investigations concerning Libya.[51] The result is a higher level of co-operation between the OTP and the Libyan Prosecutor-General's Office. In December 2014, the Libyan authorities provided the OTP with "a significant body of material" which the ICC Prosecutor declared was "resulting in investigative progress."[52] In turn, Libya provided further documentation in regard to a domestic investigation into incidents in Al-Hadba prison, including concerning the alleged torture of Saadi Gaddafi, in October 2015 in response to OTP enquiries.[53] The ICC Prosecutor reported that an initial assessment of the documentation "gives hope for optimism about these national efforts".[54]

The OTP reported in 2016 that its investigation had "greatly benefitted from the operational investigative support and cooperation it continues to receive from the Libyan Prosecutor-General's office".[55] This continued into 2017, with a report that despite the security challenges preventing OTP investigators from working on the ground in Libya, they had been using "innovative methods to collect evidence from outside the country through secure channels" which was made possible by the "ongoing assistance" of the Prosecutor-General's Office.[56] Since the *Al-Werfalli* First

[51] E.g. Cairo Institute for Human Rights, 'Peace and Democratic Transition in Libya: A Dream Deferred or an Everlasting Nightmare?', June 2018, at p.19.
[52] Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 10th Report of the Prosecutor of the International Criminal Court to the UN Security Council, supra note 45, at para.14.
[53] Ibid, at paras 27-31.
[54] Ibid, at para.31.
[55] Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 9 November 2016, at para. 30.
[56] Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 9 May 2017, paras 6 and 7.

Arrest Warrant was publicly issued on 15 August 2017,[57] it may be a result of this positive co-operation. Indeed, it is very likely that Al-Werfalli was discussed with the Libyan Prosecutor-General prior to the warrant being issued, given that the OTP does not anticipate that Libya will challenge the admissibility of this case before the ICC despite earlier challenges concerning Gaddafi and Al-Senussi.[58] Further, there was no indication of any change to the level of co-operation provided by the Libyan authorities since the warrant.[59]

Further, the security situation hampered the OTP's ability to conduct on-site inspections in Benghazi and elsewhere.[60] Nonetheless, an investigative team travelled to Libya in March 2018 to conduct investigative activities for the first time in over five years, with the OTP reporting that "substantial co-operation" was provided by both the UN Support Mission in Libya (UNSMIL) and the Libyan Prosecutor-General's Office in facilitating the visit.[61] Moreover, the Prosecutor-General's Office had "responded positively to a number of requests for assistance the office has made in the last year", with a number of working meetings held.[62] The *Al-Werfalli* Second Arrest Warrant followed, being issued publicly on 4 July 2018.[63]

The co-operation between the OTP and Libyan prosecutors evidences a move towards a sharing of competences, in the implementation of Strategic Goal 9 of the OTP's

[57] ICC, Situation in Libya, *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, PTC I, 'Warrant of Arrest', issued pursuant to Article 58 (1) of the Rome Statute, ICC-01/11-01/17-2, 15 August 2017 ('Al-Werfalli First Warrant of Arrest').
[58] Interview record 7, Head of Prosecution Division, ICC OTP, 4 December 2017.
[59] Interview record 7, Head of Prosecution Division, ICC OTP, 4 December 2017.
[60] Interview record 6 – OTP Official, ICC OTP, 4 December 2017.
[61] ICC OTP, 15th Report of the Prosecutor of the International Criminal Court to the United Nations Security Council, pursuant to UNSCR 1970 (2011), dated 9 May 2018, at p.3, para.19.
[62] Ibid, at p.4, para.30.
[63] ICC, Situation in Libya, *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, PTC I, 'Second Warrant of Arrest', issued pursuant to Article 58 (1) of the Rome Statute, ICC-01/11-01/17-13, 4 July 2018 ('Al-Werfalli Second Warrant of Arrest'), at paras 27-29.

Strategic Plan for 2016-2018, now Strategic Goal 6 of the 2019-2021 Plan.[64] Specifically, while national inactivity was reported in regard to holding commanders or members of armed groups accountable for human rights abuses committed in detention centres since 2011, the Libyan Prosecutor-General's Office was considered to be "making efforts to combat impunity" in relation to crimes concerning the smuggling and ill-treatment of migrants.[65] In February 2019, Fayez Sarraj, Head of Libya's Presidential Council, met with Fatou Bensouda in Munich, Germany, to discuss co-operation and invited the OTP to visit Libya again to review cases with the Prosecutor-General's Office.[66] Most recently, the Government of National Accord (GNA) called for the OTP to expand its investigations into the militias.[67]

In distinction to Côte d'Ivoire, the co-operation is working both ways, with the OTP also sharing evidence with Libyan prosecutors and investigators to support domestic proceedings.[68] This gives practical effect to the recognition that the OTP will never be able to try and arrest everyone and assisting domestic investigations is better for Libya's long-term future.[69]

3. Procedural Framework for Reverse Co-operation

A literal interpretation of Article 86 of the Rome Statute suggests the Part 9 co-operation regime only applies after a formal investigation is initiated – States have a general obligation to co-operate with the ICC "in its investigation and prosecution of

[64] ICC, OTP Strategic Plan 2016-2018, dated 16 November 2015, at p.18; and ICC, OTP Strategic Plan 2019-2021, dated 17 July 2019, at pp. 28-31, paras.48-56.
[65] Ibid, at p.4, paras 27 and 29.
[66] The Libya Observer, 'ICC Prosecutor keen on pursuing legal action against all Libyan fugitives', by Abdulkader Assad, 16 February 2019.
[67] Libyan Express, 'Libya's Foreign Minister demands ICC investigate Murzaq massacre', 7 August 2019.
[68] Interview record 6 – OTP Official, 4 December 2017.
[69] Interview record 6 – OTP Official, 4 December 2017.

crimes within the jurisdiction of the Court".[70] However, a broader construction is more plausible when considering the general scheme of the Rome Statute and its object and purpose to prevent impunity, as set-out in the Preamble.[71] As such, this possibility exists regardless of the stage of related ICC proceedings, namely, even during a preliminary examination. It is important for the OTP to secure the engagement of domestic judicial authorities at an early stage, including in fact-finding during the preliminary examination to assess if domestic proceedings exist for cases foreseen and the ability and willingness of the State to genuinely investigate and prosecute. The term 'investigation' should be interpreted as extending to admissibility determinations, with the co-operation regime enabling the exchange of information on domestic proceedings.[72] This would extend to reverse co-operation, enabling the State to request information on the ICC's proceedings to decide whether to challenge admissibility. Even if domestic proceedings do not already exist, such information may catalyse an investigation.

Article 93 (10) on "Other forms of co-operation" is the sole provision in the Rome Statute governing reverse co-operation. Notably, it also enables non-States Parties to seek assistance from the ICC, which means that the judicial authorities in Libya may

[70] Article 86, Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, in force on 1 July 2002, United Nations Treaty Series Vol. 2187, No. 38544.
[71] See Informal expert paper, 'The principle of complementarity in practice', supra note 7, at p.10, paras.28-29. If a narrower construction is adopted, then the ICC Prosecutor is limited to non-compulsory measures under Article 15 (2) of the Rome Statute and Rule 104 RPE, supra note 18, namely, to seeking information from the State and other counterparts voluntarily. Kleffner considers this narrow construction applies and Part 9 is not available to the Prosecutor to gather information on which to base a decision on admissibility: Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008), at 224.
[72] Kress and Prost, 'Article 86 General obligation to cooperate', in Triffterer and Ambos (Eds), supra note 3, pp. 2014-2018, at p.2017. For the contrary interpretation however, see: Informal expert paper, 'Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', supra note 533, pp.5-7, paras.22-29.

also request reverse co-operation.[73] However, in either instance, the Court has discretion whether or not to respond substantively to a State's request for assistance; Article 93 (10) prescribes only that the Court "may" - as opposed to "shall" - respond to a State's request. This is a "curiously non-cooperative form of complementarity", given that the discretionary regime for reverse co-operation continues even after a determination of inadmissibility in favour of domestic proceedings.[74] As noted by Ciampi, the Rome Statute does not contain specific criteria governing how and when the Court should exercise its discretion to respond to a reverse co-operation request.[75] Accordingly, the general rules governing the Court's exercise of jurisdiction apply, including whether it is in the interests of justice taking into account complementarity.[76] Further, while a requested State may apply for a ruling on the legality of a request for co-operation from the ICC, there is no provision for this procedure to be invoked in regard to reverse co-operation.[77]

3.1 Transfer of evidence

As highlighted by Ciampi, the material most likely to be sought by domestic authorities from the ICC is "evidence which the Court would have obtained in most, if not all, cases by seeking assistance from States".[78] This includes material obtained by the OTP from the territorial State with assistance by the same authorities now

[73] Article 93 (10)(C) Rome Statute, supra note 70.
[74] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, supra note 71, at p.233.
[75] Annalisa Ciampi, Chapter 42, 'Other Forms of Cooperation', in Cassese, Gaeta and Jones (Eds), *The Rome Statute of the International Criminal Court: A Commentary*, supra note 6, pp.1705-1747, at p.1742.
[76] Ibid, pp.1742-1743.
[77] Regulation 108 (1), Regulations of the Court, adopted by the judges of the Court on 26 May 2004, as amended on 12 November 2018, ICC-BD/01-05-16.
[78] Ciampi, supra note 75, at 1743. Article 87 (4) Rome Statute, supra note 70, states that "*the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families*".

seeking copies of it, even if that assistance was passive in the sense of permitting access to witnesses within the jurisdiction. For example, Côte d'Ivoire lacks technical capacity for DNA and ballistics analysis, with resource limitations among the factors delaying further exhumations. While the OTP has lent some assistance in relation to conducting DNA testing and sharing the results, it would be mutually beneficial to go further. Notably, an investigative judge indicated that the OTP's investigators came to Côte d'Ivoire and took away much of the physical evidence including ballistic fragments and have not shared the results of the forensic analysis.[79] It was indicated that the Cellule does not even know exactly what the ICC took altogether. The lack of physical evidence and forensic data is hampering domestic enquiries, making the sharing of the results of tests of any physical evidence by the ICC crucial to a successful outcome.

3.2 Protection of victims and witnesses

The provision for victims, witnesses and their families in Article 87 (4) of the Rome Statute is applicable to co-operation requests and responses originating from all parties and participants, whether from or to the ICC and all forms of co-operation.[80] It applies to the collection or obtaining of information and the format of its transmission to the requester.[81] Flexibility in approach means the Court can ensure both effective co-operation and the protection of victims and witnesses. For example, the Court "may choose not to include certain specific information…or ask for special steps with

[79] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[80] Kress and Prost, 'Article 86 General obligation to cooperate', in Triffterer and Ambos (Eds), supra note 3, at p.2027.
[81] Ibid, at p.2028.

respect to confidentiality or choose to communicate information in a secure manner".[82]

Further, Article 93 (10)(b) (ii)(b) of the Rome Statute makes the transmission of witness or expert evidence from the ICC to requesting States subject to Article 68 on the protection of victims and witnesses, obliging the Court to protect their safety, physical and psychological well-being, dignity and privacy.[83] However, any measures taken to protect victims or witnesses must not be "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[84] This is important as domestic authorities may request the transfer of evidence which goes to the fair trial of an accused. For example, first account witness interviews obtained by the ICC may be inconsistent with those acquired later in time by local investigators. In turn, defence witnesses may be reluctant to come forward in domestic proceedings due to a heightened risk to themselves or their families on the ground but may have participated in interviews with the OTP. Article 68 (5) enables the OTP to provide summaries of witness testimony instead of the full transcript "where the disclosure of evidence or information…may lead to the grave endangerment of the security of a witness or his or her family".[85] While this may hamper the Defence before a domestic tribunal as they would not receive the full picture, such measures are still consistent with a fair trial. Indeed, the disclosure of witness summaries may enable a trial to take place domestically in compliance with minimum due process standards, which would otherwise be impossible and mean impunity or a travesty of justice.

[82] Ibid, at p.2027.
[83] Article 68 Rome Statute, supra note 70. Likewise, Article 194 RPE, supra note 18, refers to Article 68 and provides for the views of the Chamber and relevant victims and witnesses to be taken into consideration before a State's request is decided.
[84] Article 68, Rome Statute, supra note 70.
[85] Article 68 (5) Rome Statute, supra note 70.

Moreover, material acquired by the OTP will likely include documentary or testimonial evidence from peacekeepers or international humanitarian workers. While a State may apply for protective measures on behalf of its "servants or agents" and to safeguard confidential or other sensitive information;[86] even in this situation, there may be an alternative route for the OTP to assist local prosecutors. For example, in the analogous case where a State cites national security as grounds for non-disclosure, the steps for resolving the problem include: (a) modification or clarification of the request for information; (b) a relevance determination; (c) obtaining the evidence from a different source or in a different form; or (d) providing the material in summary form or with "redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures…."[87]

Likewise, the OTP may have entered into a confidentiality agreement pursuant to Article 54 (3)(d) of the Rome Statute to secure co-operation from States, intergovernmental organisations or individuals. For example, in Lubanga, a Memorandum of Understanding between the UN and ICC Concerning Cooperation between the ICC and the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC)[88] provided that all documents would automatically be considered confidential. Confidentiality protects the safety of field staff and often, "the mandate of an organization may be of such a nature that it cannot be seen to be cooperating with the Court…."[89] If he had not agreed to the confidentiality

[86] Article 68 (6) Rome Statute, supra note 70.
[87] Rome Statute, *supra* note 70, Article 72 (5) (a), (b), (c) and (d).
[88] Signed on 8 November 2005, Article 10 (6).
[89] Ibid, para.14, n. 35.

stipulation, the Prosecutor would have been unable to obtain the documents.[90] This is likely to arise again, particularly where the ICC's intervention was not initially welcome, for example, in Gaddafi's Libya. For a reverse co-operation request, the OTP may go back to the source to seek consent to the disclosure to local prosecutors or, at a minimum, extracts or summaries which would still be helpful. Nevertheless, a co-operation agreement between the ICC and the United Nations Operation in Côte d'Ivoire (UNOCI) [91] regulates the provision of information to the OTP differently to the MONUC[92] agreement, meaning information relevant to the investigation in Côte d'Ivoire should ordinarily have been supplied to the OTP in a disclosable form.[93] Further, a broader MoU concluded between the ICC and UNOCI in June 2013 provides for wider information sharing, including the possibility for the accused and victim participants to request documents or other information from the UNOCI through the ICC Registry.[94]

The Registry is obliged to implement local protective measures for victims and witnesses who have or are to appear before the Court. It also owes a duty to other

[90] Ibid, para.18.
[91] Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Operation in Côte d'Ivoire and the Prosecutor of the International Criminal Court, 23 January 2012, Registration No. II-1358, 2803 UNTS 323; and see further Tamara Cummings-John, 'Cooperation between the United Nations and the International Criminal Court: Recent Developments in Information Sharing and Contact with Persons Subject to Warrants or Summonses', (2013) 10 International Organizations Law Review 223. Note also the Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, 2283 UNTS 202.
[92] Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of Congo and the International Criminal Court, 8 November 2005, Registration No. 1292, 2363 UNTS 332.
[93] Article 9 (6), MoU concerning Co-operation between UNOCI and the OTP, supra note 91 ("*The United Nations shall endeavour, wherever possible, to accede to the Prosecutor's requests by providing the document or documents to which the Prosecutor wishes to be afforded access and by not placing any conditions, limitations, qualifications or exceptions on their disclosure*").
[94] Memorandum of Understanding between the United Nations and the International Criminal Court concerning Cooperation between the United Nations Operation in Côte d'Ivoire and the International Criminal Court, 12 June 2013, Registration No. 1371, 2940 UNTS 2, Article 9.

"persons at risk who fall within its purview" on the territory of the State in which they reside.[95] This has particular importance in the case of individuals who may also be witnesses in domestic proceedings in that they are still entitled to protection by the international tribunal, protection which they may otherwise not receive from the domestic authorities, or not to the same standard. The ICC is alert to the increased risk from the transfer of evidence to domestic authorities such that persons not previously eligible for its witness protection programme may need to be included. The causation condition in Regulation 96 (3)(b) of the Regulations of the Registry "because of their involvement with the Court" is broad enough to cover such circumstances as it is not limited to testimony in ICC proceedings but would include providing evidence during a preliminary examination by the ICC that is later transferred to their national authorities. However, ordinarily the Court must seek the consent of witnesses before ordering protective measures.[96] A witness may actually consent to protective measures being lifted to facilitate a domestic trial, especially where no prosecution would otherwise take place if the accused is not sufficiently high-up to interest the OTP but the local prosecutor cannot charge without access to the ICC's files.

However, national proceedings in Côte d'Ivoire have been hampered by witnesses of mutual interest declining to testify in local trials to avoid media exposure. As one victim admitted, "since Paolina told us to avoid exposing the victims, we do not want to go there and be on TV", referring to the ICC victims' legal representative and his

[95] Regulation 93, ICC Regulations of the Registry, approved by the Presidency 6 March 2006, as amended 25 September 2006 and 4 December 2013, ICC-BD/03-03-13.
[96] Rule 87 (1) ICC RPE, supra note 18. Rule 87 (3) RPE also provides for the possibility of an in camera hearing to determine whether or not to grant a request for the exchange of information. The participation of victims' representatives in such a hearing provides an additional safeguard.

decision not to also testify in Simone Gbagbo's second trial in Abidjan.[97] Part of this relates to the ICC's inability to guarantee witnesses' protection save through co-operation with the Ivorian authorities.[98]

3.3 Access to archives

Access to inspect the ICC's archives also extends to "other specified persons", which may cover domestic judicial authorities.[99] ICC proceedings may not lead to charges against a particular accused based on gravity but domestic proceedings could still be envisaged. This is likely given the thousands of potential suspects in situations under investigation.

3.4 Other technical assistance

The OTP could also support the domestic judicial authorities to conduct investigations effectively by providing technical assistance. Most notably, local prosecutors would benefit from assistance with exhumations and forensic and ballistic examination. As discussed later, this is a problem in both Côte d'Ivoire and Libya, as the tools for forensic examination are unavailable or they lack the resources to conduct such examinations for crimes on a mass-scale. States Parties are reluctant for the OTP to engage in capacity-building, which some see as detracting from their core mandate of investigating and prosecuting.[100] However, engaging with local

[97] Interview record 26 – victim, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018.
[98] As one civil society activist stated *"…those who have testified openly [at the ICC], there were no security measures in place so the problem of victims is not only to go and testify, it is also their security … anything can happen at any time and there is no freedom of expression, you cannot take risks to testify or the community will know you have been (*Interview record 28 – interviewee, SOS Exclusion, 30 March 2018).
[99] Regulation 16, Regulations of the Registry, supra note 95.
[100] Report of the Bureau on Stocktaking: Complementarity, 'Taking Stock of the principle of complementarity: bridging the impunity gap', ICC-ASP/8/51, 8th session, 18 March 2010, at para 4 ("*the Court's core mandate and function… is a judicial one…the Court is not a development agency*")

authorities in knowledge transfer and sharing the result of cell site analysis or forensic expertise when OTP staff are already in-country on an investigative mission is not unduly burdensome.[101] Moreover, this is consistent with the conception of the ICC as a part of the Rome System, co-operating with the national judiciary to prevent impunity.[102]

4. Co-operation During ICC Proceedings and National Capacity-Building

Even if a State is found unable or unwilling to genuinely investigate and prosecute a specific case, steps taken to build capacity and sensitise national authorities on the importance of equal justice could catalyse national proceedings in other cases. Reverse co-operation is the most impactful way to achieve this. The second is co-operation between the OTP and the national judiciary in ICC proceedings.

4.1 On-site investigations/site visits

On-site investigations by the ICC (also known as 'extra-territorial investigations', 'self-help', 'autonomous evidence gathering' or 'local inspection'),[103] are governed by Articles 99 (4) and 57 (3)(d) of the Rome Statute. The degree of co-operation required varies with on-site investigations necessitating at a minimum passive legal

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and para.16 (defining positive complementarity as "*all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes within the Rome Statute, without involving the Court in capacity-building, financial support and technical assistance…*"); and ICC-ASP/17/34 Report of the Bureau on Complementarity, 17th session, 29 November 2018, at para 23.

[101] Interview record 4 – OTP Official, 30 November 2017; note also ICC-ASP/8/51, Report of the Bureau on Stocktaking: Complementarity, 'Bridging the Impunity Gap', ibid, at para.44 ("*there may be scope for the Office of the Prosecutor to engage in certain capacity-building activities within existing resources and without compromising its judicial mandate*", including by "*exchanging information with national authorities*").

[102] Kampala Resolution, RC/Res.1 on Complementarity, adopted at the 9th meeting of the ASP on 8th June 2010, where the Preamble recognises that strengthening domestic capacity may have positive effects on ending impunity; and Kampala Declaration 2010, RC/Decl.1, adopted at 4th Plenary on 1 June 2010, at para 5, resolving to "enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally recognised fair trial standards, pursuant to the principle of complementarity".

[103] See Sluiter, supra note 3, at 294-297.

assistance by the domestic authorities, namely, that ICC investigators be allowed onto their territory to collect evidence.[104] More active assistance may involve the local police protecting ICC investigators against security risks posed by private individuals and groups while operating in an otherwise hostile environment and providing facilities for interviews.[105] It might also entail assisting ICC investigators to locate victims, witnesses or suspects for interview or executing a search warrant, requiring coercive powers.

Article 99 (4) of the Rome Statute gives the OTP autonomy to conduct on-site investigations "where it is necessary for the successful execution of a request" but only if non-compulsory measures will be exercised. This means the OTP can interview victims and witnesses within the territory without the presence or other involvement of the State authorities if they are willing to testify voluntarily. However, it excludes house searches, exhumations or other measures requiring a court order. This is clear from the wording of the provision that a public site or other public place may be examined "without modification".[106] All is required to directly execute a request and not rely upon State co-operation is a determination of admissibility under Articles 18 or 19. While there is provision for consultation with the domestic authorities, the OTP has discretion to determine that consultation is not possible or realistic and proceed without – "following all possible consultations with the requested State Party".[107] If an admissibility determination has not yet been made, however, the Prosecutor may only conduct on-site investigations after consultation and "subject to any reasonable conditions or concerns raised" by the domestic

[104] Ibid, p.298.
[105] Ibid, pp.327-328.
[106] See Sluiter, supra note 3, at p.323.
[107] Article 99 (4), Rome Statute, supra note 70.

authorities.[108] Yet, as stated, the co-operation envisaged is passive. Article 99 (4) of the Rome Statute does not require States to do any more than simply leave ICC investigators alone to undertake non-coercive investigative steps on their territory.[109]

However, this does not prevent the OTP and domestic authorities from agreeing more active co-operation before or after on-site investigations commence, which better accords with the concept of positive complementarity. Further, the OTP would be better off engaging in co-operation and consultation under Article 99 (4)(b) and conducting mutually beneficial on-site investigations with national police and prosecutors than fighting an admissibility challenge and proceeding under Article 99(4)(a) without consultation. This is highlighted by the Group of Experts which notes "there may be situations where the Prosecutor would prefer to encourage a State to investigate or prosecute the case instead of becoming involved in the cumbersome process of proving admissibility (…). In particular, consultations and acceptance of reasonable conditions seems to be preferable in cases where there are institutions in place and (at least an emerging) political will to handle such cases in an acceptable way."[110] Consultations to identify and resolve problems in the execution of a co-operation request are also mandated by Article 97 of the Rome Statute. As noted by the Informal expert paper on fact-finding and investigative functions of the OTP, "the Prosecutor should be deeply engaged in using Article 97 on behalf of the Court to arrive at practical solutions to such problems. The solutions may often be innovative

[108] Ibid.
[109] Sluiter, supra note 3, at pp.330-331.
[110] Informal expert paper, 'Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', supra note 25, p.12, para.73.

in nature which is acceptable to the extent that they will withstand the scrutiny of the competent Chambers."[111]

Where the Pre-Trial Chamber determines a state is 'unable' in the sense of inability to execute a co-operation request due to the unavailability "of any authority or any component of its judicial system competent to execute the request for co-operation", a broader mandate is available to the ICC Prosecutor pursuant to Article 57 (3)(d) of the Rome Statute. This enables the OTP to proceed without having first secured State co-operation. However, only restrictive use should be made of this provision since it was intended to cover the failed or collapsed State scenario.[112] The Prosecutor may not rely on this where the State is unable for any reason other than unavailability of the judicial system.[113] This reinforces the importance of efforts towards securing and strengthening co-operation and the complementary basis of the Rome system.

There is also a legal basis for more active and extensive co-operation. Namely, Article 93 (1) of the Rome Statute on other forms of co-operation enables the Court to request "any other type of assistance which is not prohibited by the law of the requested State (…)". This could also be used as a basis for on-site investigations and is "compatible with States Parties voluntaristically assuming more extensive obligations than those strictly mandated by Part 9, such as by granting the OTP staff full powers to carry out investigative functions within its territory via MOUs or other

[111] Ibid, p.12, para. 64.
[112] See Swart, supra note 6, at p.1597; and Draft Statute Article 54 (4) (option 2)(iii), Doc A/CONF.183/2/Add.1 of 14 April 1998.
[113] See Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, supra note 71, at pp.231-232.

ancillary instruments".[114] It may also operate as a 'residual clause' for the Court to request the State to co-operate by allowing and facilitating on-site investigations by the Defence.[115] This is equally important for domestic capacity-building and the rule of law.

The OTP has conducted on-site investigations in both Libya and Côte d'Ivoire with the co-operation of the national judiciary. In Côte d'Ivoire this extends to participating in the exhumation of mass graves.[116]

A site visit is just as crucial at the trial stage but the ICC's judges have taken an unsatisfactory approach to this. In *Ntaganda*, the OTP argued that the best time for a site visit is prior to the trial commencing or at least, before the end of the Prosecution case.[117] The Defence sought a site visit to be rendered by the judges after the conclusion of the Prosecution case but before presentation of the Defence case, a change to their original position that it should take place towards the end of the trial.[118] The Trial Chamber rejected the request on the basis that it was not demonstrated that a site visit would assist the judges in assessing the specific facts in issue.[119]

However, a site visit in *Katanga* evidences the utility of the judges seeing the actual locations for making precisely such an assessment. A site visit to Ituri, DRC, was

[114] Informal expert paper, 'Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation', supra note 25, p.12, para.57.
[115] Sluiter, supra note 3, at p.326.
[116] For example, Soir Info, '37 corps e exhumés en présence de la Cpi', Abidjan.net, 9 December 2014, in regard to exhumations in Abobo, Abidjan, 2-3 December 2014.
[117] Situation in the Democratic Republic of Congo, *The Prosecutor v Bosco Ntaganda*, 'Decision on Defence request to conduct a site visit before the presentation of the case for the Defence', ICC-01/04-02/06-1801, 24 February 2017, at para.3.
[118] Ibid, at paras 3, 6 and 11.
[119] Ibid, at paras 12-13.

conducted by the judges in *Katanga* at the end of the trial which, although only two days,[120] informed the Trial Chamber's understanding of the context, the locations and case specific issues. The judges, prosecutor, defence counsel, victims' legal representatives and registry representatives visited Bunia and four villages after consulting the parties and participants.[121] The site visit was facilitated by the UN Mission in the Democratic Republic of the Congo (MONUSCO), conducted on the Trial Chamber's initiative.[122]

Notably, while the idea was initially supported by all parties, the OTP's stance changed to asserting that the benefits were outweighed by the time and expense and the evidence of the locations was sufficiently clear after presentation of the Prosecution's case.[123] This was strongly refuted by the defence and victims' legal representatives who recognised the benefits of a site visit even at the relatively late stage of the proceedings.[124] As the record shows, the site visit enabled the judges to evaluate the credibility of witness testimonies and put the incidents into context in terms of geography and the environment described.[125] The Katanga Defence favoured the site visit not being delayed until after the Defence case. However, due to practical and financial issues, only one site visit could be conducted and the Trial Chamber

[120] ICC, Situation in the Democratic Republic of Congo, *The Prosecutor v Germain Katanga and Mathieu Ndudjolo Chui*, Trial Chamber II, 'Declaration of closure of submission of evidence', ICC-01/04-01/07-3235-Anx-Red, 7 February 2012, at para.3.
[121] ICC, Situation in the Democratic Republic of Congo, *The Prosecutor v Germain Katanga and Mathieu Ndudjolo Chui*, Registry, 'Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo', ICC-01/04-01/07-3234-Anx-Red, 6 February 2012.
[122] ICC, Situation in the Democratic Republic of Congo, *The Prosecutor v Germain Katanga and Mathieu Ndudjolo Chui*, 'Decision on a Judicial Site Visit to the Democratic Republic of Congo', ICC-01/04-01/07-3203-tENG, 21 January 2012 (made public)(decision rendered on 13 December 2011), para.1 (hereafter 'Katanga Decision on Site Visit').
[123] ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Germain Katanga and Mathieu Ndudjolo Chui*, Prosecution, 'Prosecution's Observations Regarding a Judicial Site Visit', ICC-01/04-01/07-3142, 12 September 2011, at paras. 2, 6 and 8.
[124] Katanga Decision on Site Visit, supra note 122, paras 6-8.
[125] ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Germain Katanga and Mathieu Ndudjolo Chui*, 'Judgment pursuant to article 74 of the Statute', ICC-01/04-01/07-3436-tENG, 7 March 2014 (public 20 April 2015), at para.106.

considered the end of the trial after the presentation of the cases of all parties and participants to be the best timing.[126]

In *Gbagbo and Blé Goudé*, the OTP proposed a judicial site visit to Abidjan after the trial commenced as an alternative to conducting a trial session in situ.[127] It argued this would assist the Trial Chamber's evaluation of the evidence and increase the visibility of the ICC proceedings in Côte d'Ivoire amongst the affected population. The Gbagbo Defence proposed three judicial site-visits - before the start of the Prosecution case, before the Defence case and at the end.[128] The OTP favoured one visit during the Prosecution case after the first live witnesses.[129] The OPCV in turn asserted it would be preferable for site visits to be conducted at the mid-point or end of the Prosecution case.[130] However, the Gbagbo Defence argued it would be prejudicial to wait until after some witnesses had given evidence and there should be an earlier site-visit also.[131] Further, while the Defence suggested visiting 104 locations in Côte d'Ivoire, the OTP sought to confine the visits to a 2-3 day trip in the neighbourhoods of Adjamé, Abobo, Attecoube, Cocody, Plateau, Port-Bouët and

[126] ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Germain Katanga and Mathieu Ndudjolo Chui*, Trial Chamber, Transcript, ICC-01/04-01/07-T-224-ENG, 29 November 2010, at pp.45-47.
[127] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, OTP, 'Prosecution's response to Laurent Gbagbo's "Requête de la Défense afin que les declarations d'ouverture du procès aient lieu en Côte d'Ivoire ou du moins en Afrique" (ICC-02/110/01/15-241)', ICC-02/11-01/15-267, 02 October 2015, at para.28.
[128] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, Gbagbo Defence, 'Soumissions concernant les visites sur les sites' (submissions concerning site visits), ICC-02/11-01/15-255-Red, 1 October 2015, para 52 (hereafter 'Gbagbo Defence Submissions on Site Visits').
[129] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, OTP, 'Prosecution's submissions concerning a site visit', ICC-02/11-01/15-268, 5 October 2015, (hereafter 'Gbagbo and Blé Goudé: OTP Submissions on Site Visit')
[130] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, OPCV, 'Consolidated Response to Mr Gbagbo's Requests for in situ proceedings and for site visits (ICC-02/11-01/15-241 and ICC-0211-01/15-255-Red) and to the Prosecution's submissions on site visits (ICC-02/11-01/15-268)', ICC-02/11-01/15-273, dated 6 October 2015, at para.26 (hereafter 'Gbagbo and Blé Goudé: OPCV Response on Site Visits').
[131] Gbagbo Defence Submissions on Site Visits, supra note 128, paras 53-55.

Yopougon in Abidjan to focus on the five charged incidents.[132] This was supported by the OPCV.[133] A further sticking point was whether or not the site visits could take place in the presence of Gbagbo and Blé Goudé, with the OTP asserting their presence may lead to "uncontrollable public mass gatherings, turmoil and violence".[134]

However, the *Gbagbo and Blé* Goude Trial Chamber rejected the proposals to conduct site visits to Côte d'Ivoire before the presentation of the Prosecution case or after the first five witnesses had testified, considering this too early to appreciate the issues.[135] Yet, rather than reject the option outright, the Chamber deferred further consideration "to a later stage of the proceedings, after having heard the evidence".[136] While this might be taken as the conclusion of the trial proceedings, the judges considered that any site visit would be most appropriate after the conclusion of the Prosecution case.[137] It should have been addressed again. The deferral in 2016 was unsatisfactory in light of the information related by the Registry in its Feasibility Report that any site visit depends on co-operation and only preliminary discussions had taken place because further specifics, including locations, dates and participants, were required from the Court before a formal request could be made.[138]

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[132] Gbagbo and Blé Goudé: OTP Submissions on Site Visit, supra note 129, at paras 8 and 13.
[133] Gbagbo and Blé Goudé: OPCV Response on Site Visits, *supra* note 130, at para.25.
[134] Gbagbo and Blé Goudé: OTP Submissions on Site Visit, *supra* note 129, at para.7.
[135] ICC, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, 'Decision on requests concerning site visits', ICC-02/11-01/15-386, 12 January 2016 (hereafter 'Gbagbo and Blé Goudé: TC Decision on Site Visits').
[136] Ibid, at para.14.
[137] Ibid, at para 14.
[138] ICC, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Registry, 'Observations on Defence, 'Soumissions concernant les visites sur les sites' and Prosecution's submissions concerning a site visit', ICC-02/11-01/15-344-Conf-Annex 1, 16 November 2016 – Feasibility Report at Annex 1, at paras 3-5, 11, 40, 42-45; the Feasibility Report remains confidential but this issue was cited in: Gbagbo and Blé Goudé: TC Decision on Site Visits, supra note 135, at paras 10-11.

The Registry anticipated 1-3 months of consultations only after the formal request, followed by a reconnaissance mission and finally, a preparation mission at least 7-8 weeks prior to any site visit. Delaying a full feasibility assessment until later in the trial inevitably meant no site visits, given the risk of further trial delays. It is considered the lack of site visits affected the Trial Chamber's ability to assess the evidence, in particular, in regards to witness testimony where location was crucial. It also disappointed victims in Côte d'Ivoire, their legal representative noting it would have a "significant impact" on their participation.[139] It also affected the community's perception of the ICC with some believing it evinced a lack of diligence to fully understand the events.[140]

Site visits rendered by the trial judges of the ICTR and ICTY to Rwanda[141] and the former Yugoslavia[142] facilitated their assessment of witness' testimony and that of the accused, particularly regarding geography and distance, viewing positions and other contextual issues. Site visits help bridge the cultural and geographic gap between The Hague and affected communities. Yet, it appears the ICC is reinventing the wheel in

[139] Gbagbo and Blé Goudé: OPCV Response on Site Visits, *supra* note 130, at para. 23.
[140] Interview record 49 – victim, Plateforme des associations de victimes pout la paix et la réconciliation en Côte d'Ivoire (Duekoué), 25 October 2018.
[141] See ICTR, *Prosecutor v Ignance Bagilishema*, ICTR-95-IA-T, Judgement (TC), 7 June 2001; ICTR, *Prosecutor v François Karera*, ICTR-01-74-T, 'Decision on site visit to Rwanda', 1 September 2006, and Judgment and sentence, 7 December 2007, para.133; ICTR, *Prosecutor v Dominique Ntawukulilyayi*, ICTR-05-82, 'Scheduling order for site visit to Rwanda and Hearing of closing arguments', 9 March 2010; ICTR, *Prosecutor v Ndindiliyimana and al*., ICTR-00-56-T, 'Decision on locations for the site visit to Rwanda', 9 March 2009; ICTR, *Prosecutor v Rwamakuba*, ICTR-98-44C-T, 'Décision on Defence motion for a view locus in quo', 16 December 2005; and ICTR, *Prosecutor v Anthanase Seromba*, ICTR- 2001-66-T, 'Decision on prosecutor's motion for site visits in Rwanda', 29 March 2006. All cited in Gbagbo Defence Submissions on Site Visits, supra note 128, at paras. 26-30.
[142] See ICTY, *Prosecutor v Momčilo Perišić*, IT-04-0810 T , 'Order on site visit with annex containing rules of procedure and conduct during site visit (Confidential)', 21 May 2009; ICTY, *Prosecutor v Kupreškić*, IT-95-16-T, 'Request to the president to authorise an on-site visit pursuant to rule 4 of the rules of procedure and evidence', 28 August 1998; ICTY, *Prosecutor v Enver Hadžihasanović and Amir Kabura*, IT-01-47-T, Judgement, 15 March 2006. All cited in Gbagbo Defence Submissions on Site Visits, supra note 128, at paras 31-33. Note also the following in relation to site visits taking place in the absence of the accused: ICTY, *Prosecutor v Goran Hadžić*, IT-04-75-T, 'Decision on Site Visit', 4 June 2013; and ICTY, *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, 'Decision on Second Site Visit', 10 February 2012; cited in Gbagbo and Blé Goudé: TC Decision on Site Visits, supra note 135, at para.13, fn 29.

its assessment of site visits. While the co-operation regime differs, these differences are not as great as they may appear, at least for situations like Libya referred under Chapter VII. Arguably, site visits should be conducted in all cases unless the security environment absolutely prohibits it.

4.2 In situ hearings

ICC trials all take place at the seat of the Court in The Hague "unless otherwise decided".[143] Article 3 of the Rome Statute provides that "[t]he Court may sit elsewhere, whenever it considers it desirable". Even if a trial proceeds before the ICC instead of domestic courts, the possibility for in situ hearings means there is still scope to engage the affected community for a positive impact on the rule of law. No criteria are specified in the Statute for determining when to conduct hearings in situ. However, Rule 100 (1) of the RPE provides the Court may do so if "it would be in the interests of justice". Even if in situ hearings are not immediately practicable due to security concerns, this does not prevent the location being changed later by majority decision of the judges when circumstances improve. The Court is to make a recommendation to the Presidency for a change of venue, taking into account the views of the parties, victims and the Registry.[144] However, the State where hearings are to take place needs to be consulted and agree.[145] There must also be good co-operation between the Registry and the national authorities.[146]

[143] Article 62 Rome Statute, supra note 70.
[144] Rule 100 (2) ICC RPE, supra note 18.
[145] Rule 100 (3) ICC RPE, supra note 18.
[146] Regulation 48, Regulations of the Registry, supra note 95.

Notably, in *Ntaganda* (DRC)[147] and *Ruto and Sang* (Kenya)[148] the respective Trial Chambers recommended that the trial opening take place in situ. Though the Trial Chambers were best placed to make this assessment, unfortunately, the Presidency and Plenary of Judges, respectively, declined to change the seat from The Hague.[149] Further, in situ proceedings may be held even earlier than the trial. For example, in *Ongwen* (Uganda), Pre-Trial Chamber II recommended that the confirmation hearing take place in Uganda.[150] The Presidency again declined to change the venue.[151]

Strikingly, in *Ruto* the motion to change the seat failed to pass by only one vote. Nine judges voted in favour of holding part of the trial in Kenya, a majority but short of the two-thirds required to change the venue. As Presiding Judge of the *Ruto* trial, Judge Eboe-Osuji voted in favour of holding the proceedings in Kenya and issued a crushing separate opinion to the decision by the Plenary of Judges. The prospects of in situ proceedings seem more favourable today given that Judge Eboe-Osuji is ICC

[147] ICC, Situation in the Democratic Republic of Congo, *The Prosecutor v Bosco Ntaganda*, Trial Chamber IV, 'Recommendation to the Presidency on holding part of the trial in the State concerned', ICC-01/04-02/06-526, 19 March 2015, (panel composed of Judges Robert Fremr, Kuniko Ozaki and Chang-ho Chung) ('Ntaganda Trial Chamber Recommendation on In Situ Proceedings in the DRC').
[148] ICC, Situation in the Republic of Kenya, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V (A), 'Recommendation to the Presidency on where the Court shall sit for trial', ICC-01/09-01/11-763, 3 June 2013, (panel composed of Judges Chile Eboe-Osiyi, Olga Herrera Carbuccia and Robert Fremr) (hereafter 'Ruto and Sang Trial Chamber Recommendation on In Situ Proceedings in Kenya').
[149] ICC, Situation in Democratic Republic of Congo, *The Prosecutor v Bosco Ntaganda*, Presidency, 'Decision on the recommendation to the Presidency on holding part of the trial in the State concerned', ICC-01/04-02/06-645-Red, 15 June 2015 (panel composed of Judges Silvia Fernández de Gurmendi, Joyce Aluoch and Christine Van Den Wyngaert) (hereafter 'Ntaganda Presidency Decision on In Situ Proceedings in the DRC'); ICC, Situation in the Republic of Kenya, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Presidency: Plenary of Judges, 'Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court shall sit for trial in the case of The Prosecutor v William Samoei Ruto and Joshua Arap Sang', ICC-01/09-01/11-875-Anx, 26 August 2013 (hereafter 'Presidency Decision on In Situ Proceedings in Kenya').
[150] ICC, Situation in Republic of Uganda, *The Prosecutor v Dominic Ongwen*, 'Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda', ICC-02/04-01/15-300, Pre-Trial Chamber II, 10 September 2015.
[151] ICC, Situation in Republic of Uganda, *The Prosecutor v Dominic Ongwen*, Presidency, 'Decision on the Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda', ICC-02/04-01/15-330, 28 October 2015 (hereafter 'Presidency Decision on In Situ Proceedings in Uganda').

President. As Judge Eboe-Osuji emphasises, holding a trial in the place of commission is the best case scenario as it would bring justice closer to the affected population. This principle motivated the allied powers to hold trials in Nuremburg and Tokyo and the Special Court for Sierra Leone's establishment in Freetown.[152] In ruling it out in all cases before the ICC to date, the former Presidency diverged from the general direction of international practice.

In *Ruto*, the Defence focused on the accused's right to a private and family life and a public life.[153] As Ruto was an elected MP (he was elected Deputy President subsequent to the in situ motion), holding the proceedings in Kenya would facilitate his ability to maintain his public duties.[154] Secondly, holding the proceedings in Kenya would facilitate both the OTP's investigation and that of the Defence by being closer to the place of commission, while also assisting the Trial Chamber to better understand the geographical and social context.[155] The venue change would also be in the best interests of the witnesses, though it was acknowledged that it would primarily assist defence witnesses as almost all were anticipated to still be in Kenya.[156] Finally, more generally, holding the trial in situ would "give the people of Kenya a sense of ownership of the judicial process and should render the proceedings more directly relevant".[157] It would also serve as an example to Kenya of a fair and efficient court process.[158] In effect, the ICC's efforts in The Hague, as communicated

[152] Presidency Decision on In Situ Proceedings in Kenya, supra note 149, at para.30.
[153] ICC, Situation in the Republic of Kenya, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Defence, 'Joint Defence Application for a Change of Place where the Court shall sit for trial', ICC-01/09-01/11-567, 24 January 2013, at paras 26-27 and 29 (hereafter 'Ruto and Sang Defence Application on In Situ Proceedings').
[154] Ibid, at paras 26-27 and 29.
[155] Ibid, at paras 28 and 32.
[156] Ibid, at paras 30-31.
[157] Ibid, at para 32.
[158] Ibid, at para.33.

to local stakeholders through the outreach programme, would never have the same impact locally as a trial held in Kenya.[159]

Notably, 82% of victims surveyed by the common legal representative opposed the trial being moved to Kenya,[160] believing it would increase tensions and jeopardise consolidating the peace.[161] Primarily, they worried the accused would manipulate the trial for political ends.[162] Yet, as noted by Judge Eboe-Osuji, the *Ruto* case was already 'political' since it concerned crimes allegedly committed following a contested election. The trial was just as politicised in The Hague and people have a right to express their views.[163] The concerns expressed by civil society were not about the possibility for demonstrations turning violent, but rather, that members of the OTP might find such demonstrations intimidating. As Judge Eboe-Osuji aptly highlights, this comes with the territory of prosecuting high-profile cases.[164] Nevertheless, this appears to have swayed the judges of the Plenary opposed to the change of venue, who focused on the "acute risk of politicisation…and ensuing negative press coverage or anti-ICC demonstrations" and the lack of precedent for holding a trial on the territory of a State where one of the accused was currently Deputy President.[165] In the context of a Court which - while established to try those 'most responsible' for international crimes - has the principle of complementarity as a cornerstone, such reasoning is unpersuasive. It is inconsistent with complementarity

[159] Ibid, at para.32.
[160] ICC, Situation in the Republic of Kenya, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, 'Common Legal Representative for Victims' 'Observations in Relation to the "Joint Defence Application for Change of Place Where the Court Shall Sit for Trial"', ICC-01/09-01/11-620, 25 February 2013, at paras 3-5 (hereafter 'Victims' Observations on In Situ Proceedings in Kenya').
[161] Ibid, at para.6
[162] Ibid, at para.8.
[163] Presidency Decision on In Situ Proceedings in Kenya, supra note 149, at para.33.
[164] Ibid, at para.37.
[165] Ibid, at para.24.

as it suggests "that a Rome Statute State Party would never be in a position to prosecute its political leaders" for international crimes.[166]

It was also feared that victims and witnesses would be intimidated by "truck loads" of the accused's supporters likely to be mobilised to attend the proceedings.[167] It is true that, as the OTP recognised, some victims and witnesses would be unwilling to testify in Kenya[168], but this could be mitigated by holding parts of the trial in situ and other sessions in The Hague.[169] In particular, if the Trial Chamber were inclined to move the venue, the OTP suggested the opening and closing speeches, testimony by the accused and expert examination as the most suitable proceedings to be held in situ.[170] The Trial Chamber welcomed this compromise.[171] Some witnesses will always be reluctant to testify in a trial of this nature. Measures could be taken to address this rather than just abandoning the idea of holding any sessions in-country. However, for the majority five judges of the Plenary, the risk of witness tampering and the effect on their sense of security, further to the OTP's main submission, was too great.[172] Indeed, by the morning of the Plenary, the OTP hardened its position to

[166] Ibid, at para.40.
[167] Victims' Observations on In Situ Proceedings in Kenya, supra note 160, at para.6.
[168] The African Centre for Open Governance later related that the Defence application to hold proceedings in Kenya was "seen by both the victim and civil society in Kenya as an attempt to prevent witnesses from attending trial to testify for fear of reprisals: ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, African Centre for Open Governance, 'Amicus Curiae Observations of the African Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence', 01/09-02/11-1020, 8 May 2015, at para.13.
[169] ICC, Situation in the Republic of Kenya, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, OTP, 'Prosecution Observations on the possibility of the trial being held in Kenya or, alternatively, in Arusha, Tanzania', ICC-01/09-01/11-615, 21 February 2013, at paras 4 and 6 (hereafter 'OTP Observations on In Situ Proceedings in Kenya').
[170] Ibid, at para.6.
[171] Ruto and Sang Trial Chamber Recommendation on In Situ Proceedings in Kenya, supra note 148, at para.10.
[172] Presidency Decision on In Situ Proceedings in Kenya, supra note 149, at para. 22.

unequivocally oppose any hearing taking place in Kenya apparently for this reason.[173]

On the other hand, the common victims' legal representative considered that moving the trial closer to Kenya would reinvigorate efforts to set-up an International Crimes Division of the High Court to prosecute other crimes committed during the post-election crisis and provide the opportunity for national prosecutors and judges to benefit from technical assistance from their counterparts.[174] This appears not to have even been considered by those judges of the Plenary who opposed in situ proceedings.

Indeed, while some of the reasons for rejecting the motion to hold proceedings in situ were valid, it is apparent that the decision turned on narrow formalistic grounds and a cost assessment rather than victims' concerns. Specifically, those opposing proceedings away from The Hague interpreted the provision for this in Rule100 (3) of the RPE restrictively.[175] They reasoned that only the reasons for changing the seat expressly stated by the drafters of the Rome Statute could justify holding one court session away from The Hague. They relied on the Commentary on the Rome Statute of the ICC by Triffterer, where the reasons were given as "relevant evidence is not otherwise available or that the task of the Trial Chamber to find the truth is more likely to be achieved there".[176] They considered these grounds did not apply in *Ruto*.

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[173] Ibid, at paras 47-48.
[174] Victims' Observations on In Situ Proceedings in Kenya, supra note 160, at para.21.
[175] Presidency Decision on In Situ Proceedings in Kenya, supra note 149, at para.26.
[176] Presidency Decision on In Situ Proceedings in Kenya, supra note 149, at para.23; citing Otto Triffterer (Ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2008, Second Edition, Article 62, paragraph 11. Yet, the correct reference appears to be 'Article 62' in Triffterer and Ambos (Eds), supra note 3, 1551-1562, at para.11 (there is no Article 62 in the Second Edition).

Further, holding proceedings in Kenya (or Tanzania) would be more costly than holding a trial at the ordinary seat in The Hague.[177] Tanzania was a back-up option, given the existence of "ready-made international standard court facilities at the ICTR and its residual mechanism".[178] There would also not be the same level of risk of victims and witnesses being intimidated and public disorder as in the territorial State. This was favoured in the Plenary of Judges by Judge Tarfusser, who opposed holding any part of the trial in Kenya but was amenable to Tanzania. However, it was rejected as a poor alternative by Judge Kourula who supported the proceedings being held in Kenya. As such, The Hague remained the trial venue by default, a wholly unsatisfactory affair.

The Plenary decision was also adopted in circumstances procedurally problematic, not least because the OTP's last filing opposing in situ proceedings was made late in the day and ex parte, preventing the Defence or other participants from responding substantively. There is also a risk that this change of stance and the decision of the Court might be perceived as unduly prompted by a contemporaneous open letter to the ICC President from Kenyans for Peace with Truth and Justice by Gladwell Otieno, who had also petitioned the Kenyan Supreme Court to annul the election of Kenyatta and Ruto.[179] Nevertheless, the Presidency declined to set it aside and consider further submissions.[180]

[177] Presidency Decision on In Situ Proceedings in Kenya, supra note 149, at para.23.
[178] Ruto and Sang Trial Chamber Recommendation on In Situ Proceedings in Kenya, supra note 148, at para.11.
[179] Open letter to the President of the International Criminal Court on the decision on William Ruto's excusal from continuous presence at his trial and the forthcoming decision on in situ hearings, dated 9 July 2013.
[180] ICC, Situation in the Republic of Kenya, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Presidency, 'Decision on the Defence Application to Vacate the Decision of the Plenary of Judges on the "Joint Defence Application for a Change of Place where the Court shall sit for Trial" in

Lessons can be learned from the Kenyan cases. In similar instances where the national infrastructure and capacity exists, the ICC could show greater resolve to utilise this tool for encouraging local ownership. As Fergal Gaynor, victims' legal representative in the Kenyatta case, stated, while he has no criticism of the ICC's decision not to hold in situ proceedings in Kenya in light of victims' concerns; he remains personally convinced that holding ICC proceedings in-country is a good idea and should not be ruled out for African situation countries.[181]

In *Ntaganda*, the Trial Chamber again recommended that part of the trial be held in the situation country, considering Bunia, DRC, the best option to bring the trial closer to the victims and those most affected in a meaningful way.[182] Not only were the national authorities supportive, but the ICC could also rely on the support of MONUSCO for logistics, detention of the accused and enhanced security. While there was a concern for witnesses, the majority of whom resided in that locality, the risk for them would be reduced if the accused did not attend the in situ proceedings in person.[183] The Defence supported holding opening speeches in Bunia but only if the accused could be physically present. However, the OTP opposed holding any part of the trial in the DRC considering not just the witness protection issues but the lack of infrastructure in terms of a venue, internet, adequate facilities to present electronic

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the case of The Prosecutor v William Samoei Ruto and Joshua Arap Sang', ICC-01/09-01/11-911, 6 September 2013. See also ICC, Situation in the Republic of Kenya, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Defence, 'Defence Application to Vacate the Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court shall sit for trial in the case of The Prosecutor v William Samoei Ruto and Joshua Arap Sang', ICC-01/09-01/11-897, 1 September 2013.

[181] Interview record 57 – Fergal Gaynor, victims' legal representative, 2 November 2018.

[182] Ntaganda Trial Chamber Recommendation on In Situ Proceedings in the DRC, supra note 147, at paras 23 and 25.

[183] Considered in Ntaganda Trial Chamber Recommendation on In Situ Proceedings in the DRC, supra note 147, paras 13 and 17.

evidence, live broadcast options and suitable accommodation for court staff.[184] For obvious reasons, the same level of infrastructure could hardly be expected in Bunia as in The Hague but when balanced against the importance of open justice accessible to the affected community, such issues appear trivial. When such matters were factored into the cost estimate, holding one hearing at a cost in excess of 600,000 Euro was too much for the Presidency.[185]

The Presidency also took into account the result of the victims' survey, which highlighted the fears of those living in Bunia about the accused returning and the limited window in which outreach could be conducted prior to the opening speeches to address their concerns to limit the chances of withdrawal.[186] As such, taking into account security issues, costs, the impact on victims and witnesses, the length and purpose of the proceedings away from the seat, the impact on the perception of the Court and on other proceedings, the Presidency considered it not in the interests of justice to sit in the DRC for opening speeches.[187] However, this does not excuse the lack of consideration given to holding other trial sessions in situ at a later stage in the proceedings after wider outreach could be conducted and protective measures strengthened. That being said, the Trial Chamber in *Lubanga* had been confronted with the same issue back in 2007[188] yet the ICC's outreach in Ituri up to 2015 had still not been enough to reassure victims and witnesses.

[184] Ibid, at para.13.
[185] Ibid, at paras 21 and 26..
[186] Ibid, at para.14.
[187] Ibid, at para.18.
[188] See ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Thomas Lubanga Dyilo*, 'Decision issuing a confidential and a public redacted version of Decision on disclosure issues, responsibilities for protective measures and other procedural matters', ICC-01/04-01/06-1311, 8 May 2008, at paras.68-69.

In *Ongwen*, Pre-Trial Chamber II recommended that the confirmation hearing take place in Uganda.[189] The initiative was welcomed by the parties to bring the proceedings closer to the population. Holding the confirmation hearing in Gulu, northern Uganda would have the most impact but if this was practically unfeasible, Kampala would still be preferable to The Hague.[190] In Kampala, the hearing could be held at the International Crimes Division or alternatively, the High Court or Supreme Court. This may have improved the local population's perception of these courts. Moreover, holding the confirmation proceedings in Uganda "may also contribute to a better perception of the Court in Africa".[191] As Uganda was fully supportive there were no co-operation challenges, though Uganda reasonably asked for the confirmation hearing to be deferred until after January 2016 which coincided with parliamentary and presidential elections. Yet, the Presidency again declined to change the venue.[192]

Rather than defer the confirmation hearing until after the elections, the Presidency rejected the move outright and ruled that the hearing would take place in The Hague as scheduled. The right of the accused to a trial without delay was not mentioned. Rather, the Presidency focused on the immediate problems of holding a hearing prior to the elections, the security implications and cost.[193] Notably, victims and civil society in Uganda had expressed their wish for the confirmation hearing to be held

[189] ICC, Situation in Republic of Uganda, *The Prosecutor v Dominic Ongwen*, Pre-Trial Chamber II, 'Recommendation to the Presidency to hold the confirmation of charges hearing in the Republic of Uganda', ICC-02/04-01/15-300, dated 10 September 2015 (panel composed of Judges Cuno Tarfusser, Marc Perrin de Brichambaut and Chang-ho Chung) (hereafter 'Ongwen Pre-Trial Chamber Recommendation on In Situ Proceedings in Uganda').
[190] Ibid, at para.5.
[191] Ibid, at para.4.
[192] Presidency Decision on In Situ Proceedings in Uganda, supra note 151.
[193] Presidency Decision on In Situ Proceedings in Uganda, supra note 151, at paras 23-24.

in-country.[194] The Registry also considered the risk to victims and witnesses of moving the hearing to Gulu was manageable.[195] The level of co-operation with Uganda was described as "excellent".[196] Given the circumstances, the Presidency's decision demonstrates a lack of flexibility at the expense of local ownership.

In *Gbagbo and Blé Goude*, the Gbagbo Defence motioned for opening speeches to be held in Côte d'Ivoire or failing that, another African country.[197] The most obvious alternative was Arusha given that this was the former seat of the ICTR and as such the facilities were already in place, though it is some distance from Côte d'Ivoire, West Africa. Holding a trial session within the affected country would be more transparent, contribute to national reconciliation and would be educational in furthering public understanding of the ICC.[198] It would be one way to bring justice back to the communities concerned for them to feel a greater sense of ownership.[199] Some Ivorians interviewed more recently also hold this perspective, considering that in situ proceedings would help to change false perceptions held by some of the

[194] ICC, Situation in Republic of Uganda, *The Prosecutor v Dominic Ongwen*, OTP, 'Prosecution's submissions on conducting the confirmation of charges hearing in situ', ICC-02/04-01/15-264, 13 July 2015, at paras. 5 and 14.
[195] ICC, Situation in Republic of Uganda, *The Prosecutor v Dominic Ongwen*, Registry, 'Assessment of the Registry on the possibility of holding the confirmation of charges hearing in the Republic of Uganda', ICC-02/04-01/15-279-Conf, 27 July 2015, at paras 36-39.
[196] Presidency Decision on In Situ Proceedings in Uganda, supra note 151, at paras. 21-22.
[197] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Gbagbo Defence, 'Requête de la Défense afin queles declarations d'ouverture du procès aient lieu en Côte d'Ivoire ou du moins en Afrique (Request to hold opening speeches in Côte d'Ivoire or at least in Africa)', ICC-02/11-01/15-241, 24 September 2015 (hereafter 'Gbagbo Defence Request on In Situ Proceedings for Opening Speeches').
[198] Ibid, at paras 22, 35 and 39.
[199] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Status Conference, Transcript, ICC-02/11-T-4-ENG, dated 25 September 2015, at p.54. The Blé Goudè Defence responded that they were not opposed to holding the opening speeches in Abidjan, Arusha, or The Hague, so long as the trial was held in a manner that would establish the truth: ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Blé Goude Defence, 'Corrigendum to the Defence observations on "Requête de la Défense afin queles declarations d'ouverture du procès aient lieu en Côte d'Ivoire ou du moins en Afrique" (ICC-02/11-01/15-241)', ICC-02/11-01/15-243-Corr, 28 September 2015.

population concerning the ICC's work.[200] It would also have a greater impact as more Ivorians would watch the proceedings and see how the Court functioned and that rights are respected.[201] One civil society activist even cautioned that it would give the ICC more to do as more victims would come forward.[202]

However, the OTP opposed, arguing it was neither desirable nor in the interests of justice, taking into account the current security environment and logistical hurdles to commence the trial on time.[203] Opening statements were scheduled to begin either just after the 2015 Presidential Elections or in the election period, between the first and second rounds. As such the security environment was tense and there was a risk the trial may be used as a political instrument to mobilise supporters.[204] In turn, general elections in Tanzania were expected on 25 October 2015.[205] As such, it was difficult to devote the necessary time and resources to plan it. For the victims, given that the Defence request for in situ proceedings was lodged only 45 days before the trial was due to start, it was seen as an attempt to delay and/or manipulate the proceedings to ensure Gbagbo's presence in Abidjan during elections.[206]

Côte d'Ivoire similarly opposed the request as the presence of the accused at election time presented a risk to public order and the country lacked the logistical and security

[200] Interview record 14 – prosecutor, Côte d'Ivoire, 21 March 2018.
[201] Interview record 15 – Prosecutor, Côte d'Ivoire, 22 March 2018.
[202] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[203] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, OTP, 'Prosecution's response to Laurent Gbagbo's "Requête de la Défense afin queles declarations d'ouverture du procès aient lieu en Côte d'Ivoire ou du moins en Afrique" (ICC-02/11-01/15-241)', ICC-02/11-01/15-267, 2 October 2015 (made public 5 October 2015) (hereafter 'OTP Response to Gbagbo Request on In Situ Proceedings for Opening Speeches').
[204] Ibid, paras 18, 20-21.
[205] Ibid, para. 26.
[206] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*Pre-Trial Chamber I, OPCV, 'Consolidated Response to Mr Gbagbo's Requests for in situ proceedings and for site visits (ICC-02/11-01/15-241 and ICC-0211-01/15-255-Red) and to the Prosecution's submissions on site visits (ICC-02/11-01/15-268)', ICC-02/11-0115-273, 6 October 2015, at paras. 2, 5 and 14.

capacity to assure the security of the accused or ICC personnel.[207] This opposition appeared decisive because as the ICC Registry observed, holding any part of the trial in-country was dependent on State co-operation.[208] Côte d'Ivoire would have the primary responsibility for security and the safety of court personnel operating within its territory and adequate facilities and technical infrastructure needed to be put in place.[209] The Registry estimated that it would take up to four months to assess the technical feasibility, infrastructure required and cost of moving a trial session.[210]

Secondly, a suitable legal framework had to be put in place on privileges and immunities and to agree the accused would remain in the exclusive control and custody of the ICC while present in Côte d'Ivoire.[211] While Côte d'Ivoire concluded a Memorandum of Understanding with the ICC in 2012, including on Privileges and Immunities, it was necessary to clarify its scope and legal status.[212] Considering the issues, the Trial Chamber declined to recommend opening statements be held in Abidjan or Arusha.[213]

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[207] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, Republic of Côte d'Ivoire, '*Observations de la République de Côte d'Ivoire sur la requête de la defense afin que les declarations d'ouverture du process aient lieu en Côte d'Ivoire ou dumoins en Afrique*' (Observations of Côte d'Ivoire on the request of the Defence for the opening speeches to take place in Côte d'Ivoire or at least in Africa), ICC-02/11-01/15-290, 14 October 2015, at paras 16-17 and 20.

[208] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, Registry, 'Registry's Observations on the "Requête de la Défence afin que les declarations d'ouverture du procès oú ent lieu en Côte d'Ivoire ou du moins en Afrique" (ICC-02/1-01/15-241)', ICC-02/11-01/15-292, 14 October 2015, at para 12 (hereafter 'Registry Observations on Gbagbo Request on In Situ Proceedings for Opening Speeches').

[209] Ibid, at para.21.

[210] Ibid, at paras 2 and 38.

[211] Ibid, at paras 28-30.

[212] Ibid, at para. 31.

[213] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, 'Decision on the Gbagbo Defence Request to hold opening statements in Abidjan or Arusha', ICC-02/11-01/15-316, 26 October 2015, at para. 16.

However, it remained possible for other trial sessions to be held in situ. Had the matter been given due attention earlier and not just dealt with in response to a Defence request weeks before the trial, the necessary legal and logistical arrangements could have been made to facilitate an in situ hearing. Yet, in the initial Directions on the Conduct of the Proceedings, neither the possibility of in situ proceedings nor site visits were addressed.[214] In an earlier status conference on 21 April 2015 the possibility to hold a trial session in situ was disregarded after the Defence raised concerns about the security of the Defence team.[215] As noted, the State's expressed concerns about holding opening statements in Abidjan primarily focused on concerns as to the accused's presence. This was fundamental for Côte d'Ivoire and the victims. However, as highlighted by the OTP in a status conference on 25 September 2015, it would be legally possible to hold a trial session in situ without the accused being physically present as video link could be used.[216] While not ideal, this is rights compliant and might be compared to victims and witnesses participating in Hague-based trial sessions through video-link from Abidjan.

Nevertheless, the prospect of in situ ICC proceedings also raised concerns in Côte d'Ivoire about State sovereignty. The sense is that these concerns were actually greater than the official position expressed by Côte d'Ivoire that in situ proceedings could not be supported due to fears around the accused's presence. As interviewees – from victims' associations and NGOs, prosecutors, officials and defence counsel - expressed, there is the perception that if the ICC not only takes the cases rather than

[214] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Pre-Trial Chamber I, 'Directions on the Conduct of the Proceedings', ICC-02/11-01/15-205, 3 September 2015.
[215] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Status Conference, Transcript, ICC-02/11-01/15-T-ENG, 21 April 2015, at p.92, lines 11-15.
[216] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Status Conference, Transcript, ICC-02/11-T-4-ENG, 25 September 2015, at pp.58-59.

trusting Ivorians to prosecute them but holds the trials within Côte d'Ivoire it is another slap in the face tantamount to saying the Ivorian court system does not function.[217] An Ivorian prosecutor considered "it would be bizarre…already there is a different system and then to bring them here would not go well. Every day you would have people doing sit-ins".[218] There is also a fear that it would add to a sense of neo-colonialism. As an Ivorian human rights defender stated "people would ask – would it be possible for Africans to set up courts judging Europeans in Europe? If the answer is no, then the reverse is also not possible".[219]

Some Ivorians felt that holding the proceedings in a neighbouring country would be the same or worse as it would cause national embarrassment to say the trials are too sensitive for Côte d'Ivoire to handle but their neighbours are better equipped.[220] However, others disagreed, preferring a trial in Senegal to a trial in The Hague.[221] To some extent these concerns may be heightened by the perception that in situ proceedings would necessitate a full replication of the infrastructure and functionality of its Hague headquarters, an impression easily gained from the Court's approach to the issue to date. Indeed, an OTP official emphasised that the prospects for holding just the opening statements of a trial in situ are good as only temporary facilities would be required, whereas conducting a full trial in situ would be testament to

[217] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 13 - Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 19 – interviewee, Commission Nationale des Droits de L'Homme de Côte d'Ivoire (CNDHCI), 26 March 2018; Interview record 20 – interviewee, AFJCI, 27 March 2018; Interview record 35 – interviewee, LIDHO, 16 October 2018; Interview record 42 – human rights defender, ADJL-CI, 19 October 2018; Interview record 41 – Senior Judge, Côte d'Ivoire, 19 October 2018; Interview record 47 – defence counsel, Côte d'Ivoire, 24 October 2018; Interview record 52 – interviewee, APDH, 25 October 2018.
[218] Interview record 13 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[219] Interview record 42 – human rights defender, ADJL-CI, 19 October 2018.
[220] Interview record 19 – interviewee, CNDHCI, 26 March 2018; Interview record 16 – prosecutor, Côte d'Ivoire, 22 March 2018.
[221] Interview record 53 – human rights defender, RAIDH, 26 October 2018.

setting up a second office and require duplicating the Hague detention centre at the local level.[222]

Some interviewees thought that Libyans may also perceive in situ proceedings as an unwelcome interference in Libya's internal system.[223] Yet, Libyan interviewees significantly favoured ICC proceedings being conducted in situ in Libya, as a way of mitigating concerns over a foreign, distant justice and regaining some local ownership.[224] As regards the situation in Libya, in reporting on a trip to Libya by an OTP delegation in November 2011, the OTP asserted that it would be possible to conduct part of the *Saif Gaddafi* proceedings within Libya, in particular, the first appearance and confirmation of charges.[225]

Circumstances on the ground have changed since November 2011 but this does not rule out any part of the proceedings taking place in situ if adequate security measures can be put in place and Libya's co-operation ensured. In situ proceedings may also be held in a neighbouring country. Representatives of the OTP doubted the utility of holding proceedings anywhere other than within a situation country if not in The Hague, coming at an exorbitant cost while still removed from the affected community.[226] Yet, Libyan interviewees favoured in situ proceedings in Tunisia or Algeria rather than The Hague if Libya is not possible for security reasons, as at least

[222] Interview record 4 – OTP Official, ICC OTP, 30 November 2017.
[223] Interview record 30 – interviewee, DAAM Center, 1 October 2018; Interview record 56 – international expert, 2 November 2018.
[224] Interview record 2 – Libyan law student, 23 October 2017; Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018; Interview record 34 – Libyan activist, 13 October 2018.
[225] ICC, Situation in Libya, *Prosecutor v Saif al-Islam Gaddafi and Abdullah al-Senussi*, OTP, 'Prosecution's Submissions on the Prosecutor's recent trip to Libya', ICC-01/11-01-11-31, 25 November 2011, at para.9.
[226] Interview record 5 – Head of JCCD, ICC OTP, 30 November 2017; Interview record 6 – OTP Official, 4 December 2017.

then it would be culturally, linguistically and geographically closer to the affected communities.[227] Accordingly, the potential to still foster a greater sense of local ownership from holding proceedings in the same region should not be underestimated.

As the sentiments expressed by Ivorians and Libyans alike demonstrate, there would be a greater impact for proceedings to be held at the proximate regional level – Tunisia or Algeria for Libya or Senegal for Côte d'Ivoire – rather than the opposite end of Africa in Tanzania, though this option has been the main alternative countenanced by the ICC in approaching the issue of in situ proceedings to date.

4.3 Testimony by video-link/ pre-recorded testimony

The use of video testimony also brings the proceedings closer to victims, witnesses, civil society and other stakeholders. For victims and witnesses, Articles 68 (2) and 69 (2) of the Rome Statute provide for the giving of evidence by electronic means, enabling their protection and facilitating their participation in proceedings. A witness may give live oral testimony by video-link from a venue "conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness".[228] Video link testimony may be given by prosecution and defence witnesses alike. For example, a witness in *Ntaganda* testified via video-link where they had a health condition preventing them travelling the long distance to The Hague.[229] Likewise, defence witnesses testified from the DRC in

[227] Interview record 32 – Libyan lawyer, 5 October 2018; Interview record 33 – Libyan judge, 5 October 2018; Interview record 34- Libyan activist, 13 October 2018.
[228] Rule 67 (3) RPE, supra note 18.
[229] ICC, Situation in the DRC, *The Prosecutor v Bosco Ntaganda*, Trial Chamber, 'Decision on Prosecution's request to hear Witness P-0688's testimony via video-link', ICC-01/04-02/06-1499, 9 September 2016. See also ICC, Situation in the DRC, *The Prosecutor v Bosco Ntaganda*, Trial

Lubanga[230] and from an unidentified country in *Bemba* (CAR)[231] where the witnesses resided in remote areas and were anxious about going to a foreign country and/or due to logistical difficulties in getting them to The Hague. The possibility also extends to the accused.[232] An accused might be excused from presence at trial in The Hague to fulfil public duties at home[233] and still be able to join the proceedings by video link. In turn, the use of pre-recorded testimony enables a witness to give evidence within their home country and for the proceedings in The Hague to still be effective[234] so long as the Court considers it "would not be prejudicial to or inconsistent with the rights of the accused" and other criteria are met.[235]

The Trial Chamber in *Gbagbo and Blé Goudé* liberally interpreted the rules on video-link testimony to enable crime base witnesses to testify from Côte d'Ivoire. For

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Chamber, 'Decision on Prosecution's request to hear P-0039's testimony by way of video link', OCC-01/04-02/06-897-Red2, 12 October 2015.

[230] ICC, Situation in the Democratic Republic of Congo, *The Prosecutor v Thomas Lubanga Dyilo*, Trial Chamber, Redacted Decision on the defence request for a witness to give evidence via video-link, ICC-01/04-01/06-2285-Red, 9 February 2010 (publicly redacted version of 8 February 2010 decision).

[231] ICC, Situation in the Central African Republic, *The Prosecutor v Jean-Pierre Bemba Gombo*, Trial Chamber, 'Decision on the "Submissions on the remaining Defence evidence" and the appearance of witnesses D04-23, D04-26, D04-25, D04-36, D04-29 and D04-30 via video link', ICC-01/05-01/08-2740, 15 August 2013; and ICC, Situation in the Central African Republic, *The Prosecutor v Jean-Pierre Bemba Gombo*, Trial Chamber, 'Decision on Defence Motion for Authorisation to hear the testimony of witness D-45 via video-link', ICC-01/05-01/08-2525-Red, 7 March 2013 (publicly redacted version of decision of 6 March 2013).

[232] Rule 134 bis, Regulations of the Registry, supra note 95.

[233] Rule 134 quarter, Regulations of the Registry, supra note 95.

[234] Rule 68 RPE, supra note 18, in accordance with article 69 (2) and (4) of the Rome Statute, supra note 70.

[235] Rule 68 (2)(b), RPE, supra note 18. This is so long as the Court considers it "would not be prejudicial to or inconsistent with the rights of the accused" and other criteria are met.[235] including that the "testimony relates to issues that are not materially in dispute; is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; relates to background information; is such that the interests of justice are best served by its introduction; and has sufficient indicia of reliability". This mechanism may also be adopted if the witness is dead or "due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally", so long as "the prior recorded testimony has sufficient indicia of reliability" (Rule 68 (2)(c) RPE, supra note 18). Similarly, if the witness has been intimidated, prior recorded testimony is admissible if the Chamber is satisfied that the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion; reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; the interests of justice are best served by the prior recorded testimony being introduced; and the prior recorded testimony has sufficient indicia of reliability (Rule 68 (2)(d) RPE).

example, it was used where witnesses were anxious about testifying in The Hague[236] or travelling on a plane, where they had not been medically cleared to travel,[237] where a passport or visa had not been obtained in time[238] or for insider witnesses in detention in Côte d'Ivoire.[239] Indeed, the Trial Chamber declared that, given the technology now available, "there is no significant difference between live testimony in The Hague and live testimony by means of video-link".[240] However, this recognition of the parity between video-link and in person testimony is exceptional and while the modalities of video-link allow for proper confrontation by the parties and participants, it is still not on full parity with the ability to examine a witness in person in the courtroom, assess their demeanour and present them with documents to instantaneously challenge their account.[241] Nonetheless, video-link facilitates the participation of witnesses from the affected communities. Similarly, the Chamber broadly interpreted the provisions to admit prior recorded statements to facilitate the expeditious conduct of the proceedings, in the interests of the accused and the public.[242]

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[236] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber, 'Decision on the mode of testimony of Rule 68 (3) witnesses, ICC-02/11-01/15-721', 11 October 2016.

[237] Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber, 'Decision on protective measures, mode of testimony and the order of appearance of certain upcoming witnesses', ICC-02/11-01/15-1060, 3 November 2017.

[238] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber, 'Decision on the Prosecutor's urgent application for testimony by means of video-link testimony and for additional special measures with respect to Witness P-0554', ICC-02/11-01/15-1079, 27 November 2017.

[239] This applies to witness P-0435 who testified on 3 November 2016.

[240] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber, 'Decision on protective measures, mode of testimony and the order of appearance of certain upcoming witnesses, ICC-02/11-01/15--1060, 3 November 2017, at para.35; and ICC, Situation in Côte d'Ivoire', *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber, 'Decision on the Prosecutor's urgent application for testimony by means of video-link testimony and for additional special measures with respect to Witness P-0554', ICC-02/11-01/15-1079, 27 November 2017, at para.15.

[241] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Partially Dissenting Opinion of Judge Henderson to Decision on the mode of testimony of Rule 68 (3) witnesses, ICC-02/11-01/15-721-Anx, 18 October 2016, at para.5.

[242] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, 'Decision on the Prosecutor's application to introduce prior recorded testimony under

Further, in arranging the video-link, the Registrar is to consider setting it up in a national court.[243] This presents a significant opportunity to build the capacity of national courts, consistent with positive complementarity. Specifically, technical assistance may be required to enable the video-link, provide for an appropriate venue for the witness to testify from and ensure the implementation of protective measures and/or other measures to ensure the witnesses' well-being and security.

5. Co-operation Subsequent to an Unsuccessful Admissibility Challenge

If a State Party fails to comply with a co-operation request, the Court may make a finding of non-compliance and a referral to the Assembly of States Parties or, where the Security Council referred the situation to the Court, to the Security Council.[244] Article 112 (2)(f) of the Rome Statute enables the Assembly of States Parties to consider "any question relating to non-cooperation", and not just the specific issue referred. Article 87 (5)(b) of the Rome Statute also provides for non-compliance by non-States Parties with an ad hoc agreement with the ICC to co-operate. However, in that instance, the Court may only "inform" the Assembly of States Parties of non-compliance or refer the matter to the Security Council if the investigation arose from a Security Council referral. In the event of non-compliance by a non-State Party with a request from the Prosecutor after a deferral pursuant to Article 19(11), the consequences therefore fall to general international law. The enforcement possibilities are obviously stronger if the case was originally referred by the Security Council, as

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Rules 68 (2)(b) and 68 (3)', ICC-02/11-01/15-573-Red, 9 June 2016; ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, 'Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68 (2)(b)and 68 (3)', ICC-02/11-01/15-744, ICC-02/11-01/15 OA 8, 1 November 2016.

[243] Reg. 45 (3)(b), Regulations of the Registry, supra note 95.

[244] Article 87 (7), Rome Statute, supra note 70.

the non-State Party would still be obliged to comply.[245] However, while the provisions of the Rome Statute and Regulations of the Court deal with non-cooperation, the actual consequence, even for States Parties, in terms of the enforcement power of the Assembly of States Parties and/or UN Security Council is largely governed by general international law.[246]

To date, non-compliance rulings have been issued against Kenya[247], Libya[248], Republic of Sudan[249], Malawi[250], Chad[251], the DRC[252], Djibouti[253], Uganda[254] and

[245] See Christopher Hall, Daniel Ntanda Nsereko and Manuel Ventura, 'Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case', in Triffterer and Ambos (Eds), supra note 3, at p.897.
[246] Kaul and Kress, supra note 5, at p.218.
[247] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, Trial Chamber V (B), 'Second decision on the Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute', 01/09-02/11-1037-ENG, 19 September 2016 (hereafter 'Kenya Second Decision on Non-Compliance of September 2016').
[248] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, Pre-Trial Chamber, 'Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council', ICC-01/11-01/11-577-ENG, 10 December 2014.
[249] ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, 'Decision on the Prosecutor's request for a finding of non-compliance against the Republic of Sudan', ICC-02/05-01/09-227, 9 March 2015; ICC, Situation in Darfur, Sudan, *Prosecutor v Abdel Raheem Muhammed Hussein*, Pre-Trial Chamber, 'Decision on the Prosecutor's request for a finding of non-compliance against the Republic of Sudan', ICC-02/05-01/12-33, 26 June 2015; ICC, Situation in Darfur, Sudan, *Prosecutor v Abdallah Banda Abakaer Nourain*, Pre-Trial Chamber, 'Decision on the Prosecution's request for a finding of non-compliance', ICC-02/05-03/09-641, 19 November 2015.
[250] ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, 'Decision pursuant to Article 87 (7) of the Rome Statute on the failure of the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir, Corrigendum', ICC-02/05-01/09-139-Corr, 12 December 2011.
[251] ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, 'Decision pursuant to Article 87 (7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir', ICC-02/05-01/09-140-tENG, 13 December 2011; and ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, 'Decision on the non-compliance of the Republic of Chad with the cooperation requests issued by the Court regarding the arrest and surrender of Omar Hassan Ahmad Al-Bashir', ICC-02/05-01-09-151, 26 March 2013.
[252] ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, 'Decision on the cooperation of the Democratic Republic of Congo regarding Omar Al-Bashir's arrest and surrender to the Court', ICC-02/05-01/09-195, 9 April 2014.
[253] ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, 'Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', ICC-02/05-01/09-266-ENG, 11 July 2016.
[254] ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, 'Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute', ICC-02/05-01/09-267-ENG, 11 July 2016.

Jordan[255]. All rulings save for those in relation to Kenya and Libya concern the failure to arrest Al-Bashir or others in the situation concerning Darfur.[256] The analysis in this chapter is limited to Kenya, Côte d'Ivoire and Libya concerning co-operation after the failure of admissibility challenges.[257] A state may fail in challenging admissibility and still be obliged to co-operate in executing the ICC's requests. This tension between complementarity and the ICC's reliance on co-operation is most pronounced in Part 9 of the Rome Statute.[258]

Logically, a State deemed 'unable' may be easier to subsequently co-operate with than a State judged unwilling. As Kaul and Kress point out, the complementarity regime "makes it a very real option that the Court has to send requests for cooperation to states which it has determined to be unwilling to prosecute (…). Certainly, unwillingness to prosecute does not automatically equate with unwillingness to cooperate but it is only realistic to assume that it may".[259] In contrast, a State deemed 'unable' may have a judicial system that is 'substantially collapsed' or otherwise 'unavailable' for the purpose of Article 17 (3) of the Rome Statute, but still be able to provide assistance to further an international investigation.[260] Co-operation in the

[255] ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II, 'Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir', ICC-02/05-01/09-309, 11 December 2017; ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Appeals Chamber, 'Judgment in the Jordan Referral re Al-Bashir Appeal', ICC-02/05-01/09-397-Corr, 6 May 2019.

[256] See also the following ruling concerning Nigeria where a finding of non-compliance was avoided: ICC, Situation in Darfur, Sudan, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-159-ENG, 5 December 2013.

[257] For further analysis of the non-compliance rulings regarding the situation in Darfur, Sudan, see: Konstantinos Magliveras and Gino Naldi, 'The ICC Addresses Non-Cooperation by States Parties: the Malawi Decision', (2013) 6 African Journal of Legal Studies 137.

[258] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, supra note 71, at p.229.

[259] Kaul and Kress, supra note 5, at 208-209.

[260] Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, supra note 71, at p.229.

Kenya, Libya and Côte d'Ivoire situations illustrates this. It is apparent that Kenya, a State where the real reason behind admissibility was the issue of unwillingness, was the most challenging for the OTP to secure assistance from subsequently. However, the level of co-operation rendered by States deemed 'unable' largely depends on the cause of the inability. This is clear in the case of Libya where 'unavailability' of the national justice system – the inability to secure custody of Saif Gaddafi – is also a thorn in the OTP's side in seeking Libya's assistance with his transfer.

5.1 Lessons from Kenya

When Kenya failed to co-operate following its unsuccessful admissibility challenge, the OTP motioned for a ruling on non-compliance under Article 87 (7) of the Rome Statute.[261] Among the most serious issues, the Attorney General reportedly did nothing to withstand a High Court challenge which resulted in an order preventing the Prosecutor from interviewing Kenyan police officers. Accordingly, while the accused were able to interview officers, with Hussein Ali obtaining witness statements from 39 police or other law enforcement officials, the OTP was not able to obtain a single statement from a serving officer.[262] Part of a request to produce records concerning Kenyatta and others had been executed, yet these efforts appeared disingenuous, with an OTP official recalling Kenya sending reams of useless documentation to say they

[261] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, OTP, 'Prosecution application for a finding of non-compliance pursuant to Article 87 (7) against the Government of Kenya', ICC-01/09-02/11-866, 12 February 2014 (public version of motion of 29 November 2013); and ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, OTP, 'Further submissions on the Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute', ICC-01/09-02/11-1034, 14 September 2015 (hereafter 'OTP Further Submissions on Kenya Non-Compliance').

[262] Situation in Kenya, *Prosecutor v Uhuru Kenyatta*, 'Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence by the African Centre for Open Governance', ICC-01/09-02/11-1017, 29 April 2015, at paras 21-24; Situation in Kenya, *The Prosecutor v Uhuru Muigai Kenyatta*, African Centre for Open Governance, Amicus Curiae Observations of the African Centre for Open Governance pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/09-02/11-1020, 8 May 2015, at para.11.

were co-operating, almost enough to be plausible.[263] This view is contested by the Defence. The Kenyan Government maintained the efforts were genuine but there were legal and practical obstacles to full execution.[264]

A finding of non-compliance turned on Kenya's failure to take steps to obtain the information sought by alternative means and make bone fide efforts to overcome the difficulties.[265] Notably, the Government failed to compel the production of the records by State agencies or private companies, including telephone providers.[266] Some bank statements were provided with the accused's consent but not the three years' worth of statements sought because the Government did not compel the production of records for the wider period.[267] If there were legal obstacles, Kenya should have ensured there were procedures available under national law.[268]

Although the Trial Chamber ultimately held that the Prosecutor's conduct had not adversely impacted Kenya's obligation to co-operate[269], the picture emerging did not reflect well on the OTP. The Chamber expressed "serious concerns" about the OTP's

[263] Interview record 4 – OTP Official, 30 November 2017. Notably, in ruling on Kenya's non-compliance, the Trial Chamber's reasoning demonstrates a distaste that the OTP were satisfied that certain terms of the request had been executed – that on vehicle records, foreign transaction records and intelligence records - when all the Government provided were responses indicating that no such information was held in relation to Kenyatta: Situation in Kenya, *The Prosecutor v Uhuru Muigai Kenyatta*, Trial Chamber V (B), 'Decision on the Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute', ICC-01/09-02/11-982, 3 December 2014, at paras. 36, 63-65, 68-69 and 73 (hereafter 'Kenya Decision on Non-Compliance of December 2014').

[264] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, 'Government of Kenya's Observations on the 'Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya'', ICC-01/09-02/11-951, 7 October 2014, at paras 9-12 and 19; and ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, Observations of the Kenyan Government, Annex 2 to Registry Report pursuant to the 'Decision requesting observations from the Government of Kenya dated 9 December 2013, ICC-01/09-02/11-877-Anx2-Red, 9 January 2014 (public version issued on 5 February 2014).

[265] Kenya Decision on Non-Compliance of December 2014, supra note 263, at paras 41, 75-78.

[266] Ibid, at paras 75-76.

[267] Ibid, at paras 66-67.

[268] Ibid, at para.41.

[269] Ibid, at para.78.

delay in pursuing investigations in Kenya. It emphasised that the Prosecution should follow-up on co-operation requests "expeditiously, thoroughly and meaningfully".[270] The OTP should also have examined the reasonableness of the positions presented by the Government regarding obstacles to execution and exercised "a greater degree of diligence, persistence and, where necessary, flexibility".[271] While the Chamber held Kenya had failed to co-operate, it declined on first consideration to refer it to the ASP,[272] as the Chamber doubted that even if Kenya provided the evidence sought, it would be sufficient to reach the evidentiary threshold to proceed to trial.[273] The Court simultaneously required the Prosecutor to withdraw the charges against Kenyatta or certify trial readiness.[274] The charges were consequently withdrawn.[275]

On appeal,[276] the Appeals Chamber found that the Trial Chamber erred in conflating the non-compliance proceedings which concern State co-operation with the proceedings against Kenyatta.[277] Thus, regardless of the withdrawal against Kenyatta, referral to the ASP would be appropriate if this would be the most effective way of ensuring future co-operation for ongoing investigations or new proceedings.[278]

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[270] Ibid, at paras 85-86.
[271] Ibid, at para.88.
[272] Ibid.
[273] Ibid, at paras 82-84.
[274] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, Trial Chamber V (B), 'Decision on Prosecution's application for a further adjournment', ICC-01/09-02/11-981, 3 December 2014.
[275] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, OTP, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, ICC-01/09-02/11-983, 5 December 2014.
[276] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, 'Prosecution appeal against the "Decision on Prosecutor's application for a finding of non-compliance under Article 87 (7) of the Statute', ICC-01/09-02/11-1006, 20 March 2015. See also in support of the referral: ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, Corrected version of the Victims' submissions on the Prosecutor's appealagainst the 'Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute', ICC-01/09-02/11-1019-Corr, 5 May 2015.
[277] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, Appeals Chamber, 'Judgment on the Prosecutor's appeal against Trial Chamber V (B)'s "Decision on the Prosecutor's application for a finding of non-compliance under Article 87 (7) of the Statute"', ICC-01/09-02/11-1032, ICC-01/09-02/11 OA 5, 19 Augut 2015, at paras 73, 82 and 89 (hereafter 'Appeals Judgment on Non-Compliance by Kenya').
[278] Appeals Judgment on Non-Compliance by Kenya, supra note 277, at paras 51 and 77.

Consequently, the Trial Chamber subsequently referred Kenya's non-compliance to the ASP on the basis that it may foster State co-operation more broadly, in regard to ongoing and/or future investigations or proceedings in the Kenyan situation.[279]

Referral was supported by the victims' legal representative,[280] as some victims remain hopeful that ICC investigations will resume. The Government of course contested it.[281] It emphasised that "keeping a State Party to the Statute under the threat of countermeasures…in order to guarantee its future co-operation in, yet to be initiated, unrelated trials is not only unjust, prejudicial and humiliating, but also an [in]expedient use of the discretionary power of a Chamber to refer a State…".[282] Indeed, in practice referral had little impact. In April 2016, the Trial Chamber terminated the *Ruto and Sang* case without prejudice to a future prosecution if new evidence materialises.[283] This followed "a troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses".[284] While both Kenyan cases ultimately collapsed due to witness issues rather than co-operation problems; the OTP recognises that there is a need to

[279] Kenya Second Decision on Non-Compliance of September 2016, supra note 247, at paras. 34-35.
[280] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, 'Corrected version of the Victims' submissions on the Prosecutor's appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute'', ICC-01/09-02/11-1019-Corr, 5 May 2015, at para.62.
[281] See also ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, 'Response of the Government of the Republic of Kenya to 'Corrected version of the Victims' submissions on the Prosecutor's appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute''', ICC-01/09-02/11-1024, 15 May 2015; ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, 'Response of the Government of the Republic of Kenya to 'Prosecution appeal against the 'Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute'', 01/09-02/11-1013, 8 April 2015.
[282] ICC, Situation in Kenya, *Prosecutor v Uhuru Muigai Kenyatta*, Government of Kenya, Further submissions of the Republic of Kenya pursuant to the Trial Chamber's 'Order inviting further submissions on the Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute', ICC-01/09-02/11-1036, 15 October 2015, at para.24.
[283] ICC, Situation in Kenya, *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Trial Chamber, 'Decision on Defence Applications for Judgements of Acquittal', ICC-01/09-01/11-2027-Red-Corr, 5 April 2016 (hereafter 'Ruto Decision on Judgments of Acquittal').
[284] Ibid, at para.464.

maximise opportunities to investigate while there is still some co-operation as it is fluid and may change over time.[285] Referral to the ASP for non-compliance appears to have completely ended any hope of co-operation.

Alternatives to referral should always be taken into account, including further consultations with the Court's oversight; and whether external actors other than the ASP or the UN Security Council may be more effective in fostering co-operation, be it third States, international or regional organisations.[286] In the Kenyan situation, consultations with the OTP had been exhausted to "deadlock".[287] Further, the Trial Chamber considered other external actors, whether third states or other organisations, "may not be in a position to provide concrete, practical assistance" to Kenya that would enable it to execute the requested co-operation.[288] However, the Second Decision on Non-Compliance is left wanting in this regard because the Court failed to consider which third states or organisations actually may be able to assist and the specific limitations. No mention is made of the African Union, the Commonwealth, third states providing development assistance to Kenya or NGOs operating in the country or the limitations of these external actors in catalysing co-operation.[289]

5.2 Côte d'Ivoire

While national proceedings against Simone Gbagbo continued regardless of the ICC's admissibility rulings, to date no ruling on non-compliance has been issued by the

[285] Interview record 7 – Head of Prosecution Division, ICC OTP, 4 December 2017.
[286] Appeals Judgment on Non-Compliance by Kenya, *supra* note 277, at para.53.
[287] Kenya Second Decision on Non-Compliance, *supra* note 247, at para.20.
[288] Kenya Second Decision on Non-Compliance, *supra* note 247, at para.37.
[289] Note, however, the view of the External Independent Experts that States Parties did not seem to have the political will to exert pressure on Kenya to comply or refrain from interfering with the OTP's activities, though late notice of Kenya's non-cooperation did not help: ICC OTP Kenya Cases: Review and Recommendations, Executive Summary of the Report of the External Independent Experts, Annex 1 to Full Statement of the Prosecutor, Fatou Bensouda, at p.5, E23. The full report remains confidential.

Court or sought. That this likely due to four factors. First, it demonstrates the OTP's recognition of Côte d'Ivoire's good co-operation more generally, particularly regarding the proceedings against Gbagbo and Blé Goudé. Secondly, it is an implicit acknowledgement that non-compliance rulings and referrals made to date appear to have failed to catalyse any meaningful change in the level of co-operation by the responsible States. Further, it takes into account the reality that, as submitted by Kenya earlier, a ruling on non-compliance and referral would be considered humiliation and as such would not be conducive to securing Côte d'Ivoire's ongoing co-operation with more sensitive investigations against pro-Ouattara suspects. Finally, more is likely to be gained by seeking the support of external actors beyond the ASP, specifically, France, the African Union and/or ECOWAS to facilitate Côte d'Ivoire's willingness and ability to execute co-operation requests.

5.3 Libya's unique co-operation issues

5.3.1 Unavailability

Libya is notorious for the detention of Saif Gaddafi's former defence counsel Melinda Taylor and other ICC staff.[290] Libya failed to return legally privileged documents and destroy copies ('Return Request');[291] and to organise a visit by his new team ('Defence Visit Request').[292] Of course, Libya had also failed to surrender

[290] The Guardian, Luke Harding, Julian Borger and Chris Stephen, 'Libya accuses Australian ICC official of passing secret letter to Gaddafi's son', 25 June 2012.
[291] Notified to Libya on 4 March 2013, corresponding to: ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, PTC I, 'Decision on the 'Urgent Defence Request'', ICC-01/11-01/11-291, 1 March 2013.
[292] Notified to Libya on 8 February 2013, corresponding to: ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, PTC I, 'Decision on the 'Urgent Application on behalf of Abdullah Al-Senussi for the Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC'', ICC-01/11-01/11-269, 6 February 2013. It was formerly requested by the Defence directly through the Registrar on 23 January 2013.

Gaddafi.[293] In May 2014, the Minister of Justice signed an Exchange of Letters[294] with the Registrar addressing privileges and immunities to be accorded to the Defence, application of legal professional privilege and the provision of visas.[295] However, Libya requested an extension to respond fully due to a surge in attacks in Tripoli and Benghazi and elections in June 2014 after which there would be a new government responsible for co-operation.[296] Libya added that an adequate response would require revealing confidential information on negotiations between the central Government and the authorities in Zintan and doing so at that time would risk political instability.[297] Nevertheless, the OPCV rightly highlighted that the extension request was made on the last date for submissions and did not explain why the current Government had failed to execute the requests since 2013.[298]

In July 2014, the Pre-Trial Chamber initially issued a decision concerning the level of co-operation.[299] While denying an extension in relation to Gaddafi's surrender, at the

[293] Notified to Libya on 5 July 2011 but effective from 31 May 2013 following the admissibility proceedings, corresponding to: ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, PTC I, 'Decision on the 'Prosecutor's application pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDFAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'', ICC-01/11-01/11-1, 27 June 2011; and ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, Appeals Chamber, 'Decision on the request for suspensive effect and related issues', ICC-01/11-01/11-387, 18 July 2013.

[294] Annex 1 to ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, 'Libyan application for extension of time related to Pre-Trial Chamber I's Decision requesting Libya to provide submissions on the status of implementation of its outstanding duties to cooperate with the Court', ICC-01/11-01/11-548, 28 May 2014, available at: (last accessed 14 May 2018) (hereafter 'Libya Application for Extension for Compliance').

[295] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, State, 'Application for leave to reply and consolidated reply on behalf of the Libyan Government to Responses to the Libyan application for extension of time related to Pre-Trial Chamber I's Decision requesting Libya to provide submissions on the status of implementation of its outstanding duties to cooperate with the Court', ICC-01/11-01/11-557, 16 June 2014 (public version of document dated 13 June 2014), at para. 2 (hereafter 'Libya Consolidated Reply on Implementing Co-operation').

[296] Libya Application for Extension for Compliance, *supra* note 294, at paras 6-8.

[297] Libya Consolidated Reply on Implementing Co-operation, *supra* note 295, at para.16.

[298] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, OPCV, 'Response to 'Libyan application for extension of time related to Pre-Trial Chamber I's Decision requesting Libya to provide submissions on the status of implementation of its outstanding duties to cooperate with the Court'', ICC-01/11-01/11-552, 6 June 2014, at para. 8.

[299] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, 'Decision on matters related to Libya's duties to cooperate with the Court', ICC-01/11-01/11-563, 11 July 2014.

same time the single judge permitted the Libyan Government to submit further information.[300] Extension was granted in relation to the Property Return Request.[301] Further, it was considered that the Exchange of Letters was a sufficient development in relation to the Defence Visit Request and as such, the Defence ought to apply for a visa and organise a visit, subject to the security environment.[302]

Thereafter, in August 2014, the Government asserted there had been "considerable progress" since May, with the results of the parliamentary elections of 25 June announced by the electoral commission on 21 July and a constitutional amendment approved on 12 August for the direct election of an interim president.[303] However, it sought a further extension until 29 October due to bombing attacks in Tripoli that had disrupted communication with Zintan.[304] The Defence argued Libya's requests were simply a ploy to continue domestic proceedings against Gaddafi and avoid a non-compliance ruling and referral to the Security Council.[305] Moreover, the assertion of inability to execute co-operation requests contradicted Libya's assertion of capacity for the purpose of challenging admissibility.[306]

[300] Ibid, para.13.
[301] Ibid, paras 16-17.
[302] Ibid, paras.18-22.
[303] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, 'Libyan Government's application for extension of time for the purpose of compliance with Pre-Trial Chamber I's 'Decision on matters related to Libya's duties to cooperate with the Court'', ICC-01/11-01/11-568, 20 August 2014, at paras 3 and 6;ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, 'Corrigendum to Libyan Government's application for extension of time for the purpose of compliance with Pre-Trial Chamber I's 'Decision on matters related to Libya's duties to cooperate with the Court'', ICC-01/11-01/11-568-Corr, 21 August 2014.
[304] Ibid, at para.4.
[305] Ibid, at para.9.
[306] Ibid, at para.32.

Come December 2014, the Court decided enough was enough.[307] Libya had failed to comply with the Surrender Request and the Property Return Request and consultations pursuant to regulation 109(3) RPE were considered exhausted.[308] The ruling is problematic. Specifically, despite recognising the "genuine efforts made by Libya to maintain a constructive dialogue with the Court" and overt demonstrations of Libya's commitment in the previous months, the single judge still decided to refer Libya to the Security Council for objective non-compliance.[309]

Ultimately, the problem was obviously the inability of the Government to exert its authority over the Zintan group holding Gaddafi and the privileged documents in issue. The same inability – unavailability – gave rise to the finding of admissibility in the first place. In August 2015, the Government finally acknowledged that it did not have custody of Gaddafi or control over the Zintan group, recognising the Court's earlier finding of unavailability.[310] Further, it stated that it would be impossible for any one party to the negotiations for a unity government to attempt to secure Gaddafi's transfer.[311] The inability of the Government to execute the ICC's requests pertains to both militias as well as members of the former regime, as illustrated by the non-execution of a request for the arrest and surrender of Al-Werfalli.[312]

[307] Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, supra note 248.
[308] Ibid, paras.4 and 19.
[309] Ibid, paras. 31-34.
[310] Ibid, at para. 3.
[311] Ibid, at para.15.
[312] ICC, Situation in Libya, *Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli, ,* Pre-Trial Chamber I, 'Request to Libya for cooperation in the arrest and surrender of Mahmoud Mustafa Busayf Al-Werfalli', ICC-01/11-01/17-3, 21 August 2017.

5.3.2 Who may the OTP co-operate with?

Similarly to Côte d'Ivoire, except from the non-surrender, Libya has been co-operating with the OTP subsequent to the admissibility challenges.[313] The OTP's ability to secure co-operation in Libya more broadly is hampered by restrictions over the authority to which it may formally address a co-operation request. The ICC may only address co-operation and assistance requests to the authorities designated by the State, pursuant to Article 87(1)(a) of the Rome Statute.[314] There is no legal basis for requests to be addressed to private individuals or other bodies, even other State officials, save for intergovernmental organisations or requests through regional organisations. This hampers the Court in dealing with situations like Libya where there is a breakdown in authority and the evidence or accused is unavailable to the central State authorities but may be available to others exercising de facto authority. Notably, in April 2016, the Prosecutor requested the Pre-Trial Chamber to issue an order to direct the Registry to transmit the request for Saif Gaddafi's arrest and surrender to the commander of the Abu-Bakr al-Siddiq Battalion in Zintan.[315] While the basis for doing so is not explicit, the OTP argued that the Court could rely on Article 57 (3)(a) and/or (d) of the Rome Statute or its inherent powers.[316]

Unfortunately, the Pre-Trial Chamber[317] held that neither Article 57 (3)(a) or (d) provided a proper legal basis as the request was not "required for the purposes of an investigation" or to "authorise the Prosecutor to take any specific investigation steps

[313] Interview record 6 – OTP Official, 4 December 2017.
[314] See Ciampi, supra note 75, at 1740.
[315] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, OTP, 'Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami Al-'Ateri, Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya', ICC-01/11-01/11-624, 26 April 2016.
[316] Ibid, at para.24.
[317] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, 'Decision on the Prosecutor's 'Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami Al-'Ateri, Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya'', ICC-01/11-01/11-634-Red, 21 November 2016.

within the territory of a State Party".[318] Further, the single judge considered it inappropriate to rely on inherent powers when the transmission of requests is regulated in detail by Article 87 of the Statute and Rule 176 RPE, which provides that requests are to be transmitted through diplomatic or other channels designated by the State and no alternative channels to the internationally recognised Government, the GNA, had been designated by Libya.[319] Hence, it was left in the GNA's hands to agree that the ICC may directly address any other entity or local authority.

However, the Court ordered the Registrar to enquire with the Libyan authorities as to whether there had been any recent communication with the Zintan militia; whether they would agree to a request for Gaddafi's arrest and surrender being addressed to the Zintan militia; and whether they would facilitate its transmission or agree for the ICC to communicate directly with Zintan.[320] The Court expressly left the question unresolved as to whether the Court could directly address co-operation requests under Part 9 of the Rome Statute to non-State actors, without the agreement of the de jure State authorities.[321] The Registry reported that the Libyan Representative to the ICC, El Gehani, had been designated by both the Tripoli and Tobruk authorities to communicate with the Court.[322] It remains confidential what, if anything, the Libyan

[318] Ibid, at para.13.
[319] Ibid, at paras.13-15.
[320] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, Pre-Trial Chamber, 'Order to the Registrar with respect to the ''Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'Ajami Al-'Ateri, Commander of the Abu-Bakr al-Siddiq Battalion in Zintan, Libya'', ICC-01/11-01/11-627, 2 June 2016, at para.9.
[321] Ibid, at para. 8.
[322] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, 'Registry's Update on the Implementation of the Chamber's Order ICC-01/11-01/11-627', ICC-01/11-01/11-632, 31 October 2016. This followed Decision No. 23/2016 of the Presidency Council of the Government of National Accord in Tripoli dated 31 May 2016, Decision 69/2015 of the Council of Ministers of the interim Government in Al-Bayda dated 24 February 2015 and Decision No. 10/2015 of the President of the House of Representatives in Tobruk dated 10 February 2015: Copies at Annex 2 to Registry's Update on the Implementation of the Chamber's Order, 31/10/2016.

authorities stated in regard to communication with the Zintan militia.[323] As such, it appears the question of directing a co-operation request to non-State actors remains unresolved. Consequently, by analogy, the OTP is also restricted in its ability to submit co-operation requests directly to the LNA concerning Al-Werfalli.

Nevertheless, while official channels must be followed for formal co-operation, this does not prevent the OTP from talking to others, including those allied to the House of Representatives.[324] Indeed, as the Libyan judiciary remains unified despite the political discord, co-operation continues regardless with investigators and prosecutors at the operational level from all areas of Libya.[325]

6. Conclusion

This chapter analysed the mechanisms available to States and the ICC to co-operate, whether in the context of assisting proceedings at the national level or by the ICC. However, the available toolkit is still underused. The OTP can do more to catalyse and facilitate domestic proceedings and assist capacity-building, even in the ordinary course of its primary function to prosecute international crimes. This underuse of co-operation tools has resulted in the ICC having limited impact on the domestic justice systems in Côte d'Ivoire and Libya. Further, the OTP's different approaches to co-operation with the local judiciary has influenced the results in these situations.

Some lessons appear to have been learned since the Kenya cases in the OTP's engagement with States which unsuccessfully challenged admissibility. Nevertheless,

[323] A reply from the Libyan Attorney-General's Office dated 29 September 2016 and a summary of discussions with El Gehani were annexed to the Registry's Update of 31/10/2016 but remain confidential (Annexes 4 and 5).
[324] Interview record 6 – OTP Official, 4 December 2017.
[325] Interview record 6 – OTP Official, 4 December 2017.

new and ongoing challenges continue to hamper more effective co-operation between the OTP and domestic authorities. Most notably, this includes (i) securing co-operation in the investigation of those accused from both sides, especially from among supporters of the current government, for example, in Côte d'Ivoire; and (ii) securing the co-operation of non-State armed groups in situations where the State is fragmented albeit the judiciary remains officially unified, as in Libya. These challenges limit the ICC's ability to positively impact the rule of law in situation countries through the use of the co-operation tools identified.

Chapters V and VI turn from the theoretical framework and implementation of the policy behind positive complementarity to an analysis of the consequent impact of the ICC on the rule of law in Côte d'Ivoire and Libya.

CHAPTER V -

MEASURING IMPACT: CÔTE D'IVOIRE

> "It is not perfect but it functions. It is developing. We are dealing with the realities of developing countries".[1]

Most interviewees consider the rule of law exists in Côte d'Ivoire and is being consolidated.[2] If a formal construction of the rule of law in terms of the existence of legal texts and institutions is applied, then Côte d'Ivoire generally has everything, but the issue is the extent to which the laws are applied in practice.[3] As a civil society activist stated: "the rule of law is in construction. We move one step forward and one step backward, in constant evolution but at a very slow pace".[4] There is a need to reinforce existing institutions as the only way to prevent impunity is to ensure judicial institutions are strong enough to bring the powerful to account.[5]

The main issue is independence and impartiality.[6] This especially affects efforts to address the post-election crisis of 2010-11. When the ICC commenced investigations, the key issue was capacity; the judicial system had substantially collapsed, rendering the State 'unable' to investigate or prosecute those most responsible. Today, it is whether there is the political will for genuine proceedings concerning both sides of the conflict.

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[1] Interview record 13 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[2] E.g. Interview record 14 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire, 28 March 2018.
[3] Interview record 20 – interviewee, Association des Femmes Juristes deCôte d'Ivoire (AFJCI), 27 March 2018; Interview record 21 - interviewee, Convention Societe Civile Côte d'Ivoire, 27 March 2018.
[4] Interview record 24 – interviewee, Convention de la Societe Civil Côte d'Ivoire, 29 March 2018.
[5] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018; Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018.
[6] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 13 - Prosecutor, Côte d'Ivoire, 21 March 2018.

1. Judicial Coverage – Catalysing Normative Change

This section examines the ICC's impact on justice sector reform, considering constitutional reform, harmonisation with the Rome Statute, legal co-operation, defence rights and witness protection.

1.1 Implementing the Rome Statute

When Laurent Gbagbo was transferred to the ICC in 2011, Ivorian law only permitted the extradition of non-nationals.[7] The Constitution provided for the superiority of treaties ratified by Côte d'Ivoire over domestic law.[8] Yet, the State had not yet ratified the Rome Statute, with the Constitutional Council deciding in 2003 that its provisions were incompatible with the Constitution. Nevertheless, the Abidjan Accusation Chamber directly applied Article 59 (2) of the Rome Statute to execute the ICC's warrant and request for Gbagbo's surrender. Such procedural irregularity concerning domestic law is irrelevant for the purposes of the ICC's jurisdiction and did not constitute an abuse of process.[9] However, it caused discontent domestically.[10] As a lawyer from MIDH notes, "a lot of Ivorians took it like a deportation from

[7] Loi du 10 mars 1927 relative a l'extradition des étrangers.

[8] Article 87, Ivorian Constitution 2000, Law No. 2000-513 of 1 August 2000 on the Constitution of Côte d'Ivoire.

[9] The alleged illegality of Gbagbo's surrender under domestic law was among the grounds cited in an unsuccessful challenge by the Defence to the ICC's jurisdiction: ICC, Situation in Côte d'Ivoire, *Prosecutor v Laurent Gbagbo*, Defence, 'Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12 (3), 19 (2), 21 (3), 55 et 59 du Statut du Rome présentée par la défense du Président Gbagbo', ICC-02/11-01/11-129, 24 May 2012, at paras. 279-280. See ICC, Situation in Côte d'Ivoire, *Prosecutor v Laurent Gbagbo*, Pre-Trial Chamber I, 'Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12 (3), 19 (2), 21 (3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo', ICC-02/11-01/11-212, 15 August 2012, at paras 103-106; affirmed by ICC, Situation in Côte d'Ivoire, *Prosecutor v Laurent Gbagbo*, Appeals Chamber, 'Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings', ICC-02/11-01/11-321, ICC-02/11-01/11 OA 2, 12 December 2012.

[10] Interview record 37 – Defence Counsel, 18 October 2018; Interview record 43 – Defence Counsel, 22 October 2018; Interview record 47 – Defence Counsel, 24 October 2018.

colonial times."[11] Article 85bis recognising the ICC's jurisdiction was subsequently inserted into the Constitution,[12] with Côte d'Ivoire becoming a State Party in 2013.

Internationally, Côte d'Ivoire was considered unable to prosecute Gbagbo due to the substantial collapse of its judicial system in many areas since 2002. However, he was already under investigation, albeit for economic crimes.[13] Gbagbo argued he should be tried at the national level.[14] His transfer was seen as the new President taking advantage of the ICC to get his biggest problem off his hands. It was not inevitable that Charles Blé Goudé would be similarly transferred upon his extradition from Ghana.[15] Blé Goudé was also already under investigation nationally, with transfer seen as an admission the country still lacked capacity. Blé Goudé also initially opined that he would rather be tried in Côte d'Ivoire.[16] Nevertheless, he was surrendered in March 2014,[17] following a Cabinet level decision prompted by security concerns.[18] Gbagbo and Blé Goudé were treated as instances of inaction.[19] Yet, as in the DRC, this technical concept did not accurately reflect the facts on the ground.[20]

[11] Interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.
[12] Pursuant to Law No. 1134 of 2012, adopted 13 December 2012.
[13] Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018.
[14] ICC, Situation in the Republic of Côte d'Ivoire, *Prosecutor v Laurent Gbagbo*, Defence, 'Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut', ICC-02/11-01/11-404-Red, 15 February 2013, para.43.
[15] Modern Ghana, 'Gbagbo's arrested ally Goude extradited to Ivory Coast', 18 January 2013.
[16] Ange Aboa, Reuters, 'Ivory Coast youth leader asks government to reject ICC warrant', 23 October 2013.
[17] ICC, Press Release, 'Charles Blé Goudé transferred to the ICC', 22 March 2014.
[18] Reuters, 'Ivory Coast to send Ble Goude to The Hague court', by Loucoumane Coulibaly, 20 March 2014.
[19] ICC, Situation in the Republic of Côte d'Ivoire, *Prosecutor v Laurent Gbagbo*, Pre-Trial Chamber, 'Decision on the 'Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut', ICC-02/11-01/11-436-Red, 11 June 2013, para.28.
[20] For the DRC, see Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2018), at 166, arguing that the ICC undermined national reforms as the Ituri rebel leaders were already being investigated nationally but transferred to the ICC regardless.

The ICC's warrant for Simone Gbagbo was issued on 29 February 2012, following the OTP's application on 7 February, subsequent to three domestic cases.[21] In the meantime, national investigations into crimes alleged committed by the pro-Ouattara had also commenced.[22] On 30 September 2013, Côte d'Ivoire lodged its admissibility challenge concerning Simone Gbagbo,[23] with admissibility upheld.[24] Nevertheless, Côte d'Ivoire continued to try her.

Between the Pre-Trial and Appellate admissibility judgments in December 2014 and May 2015, the Ivorian Penal Code was revised in harmonisation with the Rome Statute, incorporating genocide, crimes against humanity and war crimes into domestic law.[25] This enabled domestic prosecutions for crimes against humanity, starting with Simone.[26] Further, Article 140-2 was inserted into the Penal Code,[27] recognising the non-application of amnesty, mitigating circumstances or commutation

[21] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Simone Gbagbo*, Pre-Trial Chamber III, 'Warrant of Arrest for Simone Gbagbo', ICC-02/11-01/12-1, 29 February 2012, unsealed 22 November 2012.
[22] FIDH – Fédération Internationale des Ligues des Droits de l'Homme, 'Côte d'Ivoire: Choosing between Justice and Impunity' ('Côte d'Ivoire: Choisir entre la justice et l'impunité – Les autorités ivoiriennes face à la leurs engagements'), Report No. 652f, 11 December 2014, at p.19.
[23] ICC, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, 'Request of the Republic of Côte d'Ivoire on the admissibility of the case The Prosecutor v Simone Gbagbo and request for suspensive effect pursuant to Articles 17, 19 and 95 of the Rome Statute', ICC-02/11-01/12-11-Red, 30 September 2013, public redacted version published 1 October 2013, (hereafter 'Côte d'Ivoire's Admissibility Challenge to the Simone Gbagbo case').
[24] ICC, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, Pre-Trial Chamber I, 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, Decision under Articles 17 and 19', ICC-02/11-01/12-47-Red, 11 December 2014 (hereafter 'PTC Decision on Côte d'Ivoire's Admissibility Challenge'); and ICC, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, Appeals Chamber, 'Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11/12/2014 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', ICC-02/11-01/12 OA, ICC-02/11-01/12-75, 27 May 2015 (hereafter 'Appeals Judgement on Côte d'Ivoire's Admissibility Challenge').
[25] Law 2015-134 of 9 March 2015 Modifying and Completing Law 61-640 of 31 July 1981 instituting the Penal Code (Loi No. 2015-134 du 9 mars 2015 modifiant et completant la loi No. 61-640 du 30 juillet 1981 instituant le code penal), see Articles 15- 22 inserting Articles 137-139 into the Penal Code.
[26] While judges could also rely on customary international law, the retroactive application of the new Penal provisions raises issues over the principle of legality. Namely, the sentencing provisions being applied are harsher than the sentences for the ordinary criminal offences that applied at the time of the events.
[27] Law 61-640 of 31 July 1981 instituting the Penal Code (Loi No. 61-640 du 30 juillet 1981 instituant le code penal), as modified by Law No. 1995-522 of 6 July 1995 ('old Ivorian Penal Code').

of sentence for these international crimes.[28] While Côte d'Ivoire had long stopped using the death penalty in practice, it was legally abolished and replaced by life imprisonment as the maximum punishment.[29] The Criminal Procedure Code (CPC)[30] was also amended to provide for the non-application of statutes of limitation to genocide, crimes against humanity and war crimes.[31]

The new Ivorian Penal Code adopted in June 2019 achieves further harmonisation by incorporating the crime of aggression into domestic law and clarifying the criminalisation of torture and inhuman and degrading treatment.[32] It also addresses human trafficking, cyber-crime, defines rape and takes into account other forms of sexual and gender-based violence (SGBV), which may lead to more prosecutions.[33]

The Constitution of 2016 highlights the importance of national reconciliation and a "determination to build a rule of law in which human rights, public freedoms, human dignity, justice and good governance…are promoted, protected and guaranteed".[34] It also affirms the right to free and equal access to justice and a fair trial within a

[28] Inserted by Article 23, Law 2015-134 of 9 March 2015 Modifying and Completing Law 61-640 of 31 July 1981 instituting the Penal Code, supra note 25.
[29] Article 31, Law 2015-134 of 9 March 2015 Modifying and Completing Law 61-640 of 31 July 1981 instituting the Penal Code, supra note 25, replacing the death penalty in Articles 361, 362, 370, 395, 415, 456 and 465 of the Penal Code with life imprisonment. See also Article 3 of the Constitution of 2016, Law No. 2016-886 of 8 November 2016 on the Constitution of the Republic of Côte d'Ivoire ('Constitution of Côte d'Ivoire 2016').
[30] Loi no. 60-366 due 14 novembre 1960 portant institution d'un code de procedure penal, Official Gazette No. 12 of 24 February 1961, p.207 ('old Ivorian CPC')
[31] Loi No. 2015-133 du 9 mars 2015 modifiant et completant la loi no. 60-366 due 14 novembre 1960 portant institution d'un code de procedure penal. This remains the same in the new Criminal Procedure Code: Article 12, Loi portant d'un code de procedure penal, 21 December 2018 (Law No. 2018-975 concerning the Code of Criminal Procedure, dated 21 December 2018), published in Official Gazette 13 March 2019, ('Ivorian CPC 2018').
[32] Articles 169 and 399, Law No. 2019-574 on the Penal Code (Loi No. 2019-574 portant Code Pénal), agreed at Committee stage 10 April 2019, adopted 26 June 2019, published in Official Gazette No. 9 (Special) of 10 July 2019 ('Ivorian Penal Code 2019').
[33] Interview record 25 – interviewee, Ministry of Women, Protection of Children and Solidarity. The corresponding provisions in the final law are Articles 365, 394, 403, 405, 418, 441 and 442, Ivorian Penal Code 2019, *supra* note 32.
[34] Preamble and Article 3, Constitution of Côte d'Ivoire 2016, supra note 29.

reasonable time, the presumption of innocence, principle of legality and non-retroactive application of the penal law.[35] It is a major advancement as references to human rights were previously confined to the preamble and vague whereas now there are multiple human rights clauses, including on women's rights.[36]

However, the Constitution also introduced the Senate (a second legislative chamber) and the Office of Vice-President, and raised concerns about the President seeking an impermissible third term in the 2020 elections.[37] Following the death of the Rally of Houphouëtists for Democracy and Peace (RHDP)'s candidate, Prime Minister Amadou Gon Coulibaly in July 2020, these concerns turned out to be well-founded.[38] Many also consider the Senate a waste of funds better spent on the justice sector.[39] For example, while the Head of State, Vice-President and the Government have immunity from prosecution while in office; the Constitution provides for the establishment for a High Court of Justice to judge them for crimes committed in the exercise of their official duties.[40] However, it is yet to be constituted.[41]

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[35] Articles 6 and 7, Constitution of Côte d'Ivoire 2016, *supra* note 29.

[36] Interview record 25 – interviewee, Ministry of Women, Protection of Children and Solidarity, 29 March 2018.

[37] Article 55, Constitution of Côte d'Ivoire 2016, supra note 29, still imposes a two term limit on Presidential office yet some anticipated the current President would assert the new Constitution resets the clock to try for another term.

[38] The Africa Report, 'Côte d'Ivoire: Alassane Ouattara pulls out of the 2020 presidential election', by Vincent Duhem, 6 March 2020; The Africa Report, 'Côte d'Ivoire: Death of Prime Minister Leaves Political Void', by Benjamin Roger, 9 July 2020; Al Jazeera, 'Ivory Coast President Alassane Ouattara to run for third term', 7 August 2020.

[39] Interview record 19 – National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018; Interview record 23 – Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.

[40] Articles 91-92 and 156-158, Constitution of Côte d'Ivoire 2016, supra note 29. See also Article 108, Constitution of Côte d'Ivoire 2000, supra note 8.

[41] As a human rights defender explained: "*there is a lack of political will to establish it. We have never had a case of a member of government brought before the law as there is no such organ except when they are no longer in power. (…) They cannot be judged by an ordinary court, the Tribunal of First Instance, as long as they stay in government – Ministers can't be judged, the heads of institutions etc [but] an MP could be brought before the court when immunity is lifted" (*Interview record 42 – interviewee, Agir pour la Democratie, la Justice et la Liberte en Côte d'Ivoire (ADJL-CI), 19 October 2018).

1.2 Prosecution mechanisms

A Special Investigation Unit, the Cellule Spéciale d'Enquête ("Cellule") was established to process cases from the crisis more effectively, as analysed below.[42] However, the Cellule operates under the same framework[43] of the Ivorian CPC that applies to the investigation and prosecution of ordinary crimes.[44] Initially dating back to 1960, the CPC was ill-equipped to address crimes committed on a mass-scale. This was acknowledged by many prosecutors and judges interviewed as among the most pressing issues affecting their ability to respond to the challenges faced.[45]

While bringing several commendable revisions, the new Ivorian CPC adopted in December 2018 could have gone further in equipping prosecutors and investigative judges with a wider range of tools to challenge impunity.[46] The Ivorian CPC prescribes investigative secrecy, subject to the rights of the defence.[47] There was formerly only one exception to this for civil parties, which affected the judiciary's ability to engage more openly with civil society, including outreach with affected communities.[48] The new CPC permits the Prosecutor to make elements of a criminal

[42] L'Arrêté No. 020/MEMJ/DSJRH/MEF du 24 juin 2011 portant creation, attributions, composition et fonctionnement d'une Cellule spéciale d'enquête relative à la crise post-électorale.
[43] Articles 6 and 12; Decree No. 2013-215 of 30 December 2013 on the creation, attributions, composition and functioning of the Special Investigation and Examination Unit (*Decret No. 2013-2015 du 30 decembre 2013 portant creation, attributions, composition et fonctionnement de la CellulesSpéciale d'enquête et d'instruction*); Articles 6 and 12, Decree No. 2016-543 of 20 July 2016 on the création, attribution, composition and functioning of the Special Unit for Investigation, Examination and the Fight Against Terrorism (*Decret No. 2016-543 du 20 juillet 2016 portant portant creation, attributions, composition et fonctionnement de la Cellule spécial d'enquête, d'instruction et de lute contre le terrorisme*), Official Gazette of 22 September 2016.
[44] Ivorian CPC 2018, supra note 31; old Ivorian CPC 1960, *supra* note 30.
[45] Interview record 15 – Prosecutor, Côte d'Ivoire, 22 March 2018; Interview record 13 - Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018; and Interview record 44 – investigating judge, Special Investigation and Examination Unit, 23 October 2018.
[46] Ivorian CPC 2018, *supra* note 31.
[47] Article 11, Ivorian CPC 2018, supra note 31. Any failure to uphold investigative secrecy may be sanctioned in accordance with Article 448 of the Ivorian Penal Code 2019, supra note 32 (Article 383 of the old Ivorian Penal Code, *supra* note 27).
[48] Ibid.

procedure public, while maintaining investigative confidentiality.[49] Further, responding to concerns over judges being overwhelmed with heavy caseloads, the new CPC enables the President of a tribunal to discharge an investigating judge from other cases.[50] While only available in exceptional circumstances, it enables a judge to be exclusively assigned to a particularly complex or sensitive case.

Arguably, the most significant reform introduced by the new CPC to modernise the criminal justice system is the establishment of a Criminal Court in every Court of Appeal, replacing the Assize Courts.[51] The Assize Courts were competent to try all serious crime cases yet only sat every three months.[52] It did not sit at all from the early 2000s to May 2014, with the ICTJ crediting the resumption of regular sessions to "the desire to reassure international observers about the progress of the judicial handling of serious crimes in Côte d'Ivoire".[53] The non-permanency of these courts was one of the most problematic features of the justice system, leading to lengthy delays between cases being charged, referred for trial by the Indictment Chamber and the start of the trial.[54] In too many cases relating to the crisis, proceedings have been pending for years post-charge. This reform could speed-up outstanding trials.[55] Further, the seat of the court may be changed on an exceptional basis.[56] This

[49] Article 22, Ivorian CPC 2018, *supra* note 31.
[50] Article 101, Ivorian CPC 2018, *supra* note 31.
[51] Chapter IV, Ivorian CPC 2018, *supra* note 31, Article 370 et seq.
[52] See Articles 232-235, old Ivorian CPC, *supra* note 30. The Courts are based in Abidjan, Yopougon, Bouaké, Bouaflé, Daloa, Man, Korhogo, Gagnoa and Abengourou.
[53] ICTJ, "Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire", April 2016, p.16, fn.97.
[54] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.
[55] However, it remains the situation that in general the criminal tribunals are only to sit every three months, though the President of the Tribunal may order one or more supplementary sessions in the same trimester, after obtaining the opinion of the Prosecutor of the Republic on the need to do so (Article 266, Ivorian CPC 2018, *supra* note 31).
[56] Article 265, Ivorian CPC 2018, *supra* note 31.

facilitates the transfer of court proceedings, for example, to respond to concerns over the security of witnesses or the accused in a particular locality.[57]

1.3 International co-operation

Investigating judges may issue rogatory letters to request assistance.[58] However, there are no specific provisions in the CPC or any other law regulating co-operation on the spontaneous exchange of information and admissibility of evidence from overseas before Ivorian courts. The only provisions dealing with foreign jurisdictions relate to crimes committed by foreigners[59] and the extradition of non-nationals.[60] Nevertheless, provisions on international co-operation in treaties ratified by Côte d'Ivoire may be applied, including the Rome Statute or the International Convention on Transnational Organised Crime.[61]

1.4 Defence rights

There has been significant reform concerning defence rights. The CPC of 2018 retains the existing rights of suspects, including the right to a lawyer throughout the investigation phase;[62] a right to inspect or obtain copies of the investigation file and acts of the investigative judge;[63] and the right to request that particular investigative acts be undertaken by the investigative judge.[64] However, it also provides for the

[57] Article 266, Ivorian CPC 2018, *supra* note 31.
[58] Articles 151-155, old Ivorian CPC 1960, *supra* note 30; Articles 188-192, Ivorian CPC 2018, *supra* note 31.
[59] Articles 658-665, old Ivorian CPC 1960, *supra* note 30; Articles 703-710, Ivorian CPC 2018, *supra* note 31.
[60] Loi du 10 mars 1927 relative a l'extradition des étrangers, *supra* note 7.
[61] UNTS vol. 2225, p.209, adopted by UN General Assembly Resolution 55/25 of 15 November 2000, entry in force 29 September 2003, Articles 18-19. UNTOC was ratified by Côte d'Ivoire on 25 October 2012.
[62] Articles 90 et seq, Ivorian CPC 2018, *supra* note 31.
[63] Article 99, Ivorian CPC 2018, *supra* note 31.
[64] Article 101, Ivorian CPC 2018, *supra* note 31.

opportunity to challenge the assignment of an investigating judge.[65] This enables a challenge to respond to concerns over partiality in a specific case. Further, the new CPC introduces additional time limits to improve efficiency and guarantee the right to an effective defence. This includes a maximum delay of 48 hours to notify the parties and their lawyers of a hearing for preventative detention;[66] and the right to be informed no less than eight days in advance of other hearings.[67] Any delay over 48 hours in bringing an arrested person before a judge in the case of preventative detention means the accused shall be immediately released.[68]

Nevertheless, there were already procedural safeguards in place for the use of preventative detention as an exceptional measure; the problem was in the non-application of the text.[69] As identified by the UN Independent Expert on the enhancement of capacity-building and technical co-operation with Côte d'Ivoire, Ivorian prisons, including the Abidjan Detention and Correctional Centre (MACA), are overcrowded and dilapidated with the frequent use of pre-trial detention one of the main causes of overcrowding.[70] As of 31 July 2017, prisons were running at 175% capacity, with 14,414 in detention in facilities with a capacity to hold 8,120. Of these, 5,314 persons were in preventative detention pre-trial (36.77%).[71] The situation

[65] Article 103, Ivorian CPC 2018, *supra* note 31.
[66] Articles 230 and 231, Ivorian CPC 2018, *supra* note 31.
[67] Article 231, Ivorian CPC 2018, *supra* note 31.
[68] See Articles 146 and 149, Ivorian CPC 2018, *supra* note 31.
[69] As defence counsel noted, "*once you are in detention, the text exists limiting the time you can be there but in practice someone can be there 3-4 years before being judged*" (Interview record 47 – Defence Counsel, 24 October 2018)
[70] UN, Report of the Independent Expert on the enhancement of capacity-building and technical co-operation with Côte d'Ivoire in the field of human rights, A/HRC/35/43, dated 19 May 2017, covering 28 May 2016 to 15 April 2017, at p.11, para.55.
[71] CNDHCI, 'Annual Report 2017 on the State of Human Rights in Côte d'Ivoire', published 2018, at p.6, copy with author.

has hardly changed since 2013[72] and deteriorated back to 2013 levels in 2018, with the National Human Rights Commission (CNDHCI) reporting that in the period January-April 2018, prisons were running at 189% capacity, with 15,025 in detention in facilities with a capacity to hold 7,970.[73] Of these, 5,507 were in preventative detention.[74] The MACA is particularly afflicted, operating at 383% capacity with a capacity of 1500 but actually housing 5,747 detainees, of which 2,280 are in preventative detention.[75] Countrywide, the majority of those in preventative detention were there for more than 18 months.[76]

This situation is inconsistent with Circular No. 005 of 6 April 2017 issued by the Ministry of Justice which emphasises the general principle is liberty of the person, with preventative detention to be used as an exceptional measure.[77] The shortage of personnel in detention centres gives rise to further risks regarding security and the conditions in detention.[78] However, a substantial advancement in terms of the prison infrastructure must not be forgotten. Even prior to the 2011-2011 crisis, only 3 of the 11 prisons in the north were operational since 2002 and all prisons in the south were damaged during the crisis and "essentially collapsed".[79] Accordingly, today's problems are of an entirely different nature.

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[72] CNDHCI, 'Annual Report 2013 on the State of Human Rights in Côte d'Ivoire', published 2014, at p.29, copy with author: reporting that 4,494 persons were detained in the MACA (Abidjan).
[73] CNDHCI, 'Report on the visit to the Detention and Correctional Centres of Côte d'Ivoire' ('*Rapport de visite des maisons d'arrêt et de correction de Côte d'Ivoire')*, January-April 2018, published 2018, at pp.3-4 ('CNDHCI Report on Prisons 2018').
[74] Ibid, at p. 5.
[75] Ibid, at p.5.
[76] Ibid, at p.6.
[77] Ibid, at p.6.
[78] Ibid, at p.7, relating that there are 2,469 penitentiary agents in Côte d'Ivoire for 15,025 detainees, a ratio of roughly 100 detainees per 10 guards, whereas there should be 6,010 guards to comply with a recommendation by the Committee against Torture.
[79] UN, 28th Report of the Secretary-General on the UN Operation in Côte d'Ivoire, S/2011/387, 24 June 2011, at pp.6-7, paras 24 and 31.

Moreover, alternative restrictive measures were introduced in the new CPC in a significant modernisation of the legal framework which may decrease the numbers in pre-trial detention. These measures include police surveillance and confiscation of travel documents, among other tools.[80] Considering the scale of overcrowding and the prevalence of reports of abuse and inhumane conditions in detention centres, the introduction of alternative measures could not come soon enough. In the event there is recourse to preventative detention or alternative restrictive measures, an explanation of the reasons must be given.[81] It is anticipated that the introduction of alternative measures will result in the proper use of preventative detention as an exceptional measure reserved for cases where judges consider there is a serious risk to the proceedings which cannot be mitigated by less intrusive means.

At the trial stage, while the defence always had the right to examine witnesses, it is clear there is now also a right to examine those co-accused.[82] There is now also a substantive right to appeal judgments on the merits.[83]

Côte d'Ivoire has also taken practical steps to strengthen fair trial guarantees by opening an office of judicial assistance, providing legal aid.[84] While its reach was initially limited to Abidjan, it now extends to rural areas.[85] It presents significant value as most counsel are based in Abidjan and the great distances and road

[80] See Articles 71-75 and 153-180, Ivorian CPC 2018, *supra* note 31.
[81] Article 97, Ivorian CPC 2018, *supra* note 31.
[82] Article 300, Ivorian CPC 2018, *supra* note 31.
[83] Article 363, Ivorian CPC 2018, supra note 31. Notably, this right is also bestowed on civil parties and the Prosecutor General may also appeal acquittals.
[84] See Ordre des Avocats, Barreau de Côte d'Ivoire, at: http://ordredesavocats.ci/FR/assistance.php.
[85] E.g. Bouake: Abidjan.net, 'Projustice remet un registre d'assistance judiciaire au tribunal de première instance Bouaké', 10 March 2015 ; Gagnoa: Agence Ivoirienne de Presse, 'Côte d'Ivoire: Le premier bureau local d'assistance judiciare ouvert à Gagnoa', 3 March 2018 ; Man: Agence Ivoirienne de Presse, 'Côte d'Ivoire: ProJustice équipe le bureau local d'assistance judiciaire du Tribunal de Man', 5 October 2017 ; Tabou: Ramedeci blog, 'Côte d'Ivoire: Un bureau local d'assistance judiciaire ouvert a Tabou', 31 May 2018.

infrastructure hampers their ability to reach remote clients. Unfortunately, the population generally remains unaware of this scheme, with multiple interviewees citing the lack of legal aid as one of the greatest obstacles to accessing justice in Côte d'Ivoire. Similarly, in a youth consultation, the absence of judicial assistance was among the reasons for a low perception of the justice system.[86] Another step forward is an ambitious programme to improve the court infrastructure, building more courthouses and installing technology.[87] This was, like other institutional reforms, initially delayed by a lack of resources but now appears to be progressing.[88] However, it remains to be seen when new courthouses in Abobo and Port-Bouet, Abidjan, will be open.[89]

1.5 Victim and witness protection

Investigating judges hear witnesses separately and outside the presence of the accused.[90] If they are unable to attend the hearing, the investigating judge may arrange transportation or for them to be interviewed locally by another judge or police officer.[91] However, defence counsel for the accused and civil parties must be notified and given a copy of witnesses' depositions to inspect within 24 hours.[92] Directly or indirectly influencing the judicial process by threatening or tampering with witnesses

[86] CNDHCI, 'Consultation des jeunes sur la gouvernance et les droits de l'homme: 'Le bruit assourdissant du silence des jeuenes', June 2018, at p. 9. However, there is a need to distinguish between the availability of judicial assistance for the accused in criminal matters, which these reforms address, and the availability of judicial assistance more broadly including to victims and in civil and family matters which remains wanting.
[87] See National Development Plan for Côte d'Ivoire 2016-2020, Action 3.1 (Part 3, page 10), Action 3.2 (Part 3, page 11), Action 3.3 (Part 3, page 12), and Action 3.4 (Part 3, page 12).
[88] E.g. Ivoire Times, "Côte d'Ivoire: Daloa, modernisation d'appareil judiciaire, du materiel informatique et bureautique à la cour d'appel", 20 February 2018.
[89] Interview record 52 – Actions pour la Promotion et la Défense des Droits de l'Homme (APDH), 25 October 2018.
[90] Article 102, old Ivorian CPC 1960, *supra* note 30; Article 123, Ivorian CPC 2018, *supra* note 31.
[91] Articles 110 and 151, old Ivorian CPC 1960, *supr*a note 302; Articles 131 and 188, Ivorian CPC 2018, *supra* note 31.
[92] Article 115, old Ivorian CPC 1960, *supra* note 30; Article 135, Ivorian CPC 2018, *supra* note 31.

is criminalised and the suspect's movement may be restricted to prevent it.[93] However, there are no formal witness protection measures within the CPC or Penal Code. Little has changed in this regard with the 2018 reforms. Once the case proceeds to trial, the court may order the hearings take place in closed session as a means of maintaining public order, which implicitly includes ensuring witneses' security.[94] The general power for the presiding judge to keep order in the court also permits other measures to be taken to protect witnesses;[95] however, the lack of specificity risks judges construing this narrowly.

Though a draft law on victim and witness protection was prepared in 2013,[96] the law was only adopted by the National Assembly on 7 July 2018, entering into force in November 2018 – Law on the protection of witnesses, victims, whistleblowers, experts and other concerned persons ("Law on Witness Protection").[97] One explanation given for the time it took to be passed is that of the ordinary legislative procedure in Côte d'Ivoire, a procedure with many bureaucratic hurdles.[98] In particular, according to a representative from the Department for Studies, Legislation and Documentation of the Ministry of Justice, the law was delayed because of the

[93] Articles 302 and 304 (3), old Ivorian Penal Code, *supra* note 27; Articles 327 and 329, Ivorian Penal Code 2019, *supra* note 32.
[94] Articles 306 and 390, old Ivorian CPC 1960, *supra* note 30; Articles 294 and 410, Ivorian CPC 2018, *supra* note 31.
[95] Article 391, old Ivorian CPC 1960, *supra* note 30; Article 411, Ivorian CPC 2018, *supra* note 31.
[96] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', supra note 53, p.26. Copies of the latest drafts from 2017 – Projet de loi relatif *à la protection des tèmoins et des victimes* (pre April 2017) and *Projet de loi relatif à la protection des tèmoins, des victims et tout autre personne concernée* (April 2017) are with the author.
[97] Law No. 2018-570 on the protection of witnesses, victims, whistleblowers, experts and other concerned persons (*Loi relative à la protection des tèmoins, victims, dénonciateurs, experts et autres personnes concernées*), adopted 7 July 2018, published in Official Gazette No. 91 dated 12 November 2018 ('Ivorian Law on Witness Protection').
[98] Interview record 46 – interviewee, Department for Studies, Legislation and Documentation (DELD), Ministry of Justice, 23 October 2018.

establishment of the new Senate which was also required to approve it.[99] It was also caught up with concerns over the budget needed to implement it. [100] However, it is very plausible that the law stalled as it became intrinsically linked with efforts to establish accountability for the post-election violence. An interviewee from the Ivorian NGO Observatoire Ivoirien des Droits de l'Homme (OIDH) considered the five years it took for a draft to be adopted was because "they wanted to ensure some groups don't take advantage of this law to engage prosecutions against government officials…the victims are scared to go to court for the pro-Ouattara. If we go back and say you can do it now they will say no. The time it has taken to adopt this law is very suspect".[101] Its final adoption may demonstrate renewed political will, were it not for the subsequent adoption of an amnesty, considered below.

The Law on Witness Protection provides for the establishment of a protection programme to preserve the life, physical and moral integrity of protected persons.[102] Protection extends not just to immediate witnesses but to persons in danger by association.[103] A range of procedural and other protective measures are foreseen, including anonymity, use of a pseudonym, screening, face and voice distortion, video-link testimony, closed hearings and family relocation.[104] Time will tell as to the political willingness to put this into practice with the establishment of a National

[99] Interview record 46 – interviewee, Department for Studies, Legislation and Documentation (DELD), Ministry of Justice, 23 October 2018.
[100] Interview record 46 – interviewee, Department for Studies, Legislation and Documentation (DELD), Ministry of Justice, 23 October 2018.
[101] Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.
[102] Article 3 and 11, Ivorian Law on Witness Protection, *supra* note 97.
[103] Article 1, Ivorian Law on Witness Protection, *supra* note 97.
[104] Articles 13 to 15, Ivorian Law on Witness Protection , *supra* note 97.

Agency for the Protection of Witnesses, Victims and Other Concerned Persons (ANP), appointment of qualified personnel and allocation of resources.[105]

1.6 Transitional justice framework

The legislature of Côte d'Ivoire has consciously chosen not to adopt a specific transitional justice law. It is apparent that the debate focused on the concept of 'transitional'. The Government considers the country requires a long-term solution with the modernisation of existing codes preferred over a special process limited in duration and remit.[106] While this approach addresses the realities of Côte d'Ivoire as a developing country, it has meant an unco-ordinated response to the crisis. Further, the debate continues over how to address victims' reparations. A Law on the Status of Victims of War was recommended by the National Commission for Reconciliation and the Reparation of Victims (CONARIV), borne out of extensive consultation with civil society and victims' associations. The draft covers victims' identification, verification, types of reparations and the procedure for disbursement.[107] However, the Government has opted for a non-judicial approach, addressing reparations through executive discretion rather than by specific legislation and judicial oversight.[108]

1.7 Conclusion

Some interviewees considered the ICC's engagement has had no influence on domestic judicial reform.[109] Yet, legislative reforms in Côte d'Ivoire were clearly

[105] Article 4, Ivorian Law on Witness Protection, *supra* note 97.
[106] Interview record 25 – interviewee, Ministry of Women, Protection of Children and Solidarity, 29 March 2018; Interview record 46 – interviewee, Department for Studies, Legislation and Documentation (DELD), Ministry of Justice, 23 October 2018.
[107] Annex IX to CONARIV, Report of Activities, March 2016 (copy with author).
[108] Interview record 46 – interviewee, Department for Studies, Legislation and Documentation (DELD), Ministry of Justice, 23 October 2019.
[109] Interview record 13 – Prosecutor, Côte d'Ivoire, 21 March 2018 (asserting *"we don't depend on them to make our actions, there is no influence on their part.").*

influenced by the ICC, particularly revision of the Penal Code to harmonise domestic law with the Rome Statute. The objective was to demonstrate that Côte d'Ivoire is able to investigate and prosecute cases of interest to the ICC at the national level with the same international legal qualification of the offence, to support an admissibility challenge. At the time this was directly linked to the *Simone Gbagbo* case.[110] However, other circumstances indicate that the Government was also alert to the prospect of the OTP opening cases against the pro-Ouattara. Most interviewees considered the reform positively, with defence counsel noting: "since there is this text, it is a text of opportunity. (…) If there are persons to pursue, let's pursue them. It's the application of this text. It would serve for nothing to send these people to the ICC."[111]

Nevertheless, this reform was part of wider efforts by Côte d'Ivoire to modernise its judicial system to meet its international commitments, not only regarding the ICC.[112] Most interviewees considered that the ICC had no bearing on any legislative reforms aside from the Penal Code.[113] The impulse was attributed to a very active civil society network in Côte d'Ivoire as well as capacity-building assistance provided or supported by the UN Mission in Côte d'Ivoire (UNOCI), USAID, EU, the ICTJ and

[110] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 14 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.
[111] Interview record 47 – Defence Counsel, 24 October 2018.
[112] Interview record 25 – interviewee, Ministry of Women, Protection of Children and Solidarity, 29 March 2018; Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[113] Interview record 47 – Defence Counsel, 24 October 2018.

development NGOs.[114] Further, rather than the ICC's proceedings in itself catalysing the reforms, the ICC's engagement merely sped up reforms already planned.[115]

2. Judicial Functioning – Catalysing Domestic Proceedings

This section examines judicial mechanisms, truth commissions and administrative bodies addressing the crisis and the ICC's impact in catalysing domestic proceedings.

2.1 National Commission of Inquiry ("CNE")

The CNE examined human rights and humanitarian law violations between 31 October 2010 and 15 May 2011.[116] Chaired by Loma Cissé Matto, it comprised 17 members from the Government, National Assembly, judiciary and victims' associations.[117] In its Summary Report of July 2012, the CNE concluded that violations were committed by both sides, including crimes against humanity.[118] The CNE identified 3,248 cases of summary execution, of which 538 were perpetrated by the FDS.[119] Considering violations of the right to life as a war crime, it concluded that 1,452 cases were perpetrated by pro-Gbagbo forces while 727 cases were attributed to the FRCI, affiliated with Ouattara.[120] It attributed further unlawful killings to non-

[114] Interview record 36 – interviewee, Réseau Action Justice et Paix (RAJP), 16 October 2018; Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[115] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI, 26 March 2018 ; Interview record 42 – interviewee, Agir pour la Democratie, la Justice et la Liberte en Côte d'Ivoire, 19 October 2018.
[116] Presidential decree 2011-176 of 20 July 2011.
[117] Specifically, representatives of the Office of the Prime Minister, Ministry of Interior, Ministry of Human Rights and Public Liberty, Ministry of Family, Women and Youth, Ministry of Ex-Combatants and Victims of War, National Assembly, Conseil Supérieur de la Magistrature, a representative from each of the order of Advocates and Doctors, and victims' representatives for internally displaced persons (IDPs) and dead victims – National Commission of Inquiry (Commission Nationale D'Enquete (CNE)), Côte d'Ivoire, Summary Report (Résumé), titled 'Rapport d'enquête sur la violations des droits de l'homme et du droit international humanitaire survenues dans la période du 31 octobre 2010 au 15 mai 2011' (Report of the inquiry on the violations of human rights and humanitarian law in the period 31 October 2010 to 15 May 2011), July 2012, (French only), at p.1.
[118] CNE, Summary Report, ibid, at p.24.
[119] Ibid, at p.12.
[120] Ibid, at p.30.

State armed groups, including Dozos. It also found 196 cases of sexual and gender-based violence, 8,441 cases involving violations of physical integrity and security of the person, 8,222 forced disappearance cases and 15,583 concerning property violations.[121] After the CNE identified perpetrators from both sides in a confidential annex, the Prime Minister declared they would all be prosecuted.[122]

2.2 Special Investigation and Examination Unit ("Cellule")

2.2.1 Mandate

The Cellule Spéciale d'Enquête ("CSE") included prosecutors, investigative judges and police investigators, headed by the Prosecutor of the Republic.[123] Investigative judges, Delphine Makoueni Cisse, Losséni Cisse and Mamadou Kone, from the 8th, 9th and 10th Cabinet of the Tribunal of First Instance of Abidjan-Plateau, were appointed in October 2011.[124] Its mandate lapsed in September 2013 with a significant risk its work would end as the Government initially considered its cases could be handled by the regular institutions.[125] However, following advocacy by civil society and donors, the unit was not only renewed but installed permanently, attached to the Tribunal of First Instance of Abidjan but located off-site.

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[121] Ibid, at pp. 14 and 20.
[122] Speech by Jeannot Kouadio Ahoussou on 29 October 2012: reported in FIDH, Press Release, "Côte d'Ivoire: Justice to combat human rights violations and insecurity, 30 October 2012.
[123] Order No. 020/MEMJ/DSJRH/MEF dated 24 June 2011 on the creation, attributions, composition and functioning of a Special Investigation Unit relative to the post-electoral crisis, supra note 42.
[124] Decree No. 2011-232 of 24 October 2011 on the nomination of magistrates to the seats of the tribunals of first instance, their sections, detachments and prosecution offices and detached sections (Decret no. 2011-232 du 24 Octobre 2011 portant nomination de magistrats aux sieges des tribunaux de premier instance, de leurs sections, detaches et aux parquets pres lesdits tribunaux et sections detaches), published in Official Journal No. 51 of 22 December 2011.
[125] Abidjan.net, Le Patriote, "Débat autour de la suppression de la Cellule Spéciale d'Enquête/Bruno Nabagné Koné: 'Il n'ya plus de raison de la maintenir", 24 October 2013.

While the permanent Special Investigation and Examination Unit (Cellule Spéciale d'Enquête et d'Instruction) was established in December 2013,[126] there were delays while the Minister of Justice appointed personnel.[127] It initially included four prosecutors, three investigative judges, 10 judicial police officers (JPOs) from the Gendarmerie and National Police and a Secretariat, again under the Prosecutor's authority.[128] However, rather than extend existing judges, prosecutors and JPOs assigned to the CSE, it was stripped of most with institutional knowledge.[129] The judges, two prosecutors and several investigators were transferred. New investigating judges were assigned at the end of 2013, along with several new prosecutors and JPOs. However, the new judges were only officially in place from June 2014.[130] This hindered the Cellule from being fully operational during this time.[131]

The Cellule's mandate is broad, extending not only to crimes during the 2010-2011 crisis but also all incidents since 2002-2003 or connected cases after the end of the crisis on 21 May 2011.[132] The Cellule does not have exclusive competence but in

[126] Decree No. 2013-215 of 30 December 2013, *supra* note 43. See also enforcement orders: Order No. 579/MJDHLP/MPMEF/MPMB of December 12, 2014; and Order No. 202 MP/MPMEF/DGTCP/DEMO of September 12, 2014.
[127] Decree No. 226/CPMGDSMJ/DSJ of June 2, 2014 on Appointment of the members of the Cellule Spéciale d'Enquête et d'Instruction (Arrête No. 226/CPMGDSMJ/DSJ du juin 2014 portant nomination des membres de la Cellule Spéciale d'Enquête et Instruction), copy with author; Order No. 579/MJDHLP/MPMEF/MPMB of December 12, 2014, ibid; and Order No. 202 MP/MPMEF/DGTCP/DEMO of September 12, 2014, ibid. See FIDH, 'Côte d'Ivoire: Choosing between Justice and Impunity', *supra* note 22, at pp.10-11.
[128] FIDH – Fédération Internationale pour les droits humains, MIDH Mouvement Ivoirien des Droits Humains and LIDHO- Ligue Ivoirienne des Droits de L'homme, 'Ivory Coast: The Fight against Impunity at a Crossroads', No. 617a, October 2013, at p.12.
[129] RFI, 'Côte d'Ivoire: amputée, la cellule spéciale d'enquête perd encore de son efficacité', 24 June 2013.
[130] Decree No. 226/CPMGDSMJ/DSJ of June 2, 2014 on Appointment of the members of the Cellule Spéciale d'Enquête et d'Instruction, supra note 127.
[131] FIDH, 'Ivory Coast: For a genuinely operational Special Investigation Unit', 16 May 2014. Further, a Financial Controller solely assigned to the Cellule was only in place by September 2014, with the Administrative and Financial Controller of the Ministry of Justice wearing two hats until then: ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, p.11, fn. 44.
[132] Article 2, Decree No. 2013-215 of 30 December 2013, supra note 43; Article 2, Decree No. 2016-543 of 20 July 2016, *supra* note 43.

reality it is now the only body in the civilian justice system handling such cases.[133] As a prosecutor elsewhere stated, "they have done quite a lot of work. If we have trials after the post-election crisis it is the work done by this unit".[134]

Following a terrorist attack in Grand Bassam in 2016,[135] its mandate was expanded to include counter-terrorism, renamed the Special Unit for Investigation, Examination and the Fight against Terrorism (Cellule Special d'Enquête, d'Instruction et de lutte contre le terrorisme).[136] This recognises the special competence of its staff in handling complex crimes. Yet, no additional resources were provided. Only two judges worked exclusively on PEV cases even prior to this, with the judge of the 8th Section also having a managerial role as the Dean of Judges.[137] Army mutinies in 2017 further diverted resources as related cases were also assigned to the Cellule.[138] The second investigative judge of the 10th Section was replaced in October 2018, again resulting in loss of institutional knowledge.

2.2.2 Strategy

There was no case mapping done at the outset, with time lost from the way cases were joined.[139] As the ICTJ highlights, initially "[i]nvestigations were not grouped according to perpetrator, location, or type of victim. Instead, (…) any new

[133] In 2018, the researcher also interviewed Ivorian prosecutors who previously worked on post-election violence cases in regional prosecution offices but are now assigned to general criminal cases.
[134] Interview record 15 – Prosecutor, Côte d'Ivoire, 22 March 2018.
[135] BBC News, 'Ivory Coast: 16 dead in Grand Bassam beach resort attack', 14 March 2016.
[136] Decree No. 2016-543 of 20 July 2016, supra note 43.
[137] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', supra note 53, p.12.
[138] Interview record 9 – Interviewee, ICTJ, 13 March 2018.
[139] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', supra note 53, p.14 ("The Public Prosecutor does not appear to have defined a prosecutorial strategy or undertaken a mapping of the crimes that had been committed. Consequently, the Public Prosecutor apparently did not prioritize some prosecutions over others, but rather submitted all cases to investigating judges").

investigation was simply added to an existing case, with no consideration of whether the facts were connected".[140] This meant it was "possible to find a single case involving 15 sub-cases concerning different events and crimes with up to 120 defendants."[141] Many cases overlapped but were initially investigated separately, duplicating work.[142] Thereafter, prosecutors considered cases geographically, but re-categorised them by offence for allocation to the judges: 8th Section -'attacks on State security'; 9th Section - 'blood crimes', including unlawful killing, rape and assault; and 10th Section - 'economic crimes', including pillaging, theft or looting.[143] The Prosecution Office reported that it had registered 147 victims of blood crimes in the ten days since the Cellule's opening on 12 July 2011, with more victims and witnesses invited to come forward.[144]

Aside from criminal complaints, the Cellule also used the CNE's report as the basis for investigations.[145] Cases from this, all assigned to the 9th Section, included 3,248 cases of loss of life, 196 rape cases, 8,441 cases concerning the violation of physical or mental integrity and 5,583 cases concerning the violation of property rights. These

[140] Ibid, p.14.
[141] Ibid, p.14.
[142] Ibid, p.14 ("Investigating judges of the CSEI had to face a large number of cases that were ill-conceived at the preliminary investigation stage. Because Ivorian criminal law requires investigating judges to investigate all the facts submitted to them in the Prosecutor's request to investigate, investigations were extremely difficult. Some people, for example, found that acts were investigated twice as part of different cases with some involving the same perpetrators, thereby increasing the CSEI's workload").
[143] FIDH, MIDH and LIDHO, 'Ivory Coast: The Fight against Impunity at a Crossroads', supra note 128, at p. 14. Also cited in: ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, p.14.
[144] Communique of Prosecution Office of Abidjan, by Substitute Prosecutor Noel Y.E. Dje, Spokesperson for Prosecutor of the Republic, dated 22 July 2011. It also reported that another 26 accused for crimes against State security and 17 accused for economic crimes were charged and detained, with international arrest warrants issued for a further seven persons. Letters of request were also issued to 14 countries in West Africa, alongside France, Belgium, Canada and Israel.
[145] OIDH, Colloquium in Abidjan, Côte d'Ivoire on 'Complémentarite et Coopération pour une meilleure efficacite de la Justice Penale International en Afrique', 11-12 May 2017, Compilation of Presentations, Presentation by Ernest Kouassi, Substitute Prosecutor, Cellule, 'Experience de domestication du Statut de Rome et de la cooperation internationale', May 2017, p. 27.

figures are not easily reflected in the Cellule's statistics because all incidents were initially opened as only one, extremely unwieldly, case for investigation.[146] Since it related to crimes on a mass-scale in different localities in Côte d'Ivoire by different groups of perpetrators, it is unsurprising it was necessary to sever the case.[147] The Ivorian CPC applicable at the time did not expressly foresee this, but the judges applied a modern construction.[148] When the case was severed for manageability, files were grouped by author and time period.[149]

Further case mapping was done in 2013.[150] A Prosecution Strategy was adopted for the prioritisation of cases, though it was not made public.[151] Cases were sequenced as follows: (1) persons in detention; (2) persons under house arrest; (3) pro-Gbagbo accused of attacking the FRCI after the crisis; (4) other persons incriminated by victims' testimony obtained by JPOs; (5) other perpetrators of serious crimes who were at liberty; and (6) the perpetrators of less serious offences.[152] There was a shift to take into account the gravity of the crimes after the Cellule was criticised for spending too much time and resources investigating ordinary offences.[153]

While the initial focus on suspects in detention is much criticised, it shows respect for human rights. The reality is that only the pro-Gbagbo were in detention, meaning

[146] Ibid, p.28.
[147] Ibid, p.27-28.
[148] Interview record 44, Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[149] Interview record 44, Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[150] Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018.
[151] Interview record 9 – interviewee, ICTJ, 13 March 2018; Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018; Interview record 44 – Investigative Judge, Special Inquiry and Investigative Unit, 23 October 2018.
[152] See ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', supra note 53, p.22). Modified slightly to specify the additional gravity criteria following interviews with members of the Special Investigation Unit in 2018.
[153] Ibid, p.32.

early investigations concerned one side, inevitably giving the impression of victor's justice and weakening the Cellule's credibility as a fair and impartial mechanism.[154] Nevertheless, it is a pragmatic approach given the absence of protective measures for victims and witnesses in the Ivorian CPC and the long delayed adoption of a specific law.[155] Victims and witnesses to abuses committed by those loyal to Ouattara are fearful of coming forward and in the security climate that prevailed in the early days of the Cellule's work, realistically, it would have put them at direct risk of harm to proceed publicly until the country stabilised. Moreover, detainees were physically available to the judges, whereas it was not clear that arrest warrants would be executed against the pro-Ouattara if they ignored summonses to attend.

However, a further issue is the lack of prioritisation of SGBV cases. Rape cases were included in the CNE report used as the basis for further investigation. Further SGBV cases were lodged with the Cellule by civil parties and NGOs, for example, further to a project initiated by AFJCI, 70 victims from Yopougon and Abidjan were referred to the Cellule following medical examination and legal assistance.[156] More victims were referred by OFACI and FIDH.[157] As the Cellule's work is the first time sexual violence has been truly taken into consideration, this is welcomed as an achievement in itself.[158] However, while gravity was adopted as one criterion to focus investigations; SGBV is not recognised as a special category requiring prioritisation. The delays in progressing these cases will have long-term consequences, with rates of

[154] Interview record 9 – interviewee ICTJ, 13 March 2018.
[155] See ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, p.31, with reference to this rationale being given by the Public Prosecutor of Abidjan and a representative of the Ministry of Justice in interviews conducted in mid-2014.
[156] Interview record 20 – Association des Femmes Juristes deCôte d'Ivoire (AFJCI), 27 March 2018.
[157] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.
[158] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.

sexual violence escalating since the crisis.[159] Further, little to no information has been provided to the victims or NGOs on progress.[160] As one interviewee stated, "women have been heard since 2014 and up to now nothing has been done. We are waiting to know. We become like a beacon of hope for them and if nothing is done they won't trust in justice anymore". [161]

As of April 2014, the Cellule had handled 61 cases relating to the crisis, concerning 1,038 accused.[162] 517 defendants were in pre-trial detention.[163] According to further figures from the Ministry of Justice in November 2014 reported by APDH, 76 cases had been opened overall, with 69 investigations concluded and seven outstanding.[164] In May 2017, it was related that the Cellule had so far handled 66 cases.[165] From these, 39 cases had been judged and 22 cases were pending trial following indictment.[166] A further six cases remained under investigation, including files IR 8 and 32/2012 concerning international crimes committed during, or linked to, the crisis.[167] The discrepancy in the figures with those from 2014 appears to relate to whether cases are counted in their original form or after severance. The outstanding

[159] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.
[160] Interview record 20 – Association des Femmes Juristes de Côte d'Ivoire (AFJCI), 27 March 2018; Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.
[161] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.
[162] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, Annex 3, p.40.
[163] Ibid.
[164] APDH, ''Côte d'Ivoire: Une justice transitionnel piegée?', Report on Transitional Justice in Côte d'Ivoire', 2015, at p.25.
[165] Ernest Kouassi, Substitute Prosecutor, Cellule, 'Options et stratégies poursuits au niveau national par le CSEI', OIDH Colloquium, *supra* note 874, at p. 27.
[166] Ibid.
[167] Ibid.

cases are large, comprising incidents throughout Côte d'Ivoire involving a huge number of victims and perpetrators.[168] Many perpetrators are still to be identified.[169]

2.2.3 Professional competence

In terms of selection and appointment, an ICTJ interviewee was unaware "of any process of scrutiny conducted to select the best and impartial police and prosecutors for the special investigation cell".[170] However, interviewees from LIDHO clarified "the recruitment process was done; they took the best and then did capacity-building".[171] Prosecutors confirmed this.[172] Prosecutors and judges in Côte d'Ivoire do not specialise and receive the same training at formation limited to national law, with continuous professional education subject to individual initiative.[173] Those assigned to the Cellule are the exception and are specially trained in international criminal law, humanitarian law and human rights and conducting complex investigations.[174] The Cellule's prosecutors and judges are very competent, with one senior judge opining that "the Cellule is led by a magistrate with a lot of experience; he is one of the best of his generation".[175]

[168] The author submitted an official request for updated statistics in October 2018 and February 2019 including on the impact of the amnesty, but no response was received as of the date of this thesis.
[169] Ibid, at p.29.
[170] Interview record 9 – interviewee, ICTJ, 13 March 2018.
[171] Interview record 35 – Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018.
[172] Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018.
[173] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 15 – Prosecutor, Côte d'Ivoire, 22 March 2018; Interview record 22 – Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018; Interview record 20 – Association des Femmes Juristes deCôte d'Ivoire (AFJCI), 27 March 2018.
[174] Interview record 9 – interviewee, ICTJ, 13 March 2018; Interview record 40 – Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.
[175] Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018.

The judicial police in Côte d'Ivoire are also fairly well regarded in terms of their professional competence.[176] They comprise different units – the police, gendarmerie and enforcement officers, with the gendarmerie considered by some to be the best equipped to conduct investigations.[177] This is in stark contrast to other police units, especially the traffic police or Directorate of Territorial Surveillance (DST), with whom some interviewees reported bad experiences. Prosecutors related that judicial police are used to "making miracles", considering the resources available to them.[178] Most interviewees considered the JPOs assigned to the Cellule as the most competent, given their specialist training and based on their interaction with them.[179]

Nevertheless, there is a need for capacity-building in investigating SGBV, including best practices in how to approach, interview and protect victims to obtain their best evidence.[180] These Cellule cases have stalled. Many victims refused to lodge a complaint due to cultural sensitivities and fear as perpetrators remain at large.[181]

[176] Interview record 10 – former international staff member, UNOCI, 15 March 2018; Interview record 14 - Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 16 - Prosecutor, Côte d'Ivoire, 22 March 2019; Interview record 20 – Association des Femmes Juristes deCôte d'Ivoire (AFJCI), 27 March 2018; Interview record 42 – Agir pour la Democratie, la Justice et la Liberte en Côte d'Ivoire (ADJL-CI), 19 October 2018; Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018; Interview record 53 – human rights defender, Regroupement des Acteurs Ivoiriens des Droits de l'Homme (RAIDH), 26 October 2018.
[177] Interview record 15 - Prosecutor, Côte d'Ivoire, 22 March 2018.
[178] Interview record 17 - Prosecutor, Côte d'Ivoire, 23 March 2018; Interview record 13 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[179] Interview records 26 and 27 – victims, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018; Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018; Interview record 40 – Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.
[180] Interview record 22 – Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.
[181] Interview 20 – Association des Femmes Juristes deCôte d'Ivoire (AFJCI), 27 March 2018.

2.2.4 National cases against Gbagbo and Blé Goude

Gbagbo was arrested and detained on 11 April 2011.[182] Preliminary investigations commenced on 29 April 2011,[183] with a judicial investigation formerly opened on 13 May 2011 for crimes against State security.[184] On 18 August 2011, another investigation was opened for economic crimes. The ICC's arrest warrant was issued 23 November 2011, following the OTP's application of 25 October 2011, subsequent to these national proceedings.[185] Gbagbo was then interviewed by Judge Cissé in the economic crime case,[186] and summoned to the Accusation Chamber for a detention review.[187] However, in Abidjan he was notified of his arrest concerning the ICC's warrant and put on a plane.[188] It was later revealed that Prosecutor Moreno-Ocampo had met with Ouattara in Paris on 26 November 2011 when Gbagbo's transfer was apparently agreed.[189] It is not clear if the investigative judge was made aware of the transfer planned by the executive. Although Gbagbo was transferred to the ICC, he was tried and convicted in absentia in the State security case.[190]

The Blé Goudé investigation was opened by the investigative judge in Abidjan on 6 February 2012 for crimes against the civilian population, including genocide, crimes

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[182] The Guardian, 'Ivory Coast's Laurent Gbagbo arrested – four months on', by Xan Rice and Nicholas Watt, 11 April 2011.
[183] ICC, PTC III, Situation in Côte d'Ivoire, OTP, 'Prosecution's provision of additional information in relation to its request for authorisation of an investigation pursuant to Article 15', ICC-02/11-7-Red, 16 August 2011, at para.10.
[184] Noted in Report of the Independent Commission of Inquiry on Côte d'Ivoire, Report A/HRC/17/48, dated 1 July 2011 (French version), at p. 21.
[185] ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo*, Pre-Trial Chamber III, 'Warrant of Arrest for Laurent Gbagbo', ICC-02/11-26, dated 23 November 2011.
[186] Jeune Afrique, 'Côte d'Ivoire: Gbagbo auditionné par la justice pour les 'crimes économiques'', 29 November 2011.
[187] La Dépêche d'Abidjan, 'Côte d'Ivoire: les secrets du transfert de Gbagbo à la CPI', 15 December 2011.
[188] Sky News, 'Ivory Coast's Ex-President Sent to The Hague', 30 November 2011; and Le Rop, Côte d'Ivoire/CPI, 'Laurent Gbagbo est parti pour La Haye', 29 November 2011.
[189] La Dépêche d'Abidjan, 'Côte d'Ivoire: les secrets du transfert de Gbagbo à la CPI', 15 December 2011.
[190] Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018.

against humanity, murder, attacks on individual liberty, bodily injury and instigating tribalism and xenophobia ("blood crimes" case). Blé Goudé was heard on 21 January 2013[191] and 30 January 2013.[192] However, a further interview planned in August 2013 had to be postponed for security reasons after the plan was reported in the press and on social media.[193] It took place later in 2013, prior to his transfer to the ICC.

Now Gbagbo and Blé Goudé have been acquitted by the ICC,[194] subject to the Prosecutor's appeal,[195] it is envisaged they will return to Côte d'Ivoire. However, Côte d'Ivoire has wasted no time. Blé Goudé was charged for crimes against humanity in October 2019, with a trial beginning before the Abidjan Court of Assize in his absence in December.[196] It is unclear if the case falls foul of ne bis in idem.

2.2.5 Simone Gbagbo and other pro-Gbagbo accused

Prior to the Cellule's establishment, an investigation had already been initiated against Simone Gbagbo and others by the Prosecutor of the Republic in May 2011 for crimes against State security.[197] Thereafter, the case was handled by the judge of the

[191] Yakocotedivoire.over-blog.com, 'Inculpe pour crimes de guerre, assassinat, volen reunion: Ble Goude au juge 'je rejette categoriquement ces accusations'', 22 January 2013.
[192] Afrique News Info, 'Côte d'Ivoire: Charles Blé Goudé répond 'je n'ai fait aucun deal avec le pouvoir d'Abidjan', 31 January 2013.
[193] Abidjan.net, Notre Voie, 'Prévue pour hier devant le juge d'instruction: L'audition de Blé Goudé n'a pas eu lieu', 29 August 2013.
[194] ICC, Situation in Côte d'Ivoire, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber I, Reasons for the oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion, ICC-CPI-02/11-01/15-1263, 16 July 2019.
[195] ICC, Situation in Côte d'Ivoire, *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, OTP, 'Corrected Version of Prosecutor's Notice of Appeal', 16 September 2019, motioning the Appeals Chamber to declare a mistrial. See also ICC, Situation in Côte d'Ivoire, *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, OTP, 'Public redacted version of "Prosecution Document in Support of Appeal", ICC-02/11-01/15-1277-Conf', ICC-02/11-01/15-1277-Red, 17 October 2019.
[196] Jeune Afrique, Vincent Duhem, 'Côte d'Ivoire: Charles Blé Goudé bientôt poursuivi à Abidjan?', Abidjan, 23 October 2019; RFI, 'Côte d'Ivoire: ouverture du procès de M. Blè Goudè pour crimes contre humanité', 18 December 2019.
[197] Noted in Report of the Independent Commission of Inquiry on Côte d'Ivoire, *supra* note 184, at 21.

8th Cabinet attached to the Cellule. The case of Simone Gbagbo and 82 others was referred to the Accusation Chamber and sent for trial in August 2013.[198] On 18 August 2011, another investigation against Simone and many of the same accused was opened for economic crimes by the judge of the 10th Section. In turn, a blood crimes case was opened on 6 February 2012 by the third judge with 134 suspects.[199]

Simone was summoned for an interview by Judge Koné of the 10th Section on 13 and 14 November 2012.[200] The ICC unsealed its arrest warrant on 22 November 2012. Simone was summoned for interview again in December 2012 by another investigative judge.[201] She declined to answer questions, asking for more time to consult defence counsel. The three related investigations were then joined by the Accusation Chamber on 15 February 2013, thereafter to be handled by the 8th Section.[202] On 30 September 2013, Côte d'Ivoire lodged its admissibility challenge since she was being investigated and prosecuted nationally.[203] Following the change of personnel at the reconstituted Cellule, Simone was summoned again in February 2014 by the new investigative judge. The interview took place over four days on 9 and 10 September and 2 and 3 October 2014.[204] It could not take place earlier as the accused was detained in Odienné and local travel conditions were too difficult.[205]

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[198] FIDH, 'Côte d'Ivoire: Choosing between Justice and Impunity', supra note 22, at p.14.
[199] FIDH, 'Côte d'Ivoire: Choosing between Justice and Impunity', *supra* note 22, at pp.17-18, information correct as of 30 November 2014.
[200] RFI Afrique, 'Côte d'Ivoire: Chronologie des tournaments judiciaires de la famille Gbagbo', 12 December 2014.
[201] PTC Decision on Côte d'Ivoire's Admissibility Challenge, supra note 24, at paras 62-73.
[202] FIDH, MIDH and LIDHO, 'Ivory Coast: The Fight against Impunity at a Crossroads', *supra* note 128, at p.15.
[203] Côte d'Ivoire's Admissibility Challenge to the Simone Gbagbo case, *supra* note 23.
[204] PTC Decision on Côte d'Ivoire's Admissibility Challenge, *supra* note 24, at para.73.
[205] ICC, Pre-Trial Chamber I, Situation in Côte d'Ivoire, *Prosecutor v Simone Gbagbo*, Defence, 'Response on behalf of Simone Gbagbo to the request of the Republic of Côte d'Ivoire on the admissibility of the case of Prosecutor v Simone Gbagbo and request for suspensive effect pursuant to Articles 17, 19 and 95 of the Rome Statute', ICC-02/11-01-12-39, 8 April 2014, at para 29 (hereafter 'Simone Gbagbo Defence Response to Admissibility Challenge').

Notwithstanding her final hearing, the bulk of the investigation was conducted by the prior investigative judges. Indeed, this has been emphasised by the Cellule's current personnel.[206] Current personnel have received additional training in leading complex investigations and international criminal law and have learned from the experience handling such cases since 2014. This should be borne in mind when considering criticism levied against the conduct of the investigation, examined below, which may have led to her acquittal in the blood crimes case.[207] The proceedings against Simone were severed to try her separately. However, the case was rushed in response to the ICC and further investigation was necessary for trial readiness. Years later, her co-accused are still to be tried. The economic crimes case also remains pending.

2.2.6 "Own side" investigations

The Cellule has investigated individuals from both sides. While it is hard to identify members of the militia and mercenaries who took part in the atrocities at Duékoué, several suspects from the FRCI are commonly known. Indeed, both official reports and social media videos place them in the vicinity of the Carrefour neighbourhood in March 2011. The difficulty for the Cellule is that most still occupy military positions and/or are supported by the local authorities in their areas. Those accused include Lieutenant Colonel Issiaka Ouattara ("Wattao"), formerly Com Zone for Séguela;[208] Lieutenant Daouda Koné ("Konda") deployed in the vicinity of Duékoue from March 2011 until the end of 2012;[209] Lieutenant Coulibaly ("Ben Laden"), Com Zone in

[206] Ernest Kouassi, Substitute Prosecutor, Cellule, 'Options et stratégies poursuits au niveau national par le CSEI', OIDH Colloquium, *supra* note 145, at p. 27.
[207] Judgment of the Court of Assize of Abidjan-Plateau, Côte d'Ivoire, in the case of Simone Gbagbo (Blood Crimes case) of 28 March 2017 – Arrêt No. 36/16 du 28 mars 2017, Cour d'Appel d'Abidjan, Cour d'Assises seant Abidjan 1ère Session d'Année 2015-2016, Ministere Public v Ehivet Simone Gbagbo (accusee de crime contre les prisonniers de guerre (crime de guerre) et crime contre l'humanite).
[208] FIDH, 'Côte d'Ivoire: Choosing between Justice and Impunity', *supra* note 22, p.8.
[209] Ibid, pp. 18-19.

Odienné; Losseini Fofana ("Loss"), Com Zone for Man; Dramane Traore, Com Zone in Touba; and Lieutenant Nadia Koné, deployed in the vicinity of Duékoue.[210]

The earliest investigation into atrocities in the West, including Duékoué, was opened by the Prosecutor General of Daloa in April 2011 on the Minister of Justice's referral, addressing criticism by UNOCI.[211] This included interviewing witnesses to crimes committed by the pro-Ouattara.[212] However, it remained preliminary.[213] The events in Duékoué were also examined by the CNE.[214] On 6 November 2012, after the Cellule's establishment, Judge Losseni Cissé opened an investigation into all crimes in the CNE's report, case RI No. 38/12, including acts attributed to the pro-Ouattara.[215] Victims registered as civil parties were interviewed by investigators in Duékoue in October 2012 and Abidjan in February 2013.[216] Amadé Ouérémi was arrested and detained in May 2013[217] and interrogated by the judge in June 2013.[218] Ouérémi led a militia alligned with the FRCI.[219] He reportedly confessed to his

[210] Ibid, p.19.
[211] Communique No. 003/04/2011 du Ministre d'Etat, Garde des Sceaux, Ministre de la Justice et des Droits de l'Homme, Jeannot Ahoussou-Kouadio, 2 April 2011.
[212] Human Rights Watch, Côte d'Ivoire, 'They Killed Them Like It Was Nothing: The Need for Justice for Côte d'Ivoire's Post-Election Crimes', New York, October 2011, at pp.114-115.
[213] Notably, in the OTP's submission of additional information to Pre-Trial Chamber III in support of its request to open an investigation into the Situation in Côte d'Ivoire, the Prosecutor relates that "*the Daloa Prosecutor stated that he does not intend to prosecute or issue warrants of arrest before receiving further instructions on the overall prosecutorial strategy from the Ministry of Justice. It is the understanding of the Daloa Prosecutor that the persons most responsible for the most serious crimes will be prosecuted before the ICC. He further noted that at this stage the domestic authorities do not have the capacity to arrest individuals and to detain them in a safe manner*": ICC, Situation in Côte d'Ivoire, OTP, 'Prosecution's provision of additional information in relation to its request for authorisation of an investigation pursuant to Article 15', ICC-02/11-7-Red, 16 August 2011, at para.18.
[214] CNE, Summary Report, supra note 117, at pp.11 and 23 (Duekoue), 12-22 and 25 statistics for Guemon. The CNE reported that 982 persons came forward and registered from the Guémon region, including 790 victims (at p.26).
[215] FIDH, 'Côte d'Ivoire: Choosing between Justice and Impunity', *supra* note 22, p.18.
[216] FIDH, MIDH and LIDHO, 'Ivory Coast: The Fight against Impunity at a Crossroads', *supra* note 128, p. 17.
[217] Jeune Afrique, 'Côte d'Ivoire: fin de partie pour Amadé Ouérémi', 31 May 2013.
[218] FIDH, 'Côte d'Ivoire: Choosing between Justice and Impunity', supra note 22, p.18.
[219] See e.g. Abidjan.net, Nord-Sud, 'Cdt Dramane Traoré, chef du bataillon de sécurisation du Guémon: Mon plan pour régler le cas Amadé Ouérémi', 28 August 2012; Koaci, 'Côte d'Ivoire:

involvement in the massacre, testifying that he led an armed group of 126 persons and received directions from FRCI officers, especially Coulibaly, who asked him to go to Duékoué and supplied him with weapons. At Duékoué, he came under the direct orders of Losseini Fofana and fought alongside Dramane Traoré and Nadia Koné.[220] Ouérémi was indicted and kept in pre-trial detention.

However, personnel changes in September 2013 included the replacement of Judge Cissé, who was tranferred to Bouaké on promotion.[221] The new judge was only officially in place in June 2014.[222] Given the complexity, it is understandable she would need time to get acquainted with the files. Yet, she conducted multiple interviews of FRCI members as early as October and November 2014.[223] By December 2014, FIDH reported that 26 accused from the follow-up criminal investigation to the CNE's report had been charged, five subject to arrest warrants.[224] While the perpetrators were from both sides; it is not clear how many were from the FRCI or related pro-Ouattara forces or their level of responsibility.

Yet, when interviewed by France24 on 31 March 2015, Prosecutor Bensouda announced the ICC would begin investigating the pro-Ouattara in mid-2015.[225] She noted the OTP's strategy of investigating the cases in sequence and that admissibility

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Amadé Ouéremi de retour au Burkina Faso?', 19 May 2013 ; and Koaci, 'Côte d'Ivoire: Amadé Ouéremi ne sera pas extradé au Burkina, selon le minister de la justice', 26 June 2013.

[220] FIDH, 'Côte d'Ivoire: Choosing between Justice and Impunity', *supra* note 22, p.19.

[221] Note that Judge Cissé subsequently joined the ICC's OTP in 2015.

[222] Decree No. 226/CPMGDSMJ/DSJ of June 2, 2014 on Appointment of the members of the Cellule Spéciale d'Enquête et d'Instruction, *supra* note 127. Note also enforcement orders: Order No. 579/MJDHLP/MPMEF/MPMB of December 12, 2014, supra note 126; and Order No. 202 MP/MPMEF/DGTCP/DEMO of September 12, 2014, supra note 126. See FIDH, "Côte d'Ivoire: Choosing between Justice and Impunity", *supra* note 22, pp.10-11.

[223] FIDH, 'Côte d'Ivoire: Choosing between Justice and Impunity', *supra* note 22, p.20.

[224] Ibid, p.18. Another report indicates that some of these charges may have been brought in July 2014: ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, p.15.

[225] France24, The Interview, ICC Chief Prosecutor, Fatou Bensouda, 31 March 2015.

is assessed in accordance with complementarity. This gave rise to clear ripple effects in Côte d'Ivoire, reinvigorating actions on the ground. It would appear it had a direct effect on the political will to hold both sides accountable at the national level.[226] Consequently, it became easier for the Cellule to progress investigations against the pro-Ouattara in exercising its judicial independence operationally.[227]

In April 2015, further interviews were conducted by the investigative judge of FRCI officers. According to reports, Wattao, Losseni Fofana, Daouda Koné, Dramane Traore, Ousmane Coulibaly, and Martin Fofie were all invited to hearings.[228] The judge also requested the Military Tribunal of Abidjan's assistance to summon eight officers.[229] The Military Prosecutor Colonel Ange-Bernard Kessi Kouamé required their attendance, stating they would be arrested if they did not show up and commenting to the media: "this means that in Côte d'Ivoire, there is no double-speed justice or justice winners (…). Côte d'Ivoire is a State of law".[230]

In July 2015, eight members of the military who were pro-Ouattara were indicted.[231] This reportedly included Ousmane Cherif, Comzone of Bouaké; Losseni Fofana;

[226] Notre Voie, 'Pour échapper à la CPI, Voici comment Soro manoeuvre pour piéger Ouattara' , 2015; and Soir Info, 'La peur gagne le camp Ouattara, le FPI se fragilise d'avantage', 8 April 2015.
[227] Interview record 44 – Investigative Judge, Special Inquiry and Investigative Unit, 23 October 2018.
[228] Soir Info, 'Crimes postélectoraux: Des chefs de commandements et de guerre pro-Ouattara auditionnés', 17 April 2015.
[229] The eight included Colonel-Major Doumbia Lacina, formerly Commander, 1st Infantry Battalion of Akouédo; Colonel Rene Kokou Sako, formerly Commander of the Tactical Inter-Army Command Centre; Lt-Col Herve Touré, Com Zone for Katiola (Central) (at the time, Head of the 3rd Battalion of Bouaké); Lieutenant-Colonel Zacharia Koné, Com Zone for Séguéla (North-West) and commander in the military police, known as "Chief Dozo"; Lt-Col Mourou Ouattara, Com Zone for Bouna (North East); Seydou Koné, formerly a commander in Agnéby-Tiassa (South); Lieutenant Patrick Kpi, formerly in charge of external relations at the Military School of Bingerville (Abidjan); and Lieutenant Duran ("Ali"): Soir Info, "Tribunal militaire d'Abidjan: Koné Zacharia, Moro Ouattara, Touré Vectho et 5 officiers Frci convoqués", by Armand Depeyla, 8 May 2015.
[230] Ibid.
[231] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, p.15 and pp..22-23.

Daouda Koné; and Eddie Medy, Chief of Sector of Danané.[232] Wattao, Zacharia Koné and Mourou Ouattara are also understood to have been indicted.[233]

In a press conference before the opening of the ICC's Gbagbo and Blé Goudé trial in 2016, Fatou Bensouda reaffirmed that the ICC's investigations in Côte d'Ivoire are ongoing. She emphasised "[m]y Office will leave no stone unturned as we seek to ensure justice and accountability on all sides".[234] Following this, President Ouattara declared no more Ivorians would be sent to the ICC. He asserted the justice system in Côte d'Ivoire was fully operational and "has begun to judge everyone without exception".[235] Thus, he proclaimed that any further proceedings would take place nationally. However, over four years on, trials are still to commence. Since the indictments are confidential, some have started to doubt the cases are really proceeding.[236] Yet, it was confirmed in early 2018 that indictments existed against the pro-Ouattara with trials coming soon.[237]

2.2.7 Other "own side" investigations – crimes post-2010/2011

The Nahibly investigation was initially opened by an investigative judge of the Tribunal of First Instance of Man. The first exhumations took place in Togueï in

[232] Jeune Afrique, 'Côte d'Ivoire: inculpations tous azimuts dans l'armée', 30 June 2015 ; RFI Afrique, 'Côte d'Ivoire: deux anciens 'Com Zone' inculpé par la justice', 8 July 2015.
[233] Jeune Afrique, 'Côte d'Ivoire: et si Simone Gbagbo était amnistée?', by Vincent Duhem and Baudelaire Mieu 9 April 2018; and Jeune Afrique, 'l'amniste accordee par Alassane Ouattara contestee par plusieurs ONG', by Vincent Duhem, 15 November 2018.
[234] ICC, Press Release, ICC Prosecutor's statement at press conference, ahead of the trial-start of the Prosecution's case against Messrs. Laurent Gbagbo and Charles Blé Goudé, 27 January 2016.
[235] AFP, 'President Ouattara says 'won't send any more Ivorians to ICC', 4 February 2016.
[236] An interviewee from ICTJ noted: "*we were told for years there is a case against the pro-Ouattara group, around 83 individuals, and that some indictments were issued but we never saw them. I am not aware of any arrest warrant and there was no progress that we could report on.*" (Interview record 9 – interviewee, ICTJ, 13 March 2018).
[237] Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018.

October 2012, overseen by a prosecutor from Man.[238] The judge first attended the scene at Nahibly and Duékoue in March 2013, nine months later, to start exhumations and identify the victims.[239] Reports indicate the FRCI's involvement in the attack, with witnesses asserting the incident took place in the presence of the prefect of Duékoué, Benjamin Effoli, and FRCI officers Daouda Koné, Yaya Doukouré and "Corporal Ben".[240] The sensitivity of the case and urgent need to protect witnesses could not be overstated. Indeed, one of the witnesses to the massacre was killed in suspicious circumstances in December 2013.[241] Yet, the case was only transferred to the Cellule in 2015, with the lapse of time seriously hampering the investigation. It was initially retained in Man as Nahibly occurred in July 2012, albeit linked to the same military unit as the events in Duékoue of March 2011.

2.2.8 Outreach

The Cellule faces a general lack of awareness and mistrust stemming from the lack of proximity between affected communities and the courts. Generally, judges and prosecutors are well-educated and from a higher social class than many victims and witnesses, which deters them from accessing justice as they feel intimidated.[242] As the office is based in one of the better Abidjan suburbs, this alone put some off while

[238] FIDH, 'Two years after the discovery of the Togueï mass grave in Duékoue, where is the justice promised?', 21 October 2014, at p.2; and FIDH, MIDH and LIDHO, 'Choosing between Justice and Impunity', *supra* note 22, at p.21.
[239] FIDH, MIDH and LIDHO, Position Paper, 'Côte d'Ivoire - Attaque du camp de Nahîbly: Une occasion du rendre justice', March 2013, at p.5; and FIDH, MIDH and LIDHO, 'Ivory Coast: The Fight against Impunity at a Crossroads', *supra* note 128, at p.19.
[240] FIDH, MIDH and LIDHO, Position Paper, 'Côte d'Ivoire: Attaque du camp de Nahibly: Une occasion de rendre justice', ibid, pp.3 and 7.
[241] RFI, 'Côte d'Ivoire: morte suspecte d'un témoin de la tuerie de Nahibly', 6 January 2014. An interviewee related "*there was a witness in the West – we allowed him to come here. He wanted to go back to see his parents but he passed away dramatically and we don't know why. His body is still to have an autopsy….*" (Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018).
[242] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018; Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (AVCPEDA) (Port-Bouet), 26 October 2018; Interview record 53 – human rights defender, Regroupement des Acteurs Ivoiriens des Droits de l'Homme (RAIDH), 26 October 2018.

even victims from other Abidjan neighbourhoods had trouble testifying as they could not afford transport.[243]

However, investigating judges and JPOs have made efforts to go into the field. The judges visited different regions between 2011 and 2012, where the judge of the 8th Section visited localities around Abidjan and in the North, the judge of the 9th Section visited localities to the West, while the judge of the 10th Section visited localities in the Centre and East and Abidjan.[244] An investigative judge went again in 2014 to Duekoué and Guiglo in the West while JPOs went to San Pedro in the South.[245] This increased public awareness and facilitated victims and witnesses coming forward. A senior judge commended the Cellule for doing "a fantastic job", since it is not an easy exercise given the level of polarisation between communities and the conditions in each locality in the aftermath of the crisis.[246] However, members of the Cellule are hampered from travelling more widely due to limited staffing and a lack of financial resources, compounded by poor road infrastructure.

Many victims are pro-active, organising themselves with the assistance of NGOs and initiating procedures, resulting in a "good collaboration between victims and the Cellule".[247] However, the level of communication with affected communities has generally been wanting, with most left wondering what is going on.[248] Some even questioned if the Cellule still existed.[249]

[243] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.
[244] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, p.17. fn. 106.
[245] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[246] Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018.
[247] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[248] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018; Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du

Outreach shortcomings have contributed to delays with exhumations. Exhumations conducted in Abidjan, including Yopougon and Port-Bouët, took place with the full engagement of victims' associations.[250] Others took place in Bangolo and Guiglo.[251] Some were conducted with OTP representatives present.[252] Yet, exhumations in Duekoué failed as outreach efforts were inconsistent. Years went by before the next exhumations. A victims' representative in Duekoué related that in 2015 further exhumations were planned between the Cellule and prefecture without victims' associations being informed and when it started women began crying asking where they were taking the bodies.[253] Thus, he contacted UNOCI to stop the procedure. [254]

While NGOs in Abidjan and international counterparts called for exhumations to be completed efficiently;[255] some leaders in the affected communities felt exhumations constituted a further violation,[256] showing a need for increased understanding of traditional cultural beliefs. This was compounded by delays in informing relatives

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District d'Abidjan (AVCPEDA) (Port-Bouet), 26 October 2018; Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.

[249] Interview record 20 – interviewee, Association des Femmes Juristes de Côte d'Ivoire (AFJCI), 27 March 2018.

[250] Interview records 26 and 27 – victims, Collectif de Victimes Doukouré Yopougon (CVQDY). and Abidjan.net '142 corps de la crise post-électorale exhumés et identifiés à Abidjan (Gouvernment)', 24 July 2014; Akody News, 'Crise post-électorale: 800 corps exhumés dans le district d'Abidjan en 2013-2014 , dans le cadre des enquêtes (Ministre)', 20 November 2014.

[251] Interview record 51 – interviewee, Platform for Associations in Duekoue (POREVCI) & COVICI, 25 October 2018.

[252] Abidjan.net, Soir Info, '37 corps exhumés en présence de la Cpi', 9 December 2014.

[253] Interview record 49 – victim, Platforme des associations de victimes pour la paix et la reconciliation en Côte d'Ivoire (PAPCI) (Duekoué), 25 October 2018.

[254] Interview record 49 – victim, Platforme des associations de victimes pour la paix et la reconciliation en Côte d'Ivoire (PAPCI) (Duekoué), 25 October 2018.

[255] FIDH, MIDH and LIDHO, Position Paper, 'Côte d'Ivoire: Attaque du camp de Nahibly: Une occasion de rendre justice', supra note 239, pp.6-7; and FIDH, 'Ivory Coast: Little judicial progress made on the case of the attack of Nahibly camp', 28 March 2013.

[256] Interview record 49 – victim, Platforme des associations de victims pour la paix et la reconciliation en Côte d'Ivoire (PAPCI) (Duekoué), 25 October 2018; and You Tube, 'Des fils et filles de Duekoue opposes a l'exhumation des victimes du genocide wê', 6 August 2015.

about the outcome of earlier exhumations and returning the bodies.[257] Further, the timing months before the Presidential election on top of feelings of having been neglected for years gave rise to mistrust that it was a cover-up, especially in the context of anticipated investigations by the ICC.[258] The exhumations have still not been completed.[259]

The Cellule recognised the need for more outreach, developing a Communication Strategy in 2017, but again, this is not public.[260] It includes keeping victims informed after they have given a statement through updating their lawyers where they are civil parties, communicating updates on a website and maintaining a telephone hotline.[261] The website has not been updated recently and the telephone network changed meaning the numbers indicated there are no longer current. It seems these efforts were affected by limited resources. It indicates that information exchange was largely limited to lawyers for the civil parties rather than all victims and witnesses who may have given a statement or affected communities more broadly. An investigative judge confirmed that "the victims have access to the judge so at any time they can come and get information".[262] Another judge added that there are stages in the investigation for

[257] FIDH, 'Two years after the discovery of the Togueï mass grave in Duékoue, where is the justice promised?', *supra* note 238, at p.2; and Interview record 51 – victim, Platform for Associations in Duekoue (POREVCI) & COVICI, 25 October 2018.
[258] Interview record 49 – victim, Platforme des associations de victimes pour la paix et la reconciliation en Côte d'Ivoire (PAPCI) (Duekoué), 25 October 2018. See also RFI Afrique, 'Côte d'Ivoire: tensions ravivées à Duékoué', 29 July 2015 ; and RFI Afrique, 'Reportage Afrique – Côte d'Ivoire: Duékoué, ville martyre', by Frédéric Garat, 9 September 2015.
[259] Interview record 51 – interviewee, Platform for Associations in Duekoue (POREVCI) & COVICI, 25 October 2018.
[260] Interview record 9 – interviewee, ICTJ, 13 March 2018.
[261] Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018.
[262] Interview record 45 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.

this, which includes informing them if someone in detention is about to be released and if forensic expertise has been conducted.[263]

However, only civil parties will be notified if someone is indicted and indictments are not disseminated.[264] Even then communication is ad hoc, with some victims receiving feedback and others waiting.[265] An interviewee from ICTJ referred to the approach adopted as more "like propaganda for victims' groups rather than keeping them informed" or facilitating a two-way exchange of information.[266] When a victim needs to attend an investigative procedure, the general approach is to send a summons to their prefecture for service.[267] In light of concerns some victims and witnesses expressed in regard to their local prefects - government appointees - this could backfire in sensitive cases.

In relation to the Simone Gbagbo processes, another interviewee confirmed "victims were not kept informed. Civil parties were part of the Cellule process yes but they were mostly poor and not informed. They needed to work with NGOs, religious leaders, community leaders", as they had better access to and understanding of the affected communities.[268] Others believe there was also no meaningful co-operation between the Cellule and civil parties, or civil society more broadly, because they were "so closed off"[269] and "the approach of the judges and the prosecutor was to work in

[263] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[264] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[265] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018.
[266] Interview record 9 – interviewee, ICTJ, 13 March 2018.
[267] Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018.
[268] Interview record 10 – former international staff member, UNOCI, 15 March 2018.
[269] Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.

full secrecy and not share information".[270] There is a difficult balance between maintaining investigative confidentiality and public trust through outreach. As one interviewee related, "justice is all about silence and efficacy. People might think it is not moving forward but it is moving secretly".[271]

2.2.9 Victim and witness protection

Victim protection is a real concern, with an interviewee from OIDH noting "victims of the pro-Ouattara prefer to hide. Reprisals are systematic".[272] Even witnesses who initially came forward in relation to cases against the pro-Ouattara are now too terrified to testify in light of the promotion of those accused.[273] Some victims did not come forward to try to access justice nationally at all, partly due to the fear and the Cellule's inability to provide them with specific protective measures.[274] An interviewee working with Ivorian victims in refugee camps in Liberia who fled the West reported that they are scared, not protected and do not trust the Ivorian judicial system so have not tried to access justice at the domestic level.[275] This fear and distrust was compounded by the lack of outreach, with no one from the Cellule going

[270] Interview record 9 – interviewee, ICTJ, 13 March 2018.
[271] Interview record 25 – interviewee, Ministry of Women, Protection of Children and Solidarity, 29 March 2018.
[272] Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.
[273] Interview record 40 – interviewee, Observatoire Ivoirien des Droits de L'Homme (OIDH), 19 October 2018.
[274] Interview record 51 – interviewee, Association des Veuves et Mamans Victimes de Guerre en Côte d'Ivoire (AVMVG-CI), 25 October 2018.
[275] "*For the Guere, they do not trust the country and their perpetrators are now in power. It would be like having the perpetrator judge himself. They are the mayors, the village chiefs. The first question is one of security. Then there is the perception of bias and the land issue – they were pushed away and see how they were treated and also they saw the trial of Simone Gbagbo and how nothing happened and there is nothing for the Ouattara side*" (Interview record 29 – interviewee, Civitas Maxima, 8 May 2018).

to the camps to explain the procedure and potentially change perceptions.[276] The same applies to the ICC, which has also not engaged with these victims.[277]

In the absence of specific provisions for victim and witness protection, the judges relied on general measures. However, their ability to safeguard witnesses was limited given the right accorded to the defence to inspect the file and attend procedures. As a judge explains, all suspects have the right to a lawyer from the beginning.[278] Nevertheless, they did what they could to safeguard victims and witnesses for as long as possible within the strictures of the code, including using pseudonyms, conducting closed hearings and using a curtain to hide their identity from the public.[279] This was confirmed by the lawyers for civil parties who acknowledged that though victim and witness protection remains a challenge, "on a case by case basis, when it is a really sensitive case, they take measures".[280] However, there was no legal basis or measures in place for maintaining anonymity, using voice distortion or relocation.[281]

While the Law on Witness Protection has now been adopted, it remains to be seen how long it will take for the National Agency to become operational. Moreover, there is a risk that witnesses once available are no longer in Côte d'Ivoire, have suffered memory loss, or due to witness fatigue or exasperation are now unwilling to testify.

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[276] Interview record 29 – interviewee, Civitas Maxima, 8 May 2018.
[277] Interview record 29 – interviewee, Civitas Maxima, 8 May 2018.
[278] "*If you write the name of the witnesses, the other party will see it. It is case by case but they are not protected. (…) All files are made in double and a file with the clerk is accessible to the lawyer according to the procedure. All acts we make are numbered. If you postpone the act, it would not be valid. We hear first the suspect who is charged then we will hear the witnesses, collect evidence and then again hear the accused. His lawyer has access to the procedure all along*" (Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018).
[279] Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018; Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[280] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018.
[281] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.

Notwithstanding this, there are hundreds of victims desperately seeking justice and if the right conditions are put in place, there is no reason that cases against even the most responsible from the pro-Ouattara cannot succeed in Côte d'Ivoire.

2.2.10 Resources

The Ministry of Economy and Finances is responsible for ensuring the Cellule has adequate financial resources from the State Budget.[282] In turn, the Ministry of Justice is to provide the personnel necessary for it to function.[283] Personnel assigned to the Cellule are too few in number and lack the material and technical resources to investigate to the full extent of their abilities. Further, the Cellule has difficulty conducting operations and accessing witnesses discretely as they were only assigned a few vehicles and all have official plates which are easily identifiable.

Another difficulty stems from the lack of expertise in forensics. The same applies to the State Prosecution generally. There is a Forensic Institute that conducts autopsies; however, there are five persons at most in the state autopsy department.[284] The Cellule relies on the Scientific Police and a Forensic Examiner for other technical expertise but they have a backlog. Often judges look to the private sector but there are extremely few medical forensic experts competent to give evidence in court, meaning high fees.[285] Moreover, there is no national database for DNA or fingerprints so even

[282] Articles 16 and 17, Decree No.2013-215 of 30 December 2013, supra note 43; Articles 16 and 17, Decree No. 2016-543 of 20 July 2016, *supra* note 43.
[283] Articles 13 and 14, Decree No.2013-215 of 30 December 2013, supra note 43; Articles 13 and 14, Decree No. 2016-543 of 20 July 2016, *supra* note 43.
[284] Interview record 12 –Prosecutor, Côte d'Ivoire, 21 March 2018.
[285] E.g. see ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, p.18, fn.108 referring to 'two or three experts who are qualified for court proceedings involving the type of forensic medical analysis needed', with one expert opinion on an autopsy billed at 400,000 CFA francs (about UK£534 or US$690).

if a sample is found, there is generally no way of matching it to anyone.[286] For want of technical resources, there is a system-wide overreliance on confession evidence.

In the immediate aftermath of the March 2011 events in Duékoue, the 14th contingent of the Moroccan battalion of UNOCI attended the scene[287] as well as the ICRC[288] and international press.[289] UNOCI initially maintained guard over some suspected execution sites in the West, including 11 wells in the Toguei area of Duékoue.[290] However, the crime scenes could easily have already been interfered with by those looking to cover up. With the justice system in recovery, and not in the best shape to begin with after over a decade of disrepair,[291] Côte d'Ivoire needed technical and logistical support and funds to carry out exhumations.[292] Experts were brought in by UNOCI from Argentina and Mexico to assist with forensic investigations but it is not clear what was achieved.[293]

[286] Interview record 10 – former international staff member, UNOCI, 15 March 2018.
[287] UNOCI, Information Note No. 1080, 'UNOCI worried at the humanitarian situation in Duekoue', 30 March 2011.
[288] ICRC, 'Côte d'Ivoire: hundreds of civilians killed in Duékoué', 2 April 2011.
[289] France24, 'Hundreds killed by Ouattara troops at Duekoue, UN says', 3 April 2011;France24, 'Exclusive: Duekoue's grim war of numbers', 19 April 2019; France24, 'Ivory Coast: the Duékoué massacre', 6 May 2011.. Human Rights Watch also interviewed 120 victims and witnesses of Duékoué in Liberia and a further 20 victims and witnesses who remained by telephone: Human Rights Watch, 'Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive: New Government Should Investigate and Prosecute Atrocities by Both Sides', 9 April 2011.
[290] FIDH, 'Two years after the discovery of the Togueï mass grave in Duékoue, where is the justice promised?', supra note 238, at p.3.
[291] See UNOCI, Study of the Ivorian Justice System, 'The Organisation and Function of the Judicial System in Côte d'Ivoire', June 2007. On the lack of capacity of the police and gendarmes to respond to crimes in progress in the early years following the PEV for lack of resources, see: Human Rights Watch, 'To Consolidate this Peace of Ours: A Human Rights Agenda for Côte d'Ivoire', New York, December 2015, at p.53.
[292] FIDH, MIDH and LIDHO, Position Paper, 'Côte d'Ivoire: Attaque du camp de Nahibly: Une occasion de rendre justice', *supra* note 239, p.6.
[293] Interview record 10 – former international staff member, UNOCI, 15 March 2018.

Yet, UNOCI's Rule of Law Division was closed in December 2014, before the final withdrawal of UNOCI as a whole in 2017.[294] One interviewee explained that the situation still closely resembles that reported in 2007.[295] Development funds from France for rule of law capacity-building filled some of the initial gaps but excluded transitional justice activities.[296] There is no longer any security over the crime sites, save for local police or military units who are not trusted by the affected communities. Tampering and delays with site inspections means that in most areas, no bullet fragments or other clues that could be forensically analysed were found. Where fragments were found, these are reportedly with the ICC.[297]

Resourcing was an issue from the start, having a direct correlation with the Cellule's results. Sources related that "at one time a lot of magistrates were part of it and then they were dispersed to other cases. Those impacted were the victims who did not have the opportunity to see trials or reparations".[298] This relates to the number of prosecutors assigned to the Cellule, as the number of judges has been the same throughout. Even at its peak, four prosecutors and three investigative judges were hardly enough. Further budget cuts were made in 2016, affecting planned activities.[299] Judges and prosecutors were also to be provided with a supplement to

[294] See Alexandra Novosseloff, 'The many lives of a peacekeeping mission: The UN Operation in Côte d'Ivoire', June 2018, New York: International Peace Institute.
[295] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[296] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', supra note 53, p.20.
[297] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[298] Interview record 19 – National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[299] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.

their ordinary salary, recognising the complexity and additional risk. However, the special salary stopped after funds dried up.[300]

It is concerning that resources were further cut-back in 2018.[301] While there were originally four prosecutors engaged at the Cellule, including the Prosecutor of the Republic; the other prosecutors have now been re-assigned. Further, there were originally ten JPOs, five from each of the Gendarmerie and the National Police. This was already too few for the task but there are only eight working there today and one of these is a police chief based elsewhere so effectively, there are only seven active investigators.[302] Two officers were re-deployed and not replaced. Logically, it is unsurprising cases have not progressed at a sufficient pace to meet victims' expectations. The further cut-backs indicate the Cellule's work is no longer a priority in the lead-up to the elections, with one interviewee predicting "soon they will say they will stop all of this; it is coming. After 2020, there won't be any of this".[303]

2.3 Military Prosecutions

Proceedings are also ongoing in the military justice system, with the Military Procedure Code applying to members of the Republican Guard, Gendarmerie, Army, Navy and Air Force.[304] However, the military system generally only has jurisdiction where all persons in the same case are in the forces.[305] Where their co-perpetrators have civilian status, the case should go before the regular courts. The exception to this

[300] Interview record 19 – National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[301] Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018; Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[302] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[303] Interview record 47 – Defence Counsel, 24 October 2018.
[304] Article, 5, Law No. 74-350 of 24 July 1974 instituting a military procedure code (Loi No. 74-350 du 24 juillet 1974 relative à l'institution d'un code de procedure militaire).
[305] Article 9, Law No. 74-350 of 1974, ibid.

is for crimes against the laws or customs of war committed during armed conflict, which still comes within military jurisdiction.[306]

Among the most notable trials is that of General Bruno Dogbo Blé, former Commander of the Republican Guard, and eight others who were tried and convicted by the Military Court of Abidjan for the kidnapping and murder of Colonel Major Dosso.[307] Other cases include that of a policeman who was convicted of manslaughter for two civilian deaths in 2011.[308] In turn, in Seahet and Others, four members of the military were convicted of illegal arrest and detention, rape, murder, concealment of a corpse and failure to obey.[309]

However, it cannot be said that the outcome of such cases is pre-determined. For example, Chief Marshall Kamana Tanoh Brice-Eric and Commander Gnahoua Dabley were tried by the Military Tribunal of Abidjan for ordering the bombing of Abobo market in March 2011.[310] Both were acquitted after the Military Tribunal considered the evidence insufficient.[311] Similarly, in Claude Yaro and Others, ten members of the FDS charged with failure to obey were acquitted in 2014.[312] This indicates the ability of the Military Tribunal to exercise judicial independence.

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[306] Article 11, Law No. 74-350 of 1974, ibid.
[307] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, at pp.42-43. Dogbo Blé was sentenced to 15 years of imprisonment.
[308] Ibid, at p. 43. He was sentenced to 3 years of imprisonment.
[309] Ibid, at p. 43. They were sentenced from between 12 months to 15 years' imprisonment.
[310] Ibid, p.42.
[311] Akody, apanews.net, 'Crise post-électorale: le doute profite à 2 soldats acquittés après 4 ans de détention', 17 March 2015.
[312] Noted in Report of the Independent Commission of Inquiry on Côte d'Ivoire, supra note 184, at p. 21; outcome related in ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, at p.43.

However, only military, gendarmes and police officers who took up arms for Gbagbo have been tried following investigations by or referred to the Military Prosecutor. The Military Prosecutor's strength is curtailed by the requirement to submit draft charges to the Minister of Defence for members of the armed forces or Minister of Interior for the police, before lodging an indictment.[313] It is not difficult to find parallels.[314]

2.4 Truth and Reconciliation Commissions and Victims' Reparations – from the CDVR to CONARIV and the PNCS

Established in July 2011, the Commission for Dialogue, Truth and Reconciliation (CDVR) ran until September 2014, enabling it to hear 72,000 testimonies.[315] However, it has been strongly criticised for failing to achieve its mandate. President Ouattara appointed Charles Konan Banny, former Prime Minister and PDCI member, as the CDVR's President to appease his rival.[316] Banny used the CDVR to advance his political career and competed in the 2015 election, resulting in deliberate efforts to discredit the CDVR's work to prevent him succeeding. The CDVR presented its Final Report to President Ouattara in December 2014. However, it was only made public in 2018, four years later.[317] By this time, many observers had disengaged.[318] Further, the

[313] ICTJ, "Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire", *supra* note 53, p.22, fn 143, citing Article 3.1 of the Military Procedure Code and Decree No. 74-489 of 30 October 1974 designating the Minister of Defence to exercise the judicial powers provided by the Military Procedure Code.

[314] For example, the former Prosecutor General of Rwanda notes that his office referred several cases concerning alleged killings by the Rwandan Patriotic Army (RPA), the armed wing of the Rwandan Patriotic Front, to the prosecution service of the military justice system but none resulted in a prosecution: Gerald Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity*, (London: Routledge, 2013), at p.231.

[315] Ordonnance No. 2011-167 du 13 juillet 2011 portant création, attributions, organisation et fonctionnement de la Commission Dialogue, Vérite et Réconciliation; with its mandate extended from an initial two years by Ordonnance No. 2014-32 of 3 February 2014.

[316] A political agreement was previously concluded to the effect that a candidate from the PDCI would have the Prime Minister's post after the 2010 election if Ouattara succeeded in his bid for the Presidency.

[317] Commission for Dialogue, Truth and Reconciliation, Final Report, dated December 2014.

[318] Interview record 42 – Interviewee, Agir pour la Democratie, la Justice et La Libertie en Côte d'Ivoire (ADJL-CI), 19 October 2018.

CDVR chose to name perpetrators it was able to identify but this Annex was never published.[319] The CDVR has been rebuked for conducting weak investigations, resulting from no clear strategy, bloated administration, lack of resources and inadequate efforts to gain support from victims.[320] Its approach was "up-down, not down-up, not participative".[321] Too few Ivorians were even aware of the CDVR, let alone how it functioned.[322] Thus, the CDVR lost the support of civil society.[323]

CONARIV followed.[324] It compiled a single list of victims and made reparation recommendations.[325] CONARIV consolidated lists from victims' associations, the CNE, Cellule, CDVR, UNHCR and Government departments, and processed the data to establish a uniform list of victims.[326] However, it also had a broader mandate to identify victims of human rights and humanitarian law violations between 1990 and 2012, adding a further challenge yet reflecting victims' experiences. However, it was

[319] Interview record 48 – Commissioner, CDVR and CONARIV, 24 October 2018.
[320] FIDH, MIDH and LIDHO, 'Ivory Coast: The Fight against Impunity at a Crossroads', *supra* note 128, at p. 20.
[321] Interview record 42 – Interviewee, Agir pour la Democratie, la Justice et La Libertie en Côte d'Ivoire (ADJL-CI), 19 October 2018.
[322] LIDHO, 'Declaration de la LIDHO du mardi 17 juillet 2012 relative a la situation socio-politique en Côte d'Ivoire', 17 July 2013, p.7.
[323] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018; Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018; Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018; Interview record 26 – interviewee, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018; Interview record 28 – interviewee, SOS Exclusion, 30 March 2018. For all its flaws, an interviewee from ICTJ stated "*it was the most disappointing, deceiving, malicious effort at truth-seeking we have seen in the last years. It was totally non-transparent and politically motivated…a completely defective truth-seeking exercise. The recommendations give you the shivers as they are so against any acknowledgement of victims' rights*". (Interview record 9 – interviewee, ICTJ, 13 March 2018).
[324] Ordonnance No. 2015 of 174 du 24 mars 2015 portant creation, attributions, composition et fonctionnement de la Commission Nationale pour la Réconciliation et l'Indemnisation des Victimes des Crises survenues en Côte d'Ivoire, dénommée CONARIV.
[325] See HRW, 'To Consolidate this Peace of Ours: A Human Rights Agenda for Côte d'Ivoire', *supra* note 291, at p.10.
[326] Interview record 48 – Commissioner, CDVR and CONARIV, 24 October 2018.

closed by December 2016.[327] Nevertheless, while many of its Commissioners came from the CDVR, the fatal flaw in leadership was corrected through the appointment of Paul Simeon Ahouanan, the Archbishop of Bouaké, as President.[328] It also made improvements in its working methods, recognising the need to improve engagement with civil society, NGOs and victims' associations to reach affected communities.[329]

CONARIV interviewed 130,560 individuals throughout Côte d'Ivoire, most of whom originated from the West.[330] 964,950 victims were initially recorded,[331] corresponding to 874,056 casefiles.[332] However, after verification, only 316,954 victims made the final list for reparation.[333] There were 2,969 verified victims of sexual or gender-based violence, 21,516 victims of murder or disappearance, 30,290 victims of grave injury and 303,662 victims of economic loss.[334] 557,102 cases were not verified, including 90,894 victims for want of documentary evidence, witnesses and/or lack of contact information.[335] Yet, a problem with telephone networks is commonly known.[336] Other claims went unverified as the forms were not completed correctly, causing consternation since it was CONARIV's own agents who completed

[327] Ordonnance No. 2016-1147 du 22 decembre 2016 mettant fin aux activities de la Commission Nationale pour la Réconciliation et l'Indemnisation des Victimes des Crises survenues en Côte d'Ivoire, dénommée CONARIV, Official Gazette No.10 of 2 February 2017.
[328] Communique of the Presidency, Abidjan, dated 24 March 2015.
[329] Interview record 9 – interviewee, ICTJ, 13 March 2018; Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018; Interview record 26 – interviewee, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018. For example, the CDVR did not facilitate the active participation of children and youth in its processes, resulting in a report which failed to adequately address the responsibility of young persons implicated in the post-election violence and those who influenced them (Interview record 36 – Action, Justice and Peace (RAJP), 16 October 2018). Through the work of the NGO Action, Justice and Peace (RAJP), together with UNICEF, ICTJ and USAID, children and young persons were interviewed and a report submitted to take their views into account for reparations.
[330] CONARIV, Report of Activities, *supra* note 107, at p.11.
[331] Ibid, at p.14.
[332] Ibid, at p.27.
[333] Ibid, at p.27.
[334] Ibid, at p.30.
[335] Ibid, at pp.16-19.
[336] Interview record 50– interviewee, Confederation of Victims (COVICI), 25 October 2018; Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.

them with victims.[337] In too many cases victims have been left out for lack of documentation, difficulties in accessing judicial assistance and poverty as they are unable to pay for a death certificate to prove the loss of their family member.[338] Documentation was unavailable or lost during the crisis.[339] As an interviewee put it bluntly: "…there were no medical doctors as everyone ran. Women were raped. Where could they go to register as a rape victim, to receive a certificate?"[340] Nevertheless, CONARIV recommended a review mechanism be put in place to enable appeals and future returnees to claim.[341]

Notably, while accepting some lower level perpetrators could be accorded conditional amnesty or pardon, CONARIV considered accountability of those most responsible essential for national reconciliation, recommending the establishment of a Special Chamber in Côte d'Ivoire.[342] However, these recommendations are not public. CONARIV's effectiveness is also doubted due to the lack of participation of political leaders;[343] and low to no participation of perpetrators, in contrast to South Africa.[344]

[337] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.
[338] Interview record 51 – interviewee, Platform for Associations in Duekoué (POREVCI) and COVICI, 25 October 2018; Interview record 20 – Association des Femmes Juristes deCôte d'Ivoire (AFJCI), 27 March 2018.
[339] As one victim explained, "a*t the time the injustice occurred, there were no services available and after the post-election crisis it was difficult to have authentic documents to justify the injustice that occurred, for example, medical certificates. All the procedures we have launched stayed suspended apart from those victims with visible injuries…Victims were killed and burned with all their documents on them so how can their family obtain these documents?* (Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018).
[340] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[341] CONARIV, Report of Activities, *supra* note 107, at p.61.
[342] Ibid, at p.65.
[343] Interview record 24 – interviewee, Convention de la Societe Civile de Côte d'Ivoire, 29 March 2018; Interview record 48 – Commissioner, CDVR and CONARIV, 24 October 2018.
[344] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.

The National Programme for Social Cohesion (PNCS) was established to distribute victims' reparations and promote national reconciliation.[345] While initially a standalone body operating simultaneously with CONARIV, it was subsumed by the Ministry of Solidarity. Many interviewees lamented an obvious lack of co-ordination between the PNCS, CDVR and CONARIV, noting the lack of transparency in how victims' reparations are currently being determined.[346] It was envisaged that PNCS would work off CONARIV's list. However, the staff at PNCS initially found they could not access CONARIV's database – put together with assistance from an international consultancy - and once in, found it could not be edited or exported so resorted to printing and going through the hardcopy.[347] Even then the list was considered defective, with PNCS re-opening the verification procedure.[348] Without a legal framework for determining victims' status and reparations, the process is at the President's discretion and "if he loses the elections, it all goes with him".[349]

The PNCS pilot saw reparations distributed to 4,500 victims and their dependants in August 2015 in ceremonies at the Presidential Palace and twelve localities.[350] This included reparations of 1 million FCFA (around USD$1,702) to the dependants of

[345] Order No. 026/MEMPD/CAB of 11 April 2012, as modified by Decree No. 2015-266 of 22 April 2015.
[346] Interview record 22 – Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018; Interview record 23 – Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.
[347] Interview record 9 – interviewee, ICTJ, 13 March 2018; Interview record 51 – interviewee, Association des Veuves et Mamans Victimes de Guerre en Côte d'Ivoire (AVMVG-CI), 25 October 2018; Interview record 51 – Platform for Associations in Duekoué (POREVCI) & COVICI, 25 October 2018.
[348] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.
[349] Interview record 51 – Platform for Associations in Duekoué (POREVCI) & COVICI, 25 October 2018.
[350] Bayota, Dania, Bouaké, Duékoué, Bangolo, Guiglo, Toulepleu, Blolequin, Danane, Zouan-hounien-Logoualé, Korhogo and Sassandara: OIDH, Colloquium in Abidjan, Côte d'Ivoire on 'Complémentarite et Coopération pour une meilleure efficacite de la Justice Penale International en Afrique', 11-12 May 2017, Compilation of Presentations, Presentation by Dr Oleh Kam, Ministry of Solidarity, Family, Women and Children, 'La politique nationale de prise en compt des victimes', May 2017, at p.34 ; and Presidency of the Republic of Côte d'Ivoire, News, 'Le Chef d'Etat a présidé la cérémonie officielle d'indemnisation des victimes des crises',4 August 2015.

3,500 deceased and 150,000 FCFA (around USD$255) to 1,000 injured.[351] The substantive individual reparations programme is still to be implemented for budget reasons. There have also been delays in initiating community reparations, remarkable considering, as a Commissioner from the CDVR and CONARIV relates, "we knew the entire village were victims as their homes were wiped out".[352] Many disengaged from these processes, perceiving the work as partial.[353]

2.5 Co-ordination between the national mechanisms

The parallel operation of these mechanisms has created difficulties in addressing cases effectively, given co-ordination shortcomings exacerbated by mandate overlap and difficulties over the sharing of information and confidentiality which have resulted in unnecessary risks for witnesses and complicated the Cellule's job.

One issue affecting the Cellule's work is a difficulty in accessing legislation, regulations and court decisions with only some texts available digitally by paid subscription.[354] While improvements have been made, progress is mainly confined to commercial matters. Many documents are not public, due to secrecy. This includes indictments and all documents up until the final trial judgment. Even judgments are nearly impossible to obtain. This means that its judges are dependent on co-operation

[351] Ibid, p.34.
[352] Interview record 48 – Commissioner, CDVR and CONARIV, 24 October 2018.
[353] *(*Interview record 43 – Defence Counsel, 22 October 2018 ("T*he work of the reconciliation commission – we have no idea what they have done, but there was a feeling of disdain, uncertainty, distrust…"*); and Interview record 47 – Defence Counsel, 24 October 2018 (expressing scepticism as to how victims were taken into account and considered the Commissions wasted money "*just to keep people busy*").
[354] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.

from the Military Prosecutor through professional working relationships to ascertain if decisions have been made in related cases.[355]

While the Cellule followed-on from the CNE, the judges initially only received its lists of witnesses and suspects and not the actual files with witness testimonies.[356] In the early days, it lacked sufficient resources to review the documentation even had it been available.[357] The Cellule and the CDVR also co-operated to a limited extent. While the Cellule provided information on victims it identifed to the CDVR; a Commissioner confirmed no information was sent in reverse as the Commission worked under the seal of confidentiality.[358]

In turn, CONARIV recorded 7,916 victims based on lists received from the Cellule in July 2015, including those deceased and survivors.[359] Most interviewees, including victims, victims' associations and NGOs, had no idea who the 4,500 individuals selected for individual reparations by the PNCS are and how they were chosen.[360] One victim said efforts to find out were unsuccessful, finding "the Ministry is

[355] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[356] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, p.15 ("The CSEI investigating judge is not allowed to use the information and testimony gathered by the CNE. Instead, the CSEI merely maintains a list of alleged perpetrators with no established connection to acts under investigation. It also has a list of testimony from anonymous victims, but the transcripts of that testimony have reportedly not been forwarded to the CSEI, nor has it received the addendum to the CNE's report, which has not been made public").
[357] ICTJ, ibid, p.15, fn. 81 ("According to the Public Prosecutor, documents in the addendum to the CNE report are at the Ministry of Justice, which probably would be willing to authorize access to them. The problem is that the CSEI does not have sufficient resources to review these documents were it to claim them. Interview with Public Prosecutor, August 29, 2014.").
[358] Interview record 48 – Commissioner, CDVR and CONARIV, 24 October 2018 (noting that, as such, "there wasn't really an inter-connection and collaboration").
[359] CONARIV, Report of Activities, *supra* note 107, at p.98.
[360] Interview record 26 – victim, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018; Interview record 36 – interviewee, Action, Justice and Peace (RAJP), 16 October 2018; Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018; Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidja (Port-Bouet), 26 October 2018.

blocked like a secret court".[361] According to the Ministry, the deceased victims were derived from a list drawn up by the CNE, the same list used by the Cellule.[362] In turn, the list of injured came from the Directorate for Victims of War of the Ministry of Solidarity and Authority for Disarmament, Demobilisation and Reintegration.[363] Some thought all victims to receive reparations so far are victims of crimes by the pro-Gbagbo.[364] However, another victim was sure beneficiaries included those who had given evidence to the Cellule in investigations against the pro-Ouattara. He confided that the victims were terrified of reprisals as their identifies have been publicly revealed for the sake of a small cash amount.[365]

Aside from co-ordination and confidentiality issues, investigations by the Cellule are hampered by witness fatigue, with witnesses reluctant to co-operate after already giving testimony to the CNE, CDVR and CONARIV and, in some cases, the ICC.[366]

2.6 Conclusion

Kersten argues that the ICC's admissibility regime means that "states are perpetually seeking to 'catch up' with the ICC".[367] As demonstrated earlier, the jurisprudence on

[361] Interview record 26 – victim, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018.
[362] OIDH, Colloquium in Abidjan, Côte d'Ivoire on 'Complémentarite et Coopération pour une meilleure efficacite de la Justice Penale International en Afrique', 11-12 May 2017, Compilation of Presentations, Presentation by Dr Oleh Kam, Ministry of Solidarity, Family, Women and Children, 'La politique nationale de prise en compt des victimes', May 2017, , p.34.
[363] Ibid, p.34.
[364] Interview record 42 – interviewee, Agir pour la Democratie, la Justice et la Liberte en Côte d'Ivoire (ADJL-CI), 19 October 2018.
[365] Interview record 49 – victim, Plateform des associations de victimes pour la paix et la reconciliation en Côte d'Ivoire (Duekoué), 25 October 2018.
[366] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018. Further, As stated by an interviewee from Port-Bouët, "t*he same victims all gave testimony to the Cellule and the CDVR, even if everyone wasn't taken into account. So their stories are known by the ICC, CDVR and the Cellule, so we think we have done all we can do to have access to justice for these victims."(* Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018).

admissibility gives rise to a significant risk that national authorities will open and scope domestic cases to mirror the OTP's investigation. However, when it comes to Côte d'Ivoire, delays by the ICC - primarily due to resourcing rather than a tailored strategy - means it is rather the ICC that is catching-up.[368] Statements by the OTP clearly catalysed domestic action, progressing investigations and prosecutions. However, in the majority of instances the judicial authorities in Côte d'Ivoire, principally, the Cellule, opened cases before the OTP took action. As such, the selection and prioritisation of specific cases at the national level has in many respects been decided without reference to the contours of ICC cases. This does not, however, rule out the strong potential that national investigations were influenced by guesswork as to who the ICC is likely to go after, for example, by considering the reports of international NGOs such as Human Rights Watch. In any event, as the OTP catches-up, there is a high likelihood of concurrent investigations leading to a new jurisdictional conflict in relation to the pro-Ouattara. As one interviewee put it, "we are expecting the other camp should also be brought to justice there by the ICC but we know – Côte d'Ivoire will refuse of course."[369]

Many see the decision to challenge the admissibility of the *Simone Gbagbo* case and try her at the national level as in President Ouattara's self-interest.[370] Nevertheless,

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[367] Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, (Oxford: Oxford University Press, 2016), Chapter 8, 'The ICC as an Actor – Negotiating Interests, Selecting Targets and Affecting Peace', at p.176.

[368] Assembly of States Parties, Proposed Programme Budget for 2017 of the International Criminal Court, for 15th Session, ICC-ASP/15/10, 17 August 2017, pp.10 (para.23), and 19 (para.90); Assembly of States Parties, Proposed Programme Budget for 2016 of the International Criminal Court for 14th Session, ICC-ASP/14/10, 2 September 2015, p.60 (para.208).

[369] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.

[370] As one interviewee from the Ivorian NGO LIDHO related, "*Simone Gbagbo was not repatriated because if she went others from the pro-Ouattara side would have to go as well. It wasn't a decision taken to protect her or to consolidate national institutions. She was used as an alibi*" (Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018).

the decision to not transfer Simone led to mechanisms being put into place so that Côte d'Ivoire would be "capable of judging Ivorians on national soil so the ICC can no longer take persons from his party", which was a beneficial outcome so the impact is considered mixed.[371] Indeed, many consider the Cellule was established and enhanced with a permanent mandate and resources to genuinely investigate and prosecute cases due to the ICC's engagement.[372] Some consider the scope of the investigations were directly influenced, even defined by, the ICC and that it was because of the ICC's interest that investigations took into account the victims of both sides.[373] However, others regard the Cellule as entirely a local level initiative with nothing to do with the ICC.[374]

Aside from the mechanism and case selection, it is also possible to discern key steps taken in national investigations that were incentivised by the OTP's engagement, particularly, the increase in investigative activities and progress concerning the pro-Ouattara cases in 2015 after public statements on the ICC's interest.[375] However, some are sceptical about this, saying "the Cellule is just to distract people because it is not going to be taken into account."[376] They do not regard national investigations against the pro-Ouattara as genuine but only superficial actions to stop the ICC intervening. Others consider the ICC's impact as real but negative in that "they have also hindered Cote d'Ivoire from carrying out investigations here because they said it

[371] Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018.
[372] Interview record 10 – former international staff member, UNOCI, 15 March 2018; Interview record 41 – Senior Judge, Tribunal of First Instance, 19 October 2018.
[373] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[374] Interview record 13 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[375] As an interviewee from COVICI stated: *"We noticed that when the ICC spoke about Ivorian justice, they started the procedures nationally very quickly so we can say it had a catalysing effect for national proceedings." (*Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018).
[376] Interview record 47 – Defence Counsel, 24 October 2018.

will hinder the ICC. The Government so wants to please the ICC that they will rush to do things."[377] The rush to bring Simone Gbagbo to trial on an incomplete investigation exemplifies this.

Nonetheless, the Cellule's efforts are in good faith and productive, continuing the CNE's work.[378] Many consider that the OTP could and should do more to strengthen the Cellule through greater co-operation, evidential exchange and pushing the Ivorian authorities to reinforce the Cellule with more resources and allow it to exercise greater independence.[379] This would be mutually beneficial considering the ICC is so reliant on co-operation that it can only secure suspects' custody through collaboration.[380] Given Côte d'Ivoire's reticence to surrender any more nationals, to prevent impunity the ICC should rather reinforce efforts by the national judiciary.[381]

The ICC's deeper engagement also has the potential to inspire trust in national institutions, with an Ivorian prosecutor noting that Côte d'Ivoire may not have the same resources but its judiciary is competent to judge the crimes concerned and people only look to the ICC as they lack sufficient confidence in their own institutions.[382] Similarly, another interviewee stated: "I still believe that with help and timing, Cote d'Ivoire could do it. Its justice system is incomparably better than that in

[377] Interview record 37 – Defence Counsel, 18 October 2020.
[378] As one civil society activist from RAIDH stated, "f*antastic work was done through the CNE that documented violations and the Cellule did their job and continue to*." (Interview record 53 – human rights defender, Regroupement des Acteurs Ivoiriens des Droits de l'Homme (RAIDH), 16 October 2018).
[379] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018; interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018;
[380] Interview record 23 – Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.
[381] In this regard, *"the ICC should not relent in putting pressure on the government that crimes need to be punished and it is not just for the ICC to do." (*Interview record 9 – interviewee, ICTJ, 13 March 2018).
[382] Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018.

the CAR though there needs to be a corresponding political will for impartial justice."[383] The fact that the Court rejected the Ivorian admissibility challenge in Simone Gbagbo's case served to reinforce Ivorians' lack of faith in their national institutions.[384] Some consider complementarity has failed to realise its potential, as exemplified by the Nahibly case where the Cellule started investigative proceedures but activities effectively "stopped because of resources and the need for the collaboration of the population".[385] Nevertheless, others doubt the ICC could really influence this.[386]

Aside from the Cellule, the ICC's engagement has also had a positive effect in invigorating efforts by civil society to advocate for increased access to justice domestically. However, any impact in this regard is indirect and not wholly resulting from the ICC's intervention.[387] Another interviewee considered the effects to be more general, saying "I think it has increased access to justice, because… when people saw the ex-President be judged, it created a boom regarding defending their rights in court."[388] A civil society activist agreed: "it has increased the rate of interest of the victims to go to the justice mechanisms in Cote d'Ivoire to try to access justice."[389]

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[383] Interview record 9 – interviewee, ICTJ, 13 March 2018.
[384] Interview record 52 – interviewee, Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018 ("for th*e ICC to judge it would suppose that Ivorian justice was incapable. (…). The actions of the ICC have linked the fact the Ivorian judge is not equipped to judge crimes against humanity and war crimes.").*
[385] Interview record 23 – Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.
[386] Interview record 20 – interviewee, Association des Femmes Juristes deCôte d'Ivoire (AFJCI), 27 March 2018 ("t*he ICC has had no impact whatsoever to increase access to justice. Ivorians have a fear of court, they are not really used to it. The ICC does not have any hand as far as Ivorians going to court here.").*
[387] As one victim highlighted "*it allowed to really push along certain human rights institutions to acquire more knowledge and information, to organise activities throughout the nation and to give confidence to victims to speak (…).It gives us the strength to believe we can push our authorities to accept this international justice. So it leads us to believe that despite the slowness, [we need] to push forward for justice for all victims." (*Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018).
[388] Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018.
[389] Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018.

However, this positive impact does not necessarily result from a positive perception of the ICC, as in some cases civil society organisations now look more towards the domestic level out of frustration with the ICC.

The OTP's ongoing concurrent investigation and anticipated issuance of further arrest warrants is viewed as a failure to respect complementarity given that national investigations are ongoing into what many believe is the same conduct.[390] Many in the domestic judiciary agree that Côte d'Ivoire now has the capacity to conduct cases at the national level and is even ready to try those close to the current Government.[391] Defence counsel concur that trials should continue nationally, perceiving the ICC's stance as an attack on national soverignty and arrogant.[392] The impact on the rule of law and national reconciliation would be greater if future cases, including that of the pro-Ouattara, take place at the local level.[393]

3. Catalysing Genuine Proceedings - Independence and Impartiality

This section examines the genuineness of national proceedings and the ICC's impact, considering independence and impartiality, including the appointment, promotion or

[390] As an Ivorian prosecutor related, *"there are persons being judged in Cote d'Ivoire just as the ICC process is ongoing. Maybe the ICC is not satisfied by the decisions which we have taken but decisions taken by the state should be respected." (*Interview record 15 – Prosecutor, Côte d'Ivoire, 22 March 2018).

[391] For example, another prosecutor stated: "*"the crimes were committed here, the evidence is here, it should go to court here. I think Cote d'Ivoire is ready to try people close to Ouattara." (*Interview record 13 - Prosecutor, Côte d'Ivoire, 21 March 2018). Similarly, another prosecutor argued "*Ivoirians accused of international crimes must be judged in Cote d'Ivoire, as the Cote d'Ivoire of today disposes of a legal arsenal and qualified magistrates which allow for the execution of such a task…and that is no matter the status or associations, confirmed or suspected, of the accused person."(* Interview record 14 - Prosecutor, Côte d'Ivoire, 21 March 2018).

[392] Interview record 43 – Defence Counsel, 22 October 2018 (*"we should be handling things ourselves on our own level. But since the international community makes us child-like, saying we do not have the capacity for handling things ourselves…").*

[393] As aptly put by one Ivorian interviewee, "*Ivorians should be judged in Côte d'Ivoire because the events occurred in Côte d'Ivoire on Ivorians by Ivorians so it is before the Ivorian nation that they must explain so that the Ivorian nation will know what they did or did not do. Only 5%of Ivorians are following the ICC procedure – those with the internet" (*Interview record 37 – Defence Counsel, 18 October 2018)

removal of judges and prosecutors; the security situation; and political will, including issues over the separation of powers, promotions and amnesty.

3.1 Appointment, promotion, transfer or removal of judges and prosecutors

The concern most frequently raised by interviewees was judicial independence and impartiality. As one interviewee stated: "it looks like you have the parliament, judiciary, things look like they are working but most institutions are not really independent".[394]

Like its predecessor, the 2016 Constitution affirms judicial independence.[395] However, new Constitutional provisions have reinforced this by establishing and strengthening the Superior Council of the Magistracy regarding the appointment, promotion, transfer and removal of judges. The President of the Supreme Court is appointed by the President of the Republic;[396] though they are first nominated by the Superior Council of the Magistracy, as for the Presidents of the Courts of Appeal and First Instance.[397] This improves on the previous rules on appointment of the senior judiciary, in that the power of nomination has moved from the Minister of Justice to the Superior Council of the Magistracy.[398] The Superior Council of the Magistracy also has power of assent over the transfer or promotion of magistrates.[399] The dismissal, suspension or disciplining of judges is also under its authority.[400] However,

[394] Interview record 10 – former international staff member UNOCI, 15 March 2018.
[395] Article 139, Constitution of Côte d'Ivoire 2016, supra note 29.
[396] Articles 150, Constitution of Côte d'Ivoire 2016, supra note 29.
[397] Article 146, Constitution of Côte d'Ivoire 2016, supra note 29.
[398] Reform instituted by Article 105, Constitution of Côte d'Ivoire 2016, supra note 877, replacing Article 5, Law No. 78-662 of 4 August 1978 on the status of the judiciary.
[399] Article 146, Constitution of Côte d'Ivoire 2016, supra note 29.
[400] Article 140, Constitution of Côte d'Ivoire 2016, supra note 29.

the President appoints the person who presides over this body.[401] This is still a significant improvement from the previous situation where the President of the Republic personally presided over the Superior Council.[402] Despite these reforms, interviewees expressed significant scepticism that the textual change has resulted in real change in practice. The reform does not go far enough as the President continues to have the decisive role in the process and "too much control over the Ministry of Justice."[403] The Superior Council should be led by a magistrate appointed solely on merit or the magistrate with the highest rank.[404]

There is a political dimension to appointments to the senior judiciary, with appointments until recently divided between the power bases of coalition partners, the RDR and PDCI - North and Central Côte d'Ivoire.[405] Some indicated appointments based on political affiliation were limited to the Presiding Judges of the Supreme Court and Constitutional Council, who are still appointed directly by the President albeit on the Superior Council of the Magistracy's recommendation.[406] However, others considered appointment based on political affiliation also affects other ranks, including the First President of the Court of Appeals, said to be from the Centre, Baoule by ethnicity and "very close to Bedie", while the President of the Tribunal of First Instance originates from the North, Ouattara's power base.[407] Further, the President of the Accusation Chamber was replaced by Presidential ordinance with a magistrate from the Centre as the magistrate elected by her peers on merit originated

[401] Article 145, Constitution of Côte d'Ivoire 2016, supra note 29.
[402] Interview record 15 – Prosecutor, Côte d'Ivoire, 22 March 2018.
[403] Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018.
[404] Interview record 52 – Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.
[405] Interview record 43 – Defence Counsel, 22 October 2018.
[406] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[407] Interview record 43 – Defence Counsel, 22 October 2018.

from the Central-West, the region associated with Gbagbo.[408] It was also alleged that the Cellule's investigative judges all originate from the North and Centre.[409] Further enquiries indicated this is not the case today though it may have been back in 2011.

While the selection of the three judge panel to sit on the Court of Assize is by the President of the Court of Appeals, defence counsel suspects the Minister of Justice maintains control.[410] Nevertheless, for the first trial of Simone Gbagbo he indicated that the judges were very competent: "it was the best we put there".[411] The problem was executive interference in the process.[412] Prosecutors acknowledged that there is a practice of judges receiving pressure from the Minister of Justice in certain cases "because the Minister can give instructions to a judge despite the fact that normally in the law this is not allowed".[413] This was corroborated by other interviewees, who noted that while judges are independent and this is respected most of the time "there may be specific cases where we ask who he received an order from."[414] It is believed that "in questions where persons of a political nature are implicated…the executive has a heavy influence on decisions".[415] Accordingly, it was asserted that the separation of powers between the legislative, executive and judiciary "is not a reality. When there is the involvement of political persons in justice, it traps justice. Judges are not free."[416] Judges are willing to assert their independence under the law but the

[408] Interview record 43 – Defence Counsel, 22 October 2018.
[409] Interview record 43 – Defence Counsel, 22 October 2018.
[410] Interview record 47 – Defence Counsel, 24 October 2018.
[411] Interview record 47 – Defence Counsel, 24 October 2018.
[412] Interview record 47 – Defence Counsel, 24 October 2018 (*"We knew intellectually these were good judges but the decision did not belong to them.")*.
[413] Interview record 16 - Prosecutor, Côte d'Ivoire, 22 March 2018.
[414] Interview record 20 – interviewee, Association des Femmes Juristes deCôte d'Ivoire (AFJCI), 27 March 2018.
[415] Interview record 52 – interviewee, Action pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.
[416] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.

lack of resources and the political and security climate makes this difficult.[417] Some answered the question indirectly, stating only "there is the reality of the hierarchy and the aspiration for independence."[418]

Despite the immense challenges, there are courageous judges who continue to do their jobs in full independence and impartiality even in the most difficult cases.[419] This was corroborated. However, judges should not have to feel in a constant state of anxiety about exercising the independence vital for their role at the heart of the legal system. It is hoped the reforms strengthening judicial independence will incentivise more judges to do so.[420]

While prosecutors are part of the judiciary, their position differs from judges concerning independence from the executive in appointments, promotions and sanction. The Prosecutor of the Republic is still appointed by Presidential decree upon the recommendation of the Minister of Justice.[421] The organisational hierarchy of the Military Prosecutor is even more problematic in that he does not have discretion to decide who to indict.[422] Most interviewees, including prosecutors,

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[417] Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018 ("*Magistrates are well-trained and in their heart they want to do their job well. They are quality people. The problem lies in their conditions of work and the environment in a system where the separation of powers is not clearly established.*")

[418] Interview record 25 – interviewee, Ministry of Women, Protection of Children and Solidarity, 29 March 2018.

[419] Interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.

[420] As a civil society activist highlights, *"now it has changed in the Constitution and it will help as in practice judges have to be courageous and take decisions as by the laws nothing obliges them to act like they are subservient to Ministries. It is about will – if they want their independence, the text is now there." (*Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018).

[421] Article 5, Law No. 78-662 of 4 August 1978 on the status of the judiciary.

[422] As noted earlier, a draft is to be submitted to the Minister of Defence or Minister of the Interior for authorisation. See ICTJ, 'Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire', *supra* note 53, p.22, fn 143, citing Article 3.1 of the Military Procedure Code and Decree

recognised that the reality of how the system is regulated means that they are not able to function in full independence.[423] In turn, as the judicial police are instructed by the prosecutors, the same applies.[424] Defence counsel compared prosecutors' appointments to an exercise of sovereign will.[425] Similarly, others asserted prosecutors directly receive orders from the Minister of Justice.[426] While the Prosecutor in the civilian justice system is free under the legal framework to open investigations and charge accused without prior consultation of the Minister, some suspect this is still being done in high-profile cases, with the most sensitive cases escalated by the Minister up to the President for approval.[427] This affects Post-Election Violence cases, creating an imbalance whereby "most of the time they don't act after the high calibre"[428] This was suggested by another interviewee who stated: "for simple cases you can decide yourself but when it's more difficult, you will refer to your hierarchy – the General Prosecutor – and based on the gravity of the case, he will also refer up".[429]

The absence of security of tenure means that while the Prosecutor does not need permission and can legally refuse to implement an executive instruction, "he is

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No. 74-489 of 30 October 1974 designating the Minister of Defence to exercise the judicial powers provided by the Military Procedure Code.

[423] Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018; Interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018; Interview record 12 - Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 13 - Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 16 - Prosecutor, Côte d'Ivoire, 22 March 2018.

[424] Interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.

[425] He compared it to the *"…old system where the prosecutors were sent by the King…the Prosecutor receives orders from the Government. The old saying is that the pen stays but words go in the air; in our system, in the same way that words go away, what is written goes away too – the ink goes too".* (Interview record 47 – Defence Counsel, 24 October 2018).

[426] Interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.

[427] Interview record 10 – former international staff member, UNOCI, 15 March 2018.

[428] Interview record 42 – interviewee, Agir pour la Démocratie, la Justice et la Liberté en Côte d'Ivoire (ADJL-CI), 19 October 2018.

[429] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.

appointed and if he wants to be there longer he has to be subservient."[430] However, others considered the matter to be more subtle in that while prosecutors may not be given instructions in specific cases they understand what is expected of them.[431] However, just because prosecutors are appointed by the executive does not mean they are not supposed to function independently in office.[432] Several prosecutors recognised this duty, affirming that independence and impartiality go hand in hand with the rule of law.[433]

There are significant indicators of continued struggles in upholding judicial independence. First, the Presiding Judge of the Constitutional Council, Francis Wodié resigned in February 2015, attributing this to executive interference with a decision over the constitutionality of the Maputo Protocol of the African Union.[434] He was replaced by the incumbent Mamadou Koné following his resignation. Koné is an Ouattara loyalist, suggesting the President deliberately appointed someone more amenable.[435] Yet, absent corroboration from the other judges in the Constitutional

[430] Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018.
[431] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018 (*"from the appointment process, the profile of a prosecutor is that they are politically inclined somehow so they don't need instruction, they understand what is expected of them.")*.
[432] As defence counsel argued, "i*n Cote d'Ivoire, the prosecutors think they are part of the executive powers but a prosecutor represents society – he is the guarantee for society and is not here simply to serve the executive power. If he is named by the executive this is normal but they are here to guarantee liberties because they represent society and not the current Government*." (Interview record 43 – Defence Counsel, 22 October 2018).
[433] Interview record 14 - Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 17 - Prosecutor, Côte d'Ivoire, 23 March 2018.
[434] See 'Wodié: 'Pourquoi j'ai démissionné du Conseil Constitutionnel'', Côte d'Ivoire, Ivorian.net, 16 October 2018.
[435] Nevertheless, it is not clear what reservations Wodié had to confirming the constitutionality of the Maputo Protocol. Conservatives in various States have raised issues of constitutionality which prevent or delay its ratification as it is very advanced in extending women's rights in public and private life. For example, Sierra Leone only ratified the Maputo Protocol twelve years after becoming a signatory as many viewed its provisions as an attack on traditional cultural practices, in particular, female genital mutilation: Politico SL, 'Sierra Leone finally ratifies Maputo Protocol', by Mustapha Sesay, 7 July 2015.

Council as to the fact and extent of executive interference, it cannot be taken as given, however probable it may seem.

Yet, a further indicator of intrusion on the separation of powers is the flight of prosecutor Ange Olivier Grah, President of the Union of Magistrates of Côte d'Ivoire (SYMACI), in mid-2018 following interviews with Afrikipresse where he highlighted concerns about judicial independence.[436] At the time, he was a Substitute Prosecutor of the General Prosecution Office attached to the Abidjan Court of Appeal.[437] Following the interviews, he was suspended on 26 June 2018 and later removed as a magistrate on the Minister of Justice's recommendation.[438] He challenged the disciplinary process adopted as ultra vires.[439] He is now in exile in the United States. Grah asserted that while the Government has rushed to put in place new political institutions, it has starved the Supreme Court and Superior Council of the Magistracy of funding and failed to define justice sector priorities, adopting only cosmetic reforms.[440] In turn, he drew attention to the relative diminution of the office of the Ministry of Justice in the overall governmental hierarchy and marginalisation of the judicial apparatus. He highlighted bad governance, the weakening of the judiciary through corruption and continuous executive interference. He claimed the Council of

[436] 'Président d'un syndicat de magistrats en Côte d'Ivoire, Grah Olivier pas content des greffiers', Dasse Claude, 31 March 2018, Afrikipresse, (Part One); 'Côte d'Ivoire: non à une justice à 2 vitesses, nos griefs contre le gouvernement (Grah Olivier, Magistrat)', Dasse Claude, 9 April 2018, Afrikipresse (Part Two); 'Magistrats humiliés par Sansan Kambilé, l'Onu saisie: les maux de la justice en Côte d'Ivoire dévoilés (Grah Ange Olivier)', Dasse Claude, 19 April 2018, Afrikipresse (Part 3).

[437] He was promoted to this function in January 2018 pursuant to Decree No. 2018-05 of 10 January 2018 – Drecet No. 2018-2018-05 du 10 janvier 2018 portant élevation d'un magistrate au rang de magistrate hors hiérarchie, Official Gazette No. 9 of 29 January 2018.

[438] Decret No. 2018-690 du 9 août 2018 portant réevocation d'un magistrat, Official Gazette No. 73 of 10 September 2018. The decree cites Opinion No. 003-CDP/2018 of 30/07/2018 of the Commission de Discipline du Parquet.

[439] He was subject to proceedings initiated by the Inspector General of Judicial Services and the opinion of a Disciplinary Committee of the Prosecution Office - which he claimed had not existed since reforms introduced with the Constitution of 2000 - rather than the Superior Council of the Magistracy: Koaci.com, Interview with Ange Olivier Grah, 'Convoque par sa hierarchie, un juge denonce la procedure, refuse de se presenter et annonce des poursuites contre l'Etat', 3 July 2018.

[440] Part Three, Afrikipresse, 19 April 2018, *supra* note 1291.

Ministers gave instructions to the Prosecutor in the opening of investigations and brought about the completion of judicial procedures in undue haste, at the risk of further diminishing public confidence.[441] Moreover, he stated that promotions are based on loyalty, not performance.

The sanctions accorded have resulted in other magistrates being more reluctant to assert their independence or openly express their opinions "as they fear having the same fate as the judge in exile."[442] In an article in January 2019, Grah declared that the Minister of Justice Sansan Kambilé has put in place a "climate of terror", with magistrates fearful of taking decisions to the executive's distaste.[443] This was contested by the Minister, who affirmed his respect for judicial independence.[444] Indeed, only on 13 January 2019, the Minister reminded members of the legislature to respect prosecutorial independence after a parliamentarian called for proceedings against Jacques Ehou, Mayor of Plateau, to be dropped.[445] Nevertheless, it was followed by a statement by the Ordre des Avocats calling on magistrates to push through any interference, to accomplish their work independently and impartially.[446]

There is also a discernible pattern of judges and prosecutors being transferred from Abidjan to remote regions in the interior after expressions of independence in high-profile cases. While the Superior Council of the Magistracy is authoritative

[441] Part Three, Afrikipresse, 19 April 2018, *supra* note 1291.
[442] Interview record 52 – Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.
[443] IvoireSoir, 'Le Président du Syndicat des magistrats déshabille Sansan Kambilé: 'Vous avez mis en place un management par la terreur'', 25 January 2019.
[444] Communiqué of the Minister of Justice, Sansan Kambile, 18 January 2019 ; L'expression, 'Côte d'Ivoire: Sansan Kambilé invite les magistrats à apporter la preuve de l'immixtion du pouvoir exécutif dans l'exercice de leurs fonctions', 23 January 2019.
[445] Communique of the Minister of Justice, Sansan Kambile, 13 January 2019.
[446] Abidjan.net, 'Justice: le barreau demande aux juges d'accomplir leur mission en tout indépendance', 28 January 2019.

concerning official disciplinary measures against judges, different rules apply to transfers which are not legally regarded as a sanction. While the Constitution provides for the general principle of security of tenure, it allows judges to be transferred without consent if "operational requirements dictate".[447] In effect, transfer has become a means of disciplining magistrates who step out of line and its ongoing threat dissuades others. For example, Judge Konan Jean Houssou was replaced several sessions into Simone Gbagbo's State security trial with Judge Fanta Touré, previously an investigative judge, after Judge Houssou was named President of the First Chamber of Daloa. In turn, Judge Bouqui Kouadjo, who presided over the second Gbagbo trial for blood crimes which resulted in her acquittal was subsequently transferred to Daloa.[448]

As related above, the Cellule's investigative judges have also changed over time. Most notably, the Dean of Judges, Makoueni Cisse, was transferred to other duties. She is today the Director of the National School for Magistrates of Côte d'Ivoire. Further, the investigative judge who initially opened the cases related to the CNE, Losséni Cissé, was transferred to Bouaké, albeit on promotion, coinciding with the appointment of new judges to the Cellule in 2013. In due course, Judge Kra N'Dri, reportedly handling the Nahibly case and economic crimes, was replaced in 2018.

There is a need for further reform for security of tenure, which could include a minimum duration for a judge to be in position before being eligible for redeployment, ending "the notion of necessity of service as the basis of which judges were transferred in all directions when they take a decision which does not satisfy the

[447] Article 140, Constitution of Côte d'Ivoire 2016, *supra* note 29.
[448] Interview record 52 – Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.

public powers."[449] The possibility of being transferred or sanctioned in another way deters judges from pro-actively asserting independence.[450] However, the idea that transfer is used as a sanction or threat was strongly refuted by a senior judge who said that all transfers are ultimately based on the reports of the supervisors of those affected, the Superior Council of the Magistracy gives advice on this and the Minister of Justice makes a decision taking into account these reports.[451] Nevertheless, the performance assessment system means that magistrates who are evaluated badly by their superiors, the General Prosecutor or President of the Court, "cannot advance professionally even if you do an extraordinary job – it deters independence".[452]

Another prosecutor noted that in most cases "even to transfer the judge, you need their consent to avoid pressure being put on persons."[453] He emphasised that "it's up to each judge to defend their independence. It's for each of them personally to assure it. All the legal texts exist; the judge only works for the law and that's the only thing they should look at."[454] Another prosecutor shared a similar view, considering it a matter of changing culture since the earlier system where independence was not guaranteed.[455] Some interviewees remarked more generally on the regular rotation of magistrates between the roles of prosecutor and judge, who receive the same training at formation, and issues stemming from the adjustment and the need for prosecutors

[449] Interview record 52 – Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.
[450] As a defence counsel explained, "i*f a judge knows he will be transferred or sacked after a decision, he cannot act, so the independence of the magistrates is true but in reality non-existent." (* Interview record 47 – Defence Counsel, 24 October 2018).
[451] Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018.
[452] Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018.
[453] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[454] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[455] Interview record 13 - Prosecutor, Côte d'Ivoire, 21 March 2018 (*"…we are impartial but not independent. It is the judges that are independent. There is nothing that impedes them being independent. For some they may not quite get the notion of independence. It's not a function of the political powers; it's about the function of the Rule of Law – to be independent from family and political influence").*

to acquaint themselves with the different responsibilities of a judge.[456] This indicates a need for training during the transition to reinforce the duty to act independently. A senior judge reinforced the point that it is up to each judge to assert their independence.[457] He disagreed that the situation was different for prosecutors.[458]

While Cellule personnel are appointed by order of the Minister of Justice; for the investigating judges, this appointment comes after obtaining the opinion of the Superior Council of the Magistracy.[459] In their daily work, the investigating judges report to the Dean of Judges. However, as the Prosecutor leads the Cellule, all its judges are under his authority. This means, ultimately, that they fall in the line of the Minister of Justice. It is queried how a prosecutor can supervise the judges and their independence still be assured.[460]

Some interviewees indicated the way the investigative process functions and the different regulation of prosecutors and judges means that in practice investigative judges understand that as a prosecutor has been appointed by the executive, when a file is referred to them for pre-trial investigation this referral has been permitted by the executive and therefore "once a magistrate receives a file from the prosecutor he

[456] Interview record 15 – Prosecutor, Côte d'Ivoire, 22 March 2018.
[457] Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018 ("*this is a personal question first. A judge himself has to appropriate this independence and then carry out this independence. The difficulty is the social ramifications are such that there is always a cousin who knows a cousin, every time a case is going to be opened, they will come. Aside from that, a judge has to be mature enough to make it understood by others they must adhere to the law…so each judge must assert their independence*").
[458] Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018 ("*there is no difference between a judge and the prosecutor so if you refuse to use your independence as you are scared to lose your position or a certain benefit, we cannot do anything for you*.").
[459] Article 11, Decree 2013-215 of 30 December 2013, *supra* note 43; Article 11, Decree No. 2016-543 of 20 July 2016, *supra* note 43.
[460] Interview record 10 – former international staff member, UNOCI, 15 March 2018.

will go in line with what is requested".[461] Others related that as judges are independent, once a file is referred to them the investigation will continue and they have full autonomy to investigate and follow the evidence to make a decision.[462] However, another prosecutor indicated the contrary, relating "often the Minister of Justice has a word in whether a case will be opened. So if the investigating judge wants to proceed, the Ministry can say no" and that "the Prosecutor receives a huge amount of pressure" and the same applies to the judges in the Cellule.[463]

Even with the hierarchical structure, it does not mean that the Cellule has not operated independently, though it will have been challenging to do so.[464] The sense that those working in the Cellule are like beacons of light in an otherwise compromised system was corroborated by interviewees.[465] However, many rightly question that if the Cellule's magistrates have been able to function with full operational independence, why more progress has not been made in the investigation of both sides to ensure equal accountability.[466]

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[461] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.

[462] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018. ("*Could a Minister order a case to be stopped? When it is still with the police yes, in the preliminary stages, but not when it's before the court, before the investigating judge…once it is before a judge then the case continues and the Minister can't stop it*").

[463] Interview record 16 - Prosecutor, Côte d'Ivoire, 22 March 2018.

[464] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018 ("*the Prosecutor is also appointed by the executive power so it is difficult for them to be independent. But …we have exceptions and some judges and prosecutors are the exception").*

[465] Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018 ("*For the Cellule, for what we have been able to see, the magistrates are really good there with transparency in their hearts. This is why we suppose they wanted to stop the work of the Cellule and we really fought to keep it. When the state fights, even the best of men are hindered in what they do*.").

[466] As OIDH emphasises, "*98% of the prosecutions were oriented to pro-Gbagbo. If we don't want a repetition of the crimes, we have to prosecute both sides. If they are independent, how come they only investigated one side when other crimes were committed at the same time in some areas? Our work is to say your work is not finished…We don't want this double standard justice.*" (Interview record 40 – Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.

Although many judges fight to uphold their independence and decide cases free of bias, the public perception that they are unable to operate independently and impartially significantly affects witnesses' willingness to participate. Between March and July 2014, the Ivorian Coalition for the ICC surveyed 300 participants throughout the country for a study on the population's perception of the justice system.[467] 64.34% did not have confidence in the justice system, with 60.74% considering national justice to be partisan, unequal and corrupt.[468] The ICC did not fare much better, though the results indicated a divide between those from Abidjan (80% considered the ICC impartial and fair) and the West, with 73% of participants from the Man region considering the ICC to be partial.[469] Just over half of the overall participants considered the ICC was capable of ending impunity in Côte d'Ivoire.[470]

Corruption also affects trust in the judiciary, including more broadly in that some judges are suspected to take into account family relationships in rendering judgments.[471] Côte d'Ivoire has progressively rebuilt its justice system but corruption is a pre-existing problem.[472] It exists even at formation in entrance to the national institute for magistrates, while others are corrupted after appointment to office due to systemic issues.[473] This includes bribes or other pressure by litigants.[474] Corruption also afflicts the police, with the prior experience of some interviewees with regular

[467] Abidjan, Bondoukou, Bouaflé, Duékoué, Ferkessédougou, Korhogo, Man, Odienné, Tuba and Zuénoula: CI-ICC, ''Nous avons soif de plus de justice': Rapport d'enquête sur la perception de la population sur la justice nationale, internationale et transitionnelle', 2015, pp.13 and 16.
[468] Ibid, pp.21 and 25.
[469] Ibid, p.30.
[470] Ibid, p.37.
[471] Interview record 43 – Defence Counsel, 22 October 2019; Interview record 23 – Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.
[472] Interview record 50 – interviewee, Confederation of Victims of Côte d'Ivoire (COVICI), 25 October 2018.
[473] Interview record 51 – interviewee, Platform for Associations in Duekoué (POREVCI) and COVICI, 25 October 2018.
[474] One interviewee noted as an example, "*the judge at 11h will give a verdict. If I am not happy, I will go to another magistrate and he will give a verdict in the same case at 14h.*" (Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018).

officers putting them off approaching the police at all.[475] However, a lack of procedural awareness also means that often people perceive a judge as corrupt or biased when they do not understand an outcome.[476]

3.2 Freedom of expression

There is a need for freedom of expression to build democratic accountability.[477] However, one interviewee asserted "freedom of speech is non-existent and even political parties cannot express themselves. Last year a lot of journalists were jailed for writing about the President. Ivorian people are very scared".[478] Issues were also raised as to heavy-handedness in dealing with political dissent, with peaceful protests on reform of the Independent Electoral Commission (CEI) met with arrests.[479] Similarly, meetings of civil society organisations have occasionally been curtailed, contrary to free assembly.[480] However, in many cases the daily press continues to disseminate the news in a manner that increases polarisation, undermining efforts towards social cohesion.[481] Consequently, better media regulation and a focus on press ethics is also required.

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[475] Interview records 26 and 27 – interviewees, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018. Similarly, another interviewee alleged that the police official responsible for anti-narcotics in their district is in charge of the crack houses and sends the proceeds to the prefect. However, the same interviewee considered there was a willingness at the top of Government to tackle the problem, saying "*if the Prime Minister finds out, they take measures immediately*" (Interview record 49 – interviewee, Plateforme des associations de victims pour la paix et la reconciliation en Côte d'Ivoire (PAPCI), 25 October 2018, referring to the former PM).

[476] Interview record 23 – Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.

[477] Interview record 14 – Prosecutor, Côte d'Ivoire, 21 March 2018.

[478] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.

[479] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018. This is despite such reform being called for by the African Court on Human and Peoples' Rights: *APDH v Republic of Côte d'Ivoire*, Judgment of 18 November 2016, Application No. 001/2014.

[480] Interview record 21 – Convention Societe Civile de Cote d'Ivoire, 27 March 2018 (*"it was the EU-AU Summit two months ago and we organised an alternative summit of African and European civil society but the police came at 4am and scattered everybody so we had to reconvene our meeting").*

[481] As one prosecutor emphasised, *"they are very important, so much so we call them the fourth power – legislative, executive, judiciary and the media. They have to give the correct information. Political discord, calls for violence being renewed – they need to respect their ethics charter" (*Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018).

3.3 Security situation

The security environment has greatly improved since 2011. As one prosecutor stated, while previously everything was at a standstill due to insecurity, now all parts of the judicial system are functioning.[482] There is some indication that the ICC has contributed to general deterrence in preventing a relapse of the conflict by signalling the end of impunity.[483] Bocchese argues that the OTP's communication in December 2010 warning Gbagbo and Blé Goudé that the ICC was watching "failed to deescalate the conflict and perhaps even strengthened their resolve to fight until the end" without the possibility of amnesty.[484] However, other accounts suggest that the ICC's watch did have some bearing in 2011.[485] Nonetheless, the situation remains fragile and is susceptible to deteriorate.[486] With Presidential elections coming in 2020, the municipal and regional elections in 2018 were a test. As reported by the National Commission for Human Rights of Côte d'Ivoire, the climate around the elections was encouraging.[487] There were acts of violence in some localities after the results. However, while the results were annulled and a re-vote ordered in two regions and six communes;[488] it is positive that most people resorted to peaceful means to contest the results and the Supreme Court responded well to the challenge.

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[482] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018 ("*when I go to court, this is not one of my concerns. We can work freely. We do our job. It's a risky job by nature but there are no attacks on magistrates in general; we are not particularly targeted. I'm not aware of any attacks on or intimidation of judges*").
[483] Linus Nnabuike Malu, 'The International Criminal Court and the Complex Road to Peace in Côte d'Ivoire' (2016) 16 International Criminal Law Review 826-855, at 852-855.
[484] Marco Bocchese, 'Gbagbo's Lost Bet: When Inviting External Judicial Scrutiny Backfires', (2019) 23 (10) The International Journal of Human Rights 1648-1672, at 1667.
[485] Interview record 48 – Commissioner, CDVR and CONARIV, 24 October 2018.
[486] CNDHCI, 'Report on the monitoring of the elections (municipal and regional)', 13 October and 16 December 2018, at p.8, ('CNDHCI Report on the municipal and regional elections 2018').
[487] Ibid, at p.7.
[488] Ibid, at p.6.

Aside from gangs of disaffected youth prone to exploitation for political ends;[489] the larger issue is the continued influence of the former Com Zones who supported Ouattara's victory, many of whom occupy key positions.[490] Further, traditional hunters affiliated to the Forces Nouvelles who supported the front in Bangolo, Duékoue and Kouibly,[491] are still present there. The security environment in the West was especially difficult in the relatively early stages of the Cellule's investigations, with an attack in a village near the Liberian border in May 2014 linked to fighters loyal to Gbagbo.[492] This reinforced the need to maintain troops in the area and may have disincentivised the Government from supporting investigations.

The absence of effective security measures for judges and prosecutors to perform their duties without fear for their own or their family's security is a real problem for PEV cases on which views are so polarised. It was reported that a member of the Prosecutor's Office assigned to the Cellule was attacked at home by armed men in August 2012.[493] This meant others were reluctant to be part of the Cellule.[494] While public reports of such incidents occurring since then have been scarce, it is likely that

[489] CNDHCI, 'Consultation des jeunes sur la gouvernance et les droits de l'homme: 'Le bruit assourdissant du silence des jeuenes', June 2018, at p. 13. See also CNDHCI, 'Report on the phenomenon of 'microbes' and children in conflict with the law', August-September 2017.
[490] UN, Report of the Independent Commission of Inquiry on Côte d'Ivoire, A/HRC/17/148, 1 July 2018, p.9, para 20: (1) Bouna: Morou Ouattara ("Atchengué"); (2) Katiola: Hervé Touré ("vetcho"); (3) Bouaké: Ousmane Chérif ("Papa Guépard"); (4) Mankono: Zoumana Ouattara (Lieutenant Zoua); (5) Séguéla: Koné Zacharia ("Djacki"); (6) Man: Loss Fofana ("loss"); (7) Touba: Dramane Traoré; (8) Odienné: Ousmane Coulibaly ("Ben Laden"); (9) Boundiali: Gaoussou Koné ("Jah Gao"); and (10) Korhogo: Kouakou Martin Fofie. However, Koné Zacharia was replaced as Com Zone for Séguéla by Issiaka Ouattara ("Wattao") in May 2008 with reports indicating a violent struggle between forces loyal to Wattao and those loyal to Zacharia: La Depeche Abidjan, "Tensions en Côte d'Ivoire: Wattao et Koné Zacharia se guettent", 8 August 2017. For the latest information: Koaci, "Côte d'Ivoire: Liste complète des nouvelles nominations dans l'armée", 6 March 2019.
[491] UN, Report of the Independent Commission of Inquiry on Côte d'Ivoire, A/HRC/17/148, 1 July 2018, *supra* note 490, at p.10, para.29.
[492] Jeune Afrique, 'Côte d'Ivoire: l'attaque de Fetai livre ses secrets', by Baudelaire Mieu, 19 May 2014.
[493] ICTJ, 'Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire', *supra* note 53, p.28, fn.185.
[494] ICTJ, 'Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire', *supra* note 53, p. 28.

police, prosecutors and judges involved in PEV cases continue to experience lower-level threats and intimidation.[495]

It takes courage for the Cellule's investigative judges and investigators to assert their authority in cases concerning both sides. Legislative and other reforms concerning judicial independence may only have a greater impact when the political and security environment in which magistrates operate further stabilises to enable them to assert this independence.[496] As emphasised by an interviewee from LIDHO, "if the judge goes to Man, the Chief of the Forces Nouvelles was implicated, so can the magistrate give a summons to him?".[497] As ex-rebels were also integrated into the army and police, there is also an internal risk and likelihood that those sought will be tipped off.[498] Further, as the executive is responsible for reinforcing the security of judges and prosecutors, it does not easily dispose them to asserting their independence against the political current at the risk of no or weak protection.[499] This security environment has clearly influenced the sequencing of Cellule investigations, with cases against the pro-Ouattara opened only after the initial transition. The promotion of the Com Zones, coupled with UNOCI's withdrawal, has increased the level of perceived risk, which may have led to a standstill in the judicial process for those accused despite sufficient evidence being acquired to prosecute.[500]

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[495] As noted by an interviewee from AFJCI, "*a judge is someone who is discrete, a public figure, we believe they are threatened but they would never tell people openly. They would not talk for their own safety and they have their ethics too*" (Interview record 20 – interviewee, Association des Femmes Juristes deCôte d'Ivoire (AFJCI)), 27 March 2018.

[496] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.

[497] Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018.

[498] Interview record 22 – Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2019; Interview record 24 – interviewee, Convention de la Societe Civile de Côte d'Ivoire, 29 March 2018.

[499] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.

[500] Interview record 16 - Prosecutor, Côte d'Ivoire, 22 March 2018.

However, there are no longer any direct threats or physical attacks on judges and prosecutors; it is rather a case of a reluctance to act contrary to the perceived will of the executive for fear of transfer.[501] Today, the issue is not so much one of protecting judges from alleged perpetrators but from political interference.[502]

3.4 Political will

3.4.1 Provisional release

Legally, provisional release is determined by the judiciary. The Prosecutor could require a detainee to be released at any moment and an investigating judge must put this into effect within five days.[503] A judge may also order provisional release on their own motion. However, the executive has an undeniable influence.

In December 2012, the Abidjan Accusation Chamber ordered the interim release of nine former Gbagbo officials and supporters.[504] In turn, the interim release of a further fourteen was secured in August 2013, including his son Michel Gbagbo, President of the FPI Pascal Affi N'Guessan, Vice-President Aboudramane Sangaré, and Gbagbo's Minister of Foreign Affairs Alcide Djedjé.[505] When the Ivorian Government announced the restart of national dialogue with Gbagbo's party in May 2014, the FPI called for the release of 719 individuals as an expression of goodwill.[506] It was announced that 150 individuals close to Gbagbo, including Gilbert Marie Aké

[501] Interview record 15 - Prosecutor, Côte d'Ivoire, 22 March 2018.
[502] Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018.
[503] Article 140, old Ivorian CPC 1960, *supra* note 30.
[504] FIDH, MIDH and LIDHO, 'Ivory Coast: The Fight against Impunity at a Crossroads', *supra* note 128, p.7.
[505] Ibid, at p.8.
[506] Note though that Abidjan.net found that 228 of those listed by FPI were not in fact detained according to the records of the penitentiary administration.

N'Gbo, the former Prime Minister, Jean-Yves Dibopieu, the former Secretary-General of FESCI and President of African Solidarity and Angenor Youan-Bi, Second in COJEP[507] to Blé Goudé, would be provisionally released.[508] Forty-three were previously released in April 2014.

The Prosecutor may have felt compelled to request the release of those named by politicians in the media.[509] However, this does not necessarily demonstrate a lack of will to hold those accused of serious crime to account. Rather, it might be viewed as a human rights compliant initiative to end detention based on political affiliation.

3.4.2 Promotions

The situation concerning the pro-Ouattara of interest to the Cellule and/or the Military Prosecutor definitively indicates a lack of political will and determined efforts to undermine the work of the judiciary. Many consider the Com Zones "untouchable", considering there is no political will to prosecute those who fought for Ouattara.[510] The Com Zones continue to have enormous influence over the country's direction.[511]

This is exemplified by Wattao, initially Chief of Security for Abidjan-South and Second in Command of the Republican Guard.[512] In 2013, he was appointed Second

[507] Congrès panafricain des jeunes patriotes (COJEP)
[508] Abidjan.net, 'Liberation d'un cinquantaine de pro-Gbagbo dont Jean Yves Dibopieu', 31 May 2014. Note that Dibopieu was only arrested in February 2013 when he was extradited from Ghana and detained at the MACA in Bouaké.
[509] ICTJ, 'Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire', *supra* note 53, p. 18 and 22; and Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018.
[510] Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018 ("*the deal was for them to protect him once he was in power*").
[511] See e.g. Soir Info, 'Ouattara ou Soro: les Com'zone choisissent leur camp', 26 July 2018.
[512] You Tube, 'Wattao, un chef de guerre de Ouattara en trellis americain', 15 August 2011. Aside from his strength as a former Com Zone, Wattao was also a key figure in the Ivorian mafia: ACAT France, 'Wattao: Parcours d'un militaire ivoirien, ex-chef de guere devenu caïd', 10 April 2015.

in Command of the Centre of Command for Operations.[513] He was relieved of command in July 2014.[514] Yet, in 2015 he was promoted to Colonel, then Commander of the Republican Guard.[515] Aside from his strength as a former Com Zone, Wattao was also a key figure in the Ivorian mafia.[516] Only in March 2019, he was promoted again to Commander of units attached to the General Staff of the Armed Forces.[517] Nevertheless, some saw the move as a sign that he was no longer as trusted as he was further removed from the troops.[518] In turn, Morou Ouattara, Com Zone for Bouna, was made commander in the Special Forces in 2011.[519] In February 2017, he was made Commander of the Battalion for Security of the East.[520] However, already linked to organised crime[521] he has now come under the Military Prosecutor's radar for corruption, being charged with illicit enrichment for pocketing money for

[513] Jeune Afrique, 'Côte d'Ivoire: comzone un jour, comzone toujours', 25 September 2013.
[514]Jeune Afrique, 'Côte d'Ivoire: retour sur la chute de Wattao, le plus 'bling-bling' des ex-com-zones', 3 August 2014.
[515] Soir Info, 'Côte d'Ivoire: Ouattara fait de nouvelles nominations dans l'armée, Wattao confirmé à la GR', 26 January 2017.
[516] See ACAT France, 'Wattao: Parcours d'un militaire ivoirien, ex-chef de guere devenu caïd', 10 April 2015.
[517] Jeune Afrique, 'Côte d'Ivoire: des ex-chefs de la rébellion nommés au sein des forces armées', Baudelaire Mieu, Abidjan, 8 March 2019. Note, however, that some consider this not as it appears on its face, comparing it to being "parked in the garage" on the basis that he does not have a unit under his command like he did as Commander of the Republican Guard prior to this reshuffle: Abidjanpeople.net, 'Côte d'Ivoire – Nominations au sein de l'armée: les precisions d'un militaire, le cas Wattao évoqué', by Aziz Brahimi, 7 March 2019.
[518] The Africa Report, 'General Lassina Doumbia, keeping the Ivorian army in line', by Vincent Duhem, 4 April 2019. Wattao died in January 2020: The Africa Report, Baudelaire Mieu and Vincent Duhem, 'Côte d'Ivoire: death in New York of Issiaka Ouattara, alias Wattao', 6 January 2020.
[519] Africa Intelligence, 'Les com zones capitalisent sur la sécurié', La letter du continent no. 619, 22 September 2011.
[520] Connection Ivoirien, 'Mourou Ouattara a pris le commandement du BSE', 2 February 2017.
[521] Including illegal exportation and arms trafficking : Côte d'Ivoire News, 'Côte d'Ivoire: L'ancien chef de guerre Morou Ouattara cite dans un trafique de noix de cajou vers le Ghana', 12 April 2018 ; and RFI Afrique, 'Côte d'Ivoire: Des traffics illégaux prospèrent en Côte d'Ivoire, selon l'ONU', 26 April 2014.

the Special Forces.[522] As Guillaume Soro has been increasingly ostracised since 2019, the influence of those closest to him may also be considered lower.[523]

However, Ousmane Cherif and Losseini Fofana are Ouattara's allies.[524] Cherif is also a close associate of Hamed Bakayoko, Minister of Interior and Security from 2010 to 2017,[525] now Minister of Defence and Prime Minister.[526] In 2011, Cherif was made Second in Command of the Security Group for the Presidency of the Republic (GSPR).[527] Despite being indicted for blood crimes, in February 2017, he was made Commander of the 1st Battalion of the Parachute Commandos in Akouédo.[528] In March 2019, he was further promoted to Deputy Chief of Staff of the Army.[529] Moreover, Loss was appointed Vice-Commander of the Special Forces, before becoming Commander of the Battallion for the Security of the West.[530] In March

[522] Côte d'Ivoire News, 'Côte d'Ivoire: Morou Ouattara dans le collimateur du Tribunal Militaire d'Abidjan', 7 September 2016 ; Afrique sur 7, 'Côte d'Ivoire: Ange Kessi ne lâche toujours pas Morou Ouattara', by Dreyfus Polichinelle, 7 June 2018 ; and Ivoire Matin, 'Tribunal Militaire d'Abidjan: Mourou Ouattara inculpé pour vol de 50 millions', 29 December 2019.
[523] The Africa Report, Jeune Afrique, 'Côte d'Ivoire; Why the hurry, Guillaume Soro?', 24 October 2019; RFI, 'Côte d'Ivoire: Guillaume Soro gets 20 years for 'trumped-up' charges', 29 April 2020.
[524] Cherif is also married to the granddaughter of the former President of Burkina Faso, friends with the First Lady: All Africa, 'Côte d'Ivoire: Mariage princier à Ouaga –Mlle désarme Chérif Ousmane', 17 December 2007; and Connection Ivoirienne, 'Côte d'Ivoire: Pourquoi Ouattara protège Chérif Ousmane', 3 August 2011.
[525] Jeune Afrique, 'Côte d'Ivoire: Nouvelle vie dorée des COM Zones', *supra* note 1395 (noting Zakaria Koné is also close to Bakayoko).
[526] Reuters, 'Ivory Coast's Ouattara replaces key ministers in reshuffle', 19 July 2017; Africa Intelligence, Insiders, 'Hamed Bakayoko: A Ouattara follower who sticks with his friends', 30 July 2017; Africa Confidential, Vol 60 No. 4, 'All bets are off', 22 February 2019; and Reuters, 'Ivory Coast Defence Minister Bakayoko named Prime Minister', 30 July 2020.
[527] Connection Ivoirienne, 'Ouattara nomme Chérif Ousmane à la GSPR, Fofié à la CTK et Wattao à la garde Republicaine', 4 August 2011.
[528] Abidjan.net, APA, 'Après son depart de la sécurité présidentielle Chérif Ousmane réaffirme sa 'loyauté' à Ouattara', 4 February 2017 ; Net Afrique, 'Côte d'Ivoire – Nominations dans l'armée: Wattao et Chérif Ousmane promus, Le cas des autres ex-Com Zone', 27 January 2017. Aside from his indictment for blood crimes, reports also implicate him in organised crime: RFI Afrique, 'Côte d'Ivoire: Des traffics illégaux prospèrent en Côte d'Ivoire, selon l'ONU', 26 April 2014.
[529] 'Côte d'Ivoire: des ex-chefs de la rébellion nommés au sein des forces armées', Baudelaire Mieu, Abidjan, Jeune Afrique, 8 March 2019.
[530] Abidjan.net, Nord Sud, 'Force spéciale/Jah Gao, Loss, Koné Zakaria…s'en vont', 28 December 2012.

2019, he returned to the Third Battalion of Bouaké.[531] Other ComZones implicated in the post-election violence have also been promoted.[532]

Army mutinies in 2014 and early 2017 - led by members of the Forces Nouvelles or former militias integrated into the chain of command in 2011 strengthened the Com Zones' position and entrenched political reluctance to hold them to account for past conduct for fear of destabilising the country.[533] Nevertheless, the security situation is much better today and while the Com Zones still have influence they no longer have the same weight. As such, interviewees considered the issue was one of political will as "politicians fear the Com Zones more than the common people do".[534]

Difficult political allegiances with Soro, until February 2019, President of the National Assembly, may also have influenced the level of will to proceed against

[531] Jeune Afrique, 'Côte d'Ivoire: des ex-chefs de la rébellion nommés au sein des forces armées', Baudelaire Mieu, Abidjan, 8 March 2019.

[532] (1) Herve Touré - appointed Head of the National Agency for Strategy and Intelligence in 2011, promoted to Lieutenant-Colonel and made Commander of the 3rd Infantry Battalion in Bouaké in 2014, a position he retains today; (2) Zacharia Koné became Second in Command of BASA-Ground-to-Air Artillery Battalion at Akouédo in 2013, the largest camp in the country. In 2017, he was made Commander of a Tactical Unit for Command and Support; (3) Dramane Traore was chosen to lead the Batallion for Security of Guémon and Mont Peko in the West in 2012. He was promoted to Lieutenant Colonel in 2014 and became Commander of the 4th Infantry Battalion in 2017; (4) Ousmane Coulibaly became the prefect of San Pedro region in September 2012, where he remains; and (5) Martin Fofie led the Territorial Company for Korhogo, before becoming Commander of the 4th Infantry Battalion in September 2016. Since 2017, he is Second in Command for the Army in Daloa. See Koaci, 'Côte d'Ivoire: Le Commandant Hervé Touré à la tete des services de renseignement' by Laurent Despas, 29 November 2011; Koaci, 'Côte d'Ivoire: Les commandants de lex-rébellion promus aux grades de Lieutenant-Colonel', 22 January 2014; Soir Info, 'Côte d'Ivoire: Ouattara fait de nouvelles nominations dans l'armée, Wattao confirmé à la GR', 26 January 2017; Jeune Afrique, 'Côte d'Ivoire: Nouvelle vie dorée des COM Zones', 17 September 2013; Afrique sur 7, 'Côte d'Ivoire: Nouvelles nominations dans l'armée, la liste complete', 28 January 2017; Abidjan.net, Le Patriote, 'Commandant Coulibaly Ousman dit 'Ben Laden' (Préfet de region de San-Pedro): 'Concernant Mme Gbagbo, je n'ai rien à me reprocher'', 13 November 2012 ; Koaci, 'Côte d'Ivoire: Des FRCI affectées à Korhogo et refoulées par Martin Kouakou Fofié', 8 November 2011; and Koaci, 'Côte d'Ivoire: Des FRCI affectées à Korhogo et refoulées par Martin Kouakou Fofié', 8 November 2011.

[533] See Richard Ehui, 'Côte d'Ivoire: mutineers' paradise?' 53 (1) Canadian Journal of African Studies (2019), 109-129; Rebecca Schiel, Christopher Faulkner and Jonathan Powell, 'Mutiny in Côte d'Ivoire', 52 (2) Africa Spectrum (2017) 103-115; VOA Afrique, 'Bouaké sous contrôle des mutins ivoiriens', 6 January 2017; Al Jazeera, 'Ivory Coast minister freed after troops mutiny deal', 7 January 2017.

[534] Interview record 10 – former international staff member, UNOCI, 15 March 2018.

former rebels. As a civil society activist noted, Soro has given a clear message towards victor's justice in speeches.[535] Nevertheless, in an interview in June 2018, President Ouattara continued to indicate that 'own side' forces would also be held to account though he commented that "after the Second World War, it took thirty years to judge certain accused".[536]

3.4.3 Resources

Even in Abidjan, there are only two tribunals to meet the needs of five million residents.[537] This affects the work of prosecutors and judges as "there are not enough magistrates so you can see from the volume of cases they have no time to go deeper".[538] As they are overloaded system-wide, case management means "either the procedures are very slow or go very fast and are not handled well".[539] Further, trial delays due to the non-permanent nature of the Court of Assize were also incurred for the want of money to organise a trial session. At one point there was only one court session a week and the next session could be in six months or a year.[540] Many interviewees expressed the need for the judicial system to be reinforced through the allocation of adequate resources to enable it to function more effectively.[541] Moreover, the judiciary needs adequate resources to be independent.[542]

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[535] Interview record 24 – interviewee, Convention de la Societe Civile de Côte d'Ivoire, 29 March 2018.
[536] Jeune Afrique, 'Côte d'Ivoire – Alassane Ouattara: 'Je prendrai ma decision en 2020'', by Marwane Ben Yahmed, 11 June 2018.
[537] Interview record 15 - Prosecutor, Côte d'Ivoire, 22 March 2018.
[538] Interview record 25 – interviewee, Ministry of Women, Protection of Children and Solidarity, 29 March 2018.
[539] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[540] Interview record 10 – former international staff member, UNOCI, 15 March 2018.
[541] Interview record 13 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[542] Interview record 16 - Prosecutor, Côte d'Ivoire, 22 March 2018,

Defence counsel alleged that in some cases prosecutors are not fulfilling their duty to also investigate matters which may exculpate the accused but only look for incriminatory evidence for want of resources.[543] Resource constraints have also affected the Cellule's ability to investigate both sides and the public's perception. As an interviewee from RAIDH notes, "they work independently but the means made the problems".[544] However, the Cellule has more resources than the General Prosecutor's Office in Abidjan which deals with all general criminal cases, an enormous docket, with one prosecutor noting "here we are used to working with little".[545] Sources indicated the cut-back on resources for the Cellule relates to country-wide budget problems affecting every State institution.[546] However, there is a real sense that the extent of the cut-backs and timing has a political dimension.[547] There is some indication that the Cellule's resources may have been cut as it is closely associated with the work of the ICC.

3.4.4 Amnesty

The President's pronouncement of an amnesty on 6 August 2018 provides further insight into political will.[548] Many question the Government's willingness to allow genuine proceedings.[549] There are substantial doubts as to whether there was ever the

[543] Interview record 43 – Defence Counsel, 22 October 2019.
[544] Interview record 53 – human rights defender, Regroupement des Acteurs Ivoiriens des Droits de l'Homme (RAIDH), 26 October 2018.
[545] Interview record 13 - Prosecutor, Côte d'Ivoire, 21 March 2018.
[546] Interview record 53 – human rights defender, Regroupement des Acteurs Ivoiriens des Droits de l'Homme (RAIDH), 26 October 2018.
[547] One NGO worker considered "*the Ivorian Government has the means to give materials to [the] justice [system] but the core problem is [magistrates are] always to beg. They would say there is no material but if there was the political will, Côte d'Ivoire has enough material to equip justice*"(Interview record 28 – interviewee, SOS Exclusion, 30 March 2018).
[548] RFI, 'Côte d'Ivoire: le president Ouattara annonce l'amnestie de Simone Gbagbo', 7 August 2018.
[549] Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018 ("*Reports were made, accounts were well noted, but there was no follow-up…there is no real will by the state to accompany these victims*").

political will to implement the CNE's recommendations concerning both sides.[550] The Cellule has worked hard to satisfy expectations, but the amnesty means it is unable to finish the job.[551]

Despite many promising reforms, the amnesty unravels much of the progress achieved towards accountability. It followed the leak of a confidential EU report critical of Côte d'Ivoire's efforts. It applies to all persons investigated, tried or convicted for infractions committed during the post-electoral crisis or related acts after 21 May 2011. When the amnesty was announced, the President declared that members of the military and armed groups involved in blood crimes would be excluded. It explicitly excludes "those on trial before the ICC, the military and members of armed groups" from benefitting from the amnesty.[552] However, there is no express exemption for those accused or convicted of blood crimes, including crimes against humanity or war crimes. Indeed, Simone Gbagbo remained accused of crimes against humanity after the Chamber of Cassation of the Supreme Court overturned her acquittal at first instance on 26 July 2018.[553] Just days later, Ouattara declared she would benefit from amnesty and thus, there will be no re-trial.[554]

[550] Interview record 47 – Defence counsel, 24 October 2018 ("*Zero. What is the result? During all this time. We name an enquiry commission. If it is not to use the result of the Commission's work, why are we wasting the time of citizens for nothing?")*
[551] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018 ("*They gave results about those responsible, even the military and high-profile, who were expected to be put on the bench but when politics is in front, we can only archive the investigations made and we will say we tried. We need to apply the result but there needs to be political will*").
[552] Article 1, Ordonnance No. 2018-669 du 6 Août 2018 portant amnestie, ibid.
[553] Simone Gbagbo, Judgment of the Chamber of Cassation, Supreme Court of Côte d'Ivoire, Arret No. 131/Pe/18, 26 July 2018, copy available as Annex II to Transmission of Information from the Authorities of the Republic of Côte d'Ivoire, Situation in Côte d'Ivoire, Prosecutor v Simone Gbagbo, ICC-02/11-01/12-86-AnxII, 23 October 2019.
[554] RFI, 'Côte d'Ivoire: le president Ouattara annonce l'amnestie de Simone Gbagbo', 7 August 2018.

In *MIDH v Cote d'Ivoire*, the African Commission held a blanket amnesty in the 2000 Constitution for perpetrators of violations committed during events which led to the change of Government in 1999 violated the African Charter on Human and Peoples' Rights in encouraging impunity.[555] The latest amnesty demonstrates no lessons were learned. The 2018 amnesty also differs significantly to another Law on Amnesty of 2003[556] in that grave violations of human rights and international humanitarian law and international crimes covered by the Rome Statute are not expressly excluded.[557] This directly conflicts with the Ivorian Penal Code on the non-application of amnesty for these international crimes.[558]

The amnesty was adopted by decree rather than a law, in contrast to the Law on Amnesty of 2003.[559] Accordingly, FIDH, MIDH and LIDHO announced they would challenge it before the Administrative Chamber of the Supreme Court as an abuse of power as it was adopted in the absence of a mandate by the National Assembly.[560] However, it was subsequently adopted as a law on 27 December 2018.[561] The political rhetoric around the amnesty is that of reconciliation and national

[555] African Commission on Human and Peoples' Rights, *MIDH V Cote d'Ivoire*, Communication No. 246/02, 21-29 July 2008, paras 88-98. See also *Malawi African Association and Others v Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97 and 210/98; and *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No. 245/02.
[556] Law on Amnesty, Law No. 2003-309 of 8 August 2003.
[557] Article 4 (b) and (d), Law on Amnesty, Law No. 2003-309 of 8 August 2003, ibid.
[558] Article 120 (1), old Ivorian Penal Code, supra note 27, inserted by Article 23, Law 2015-134 of 9 March 2015 Modifying and Completing Law 61-640 of 31 July 1981 instituting the Penal Code, *supra* note 25.
[559] Interview record 52 – interviewee, Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.
[560] FIDH, 'Côte d'Ivoire: Three organisations lodge an appeal against presidential amnesty', press release dated 15 November 2018.
[561] Loi No. 2018-980 of 27 decembre 2018 portant ratification de l'ordonnance No. 2018-669 du 6 août 2018 portant amnistie, Official Gazette No. 06 of 21 January 2019. See also Commission des affaires générales et institutionnelles de l'Assemblée nationale (CAGI) – See 'Côte d'Ivoire : Le projet de loi portant ratification de l'ordonnance n°2018-669 du 6 août 2018 portant amnistie voté, abstention du PDCI', Marius Konan, KOACI, 11 December 2018.

solidarity.[562] However, this rationale is not included in the text and there is no mention of alternative redress or victims' reparation. In contrast, the 2003 Law on Amnesty referred to reparations for harm resulting from the acts amnestied.[563]

The amnesty significantly affects the Cellule's work. In October 2018, investigative judges indicated that much of the work had been suspended with all casefiles save for one or two relating to military accused with civil parties falling subject to the Amnesty.[564] Even cases concerning blood crimes are suspended, though such cases were not supposedly covered by the amnesty's terms.[565] A new investigative judge was unfamiliar with the Nahibly case but indicated that the only files left were those not subject to the amnesty.[566] This suggests those suspected in relation to Nahibly have also been accorded amnesty.

Those benefitting from amnesty are being selected further to criteria set by the Ministry of Justice.[567] It is not clear who is actually making the determination, though LIDHO understood it is being handled by the Department on Penitentiaries of the Ministry of Justice rather than the Prosecutor.[568] As yet, there has been no information released to victims, the affected communities or civil society more

[562] Extract of the speech of President Ouattara, 'Le président Alassane Ouattara annonce les amnesties (extrait)' at RFI, 'Côte d'Ivoire: le president Ouattara annonce l'amnestie de Simone Gbagbo', 7 August 2018.
[563] Article 10, Law on Amnesty, Law No. 2003-309 of 8 August 2003, *supra* note 1152.
[564] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018; Interview record 45 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[565] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018; Interview record 45 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[566] Interview record 45 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[567] Interview record 44 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018; Interview record 45 – Investigative Judge, Special Investigation and Examination Unit, 23 October 2018.
[568] Interview record 35 – interviewees, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018.

broadly as to who specifically from '800 persons' noted in the President's speech in August 2018 is set to benefit from the amnesty aside from Simone Gbagbo. Victims are worried about what will happen with perpetrators currently in detention.[569]

Ivorian prosecutors are overwhelmingly against the granting of amnesty, at least prior to trials to establish beneficiaries' responsibility. Some prosecutors spoke against amnesty in any circumstances, considering "we need justice for reconciliation".[570] This view is widely held across Ivorian society.[571] Interviewees particularly rejected amnesty for those accused of crimes against humanity or other 'blood crimes', considering that in any event only lower-level offenders should be eligible.[572]

Others considered individuals from both sides should be judged before amnesty or pardon is contemplated.[573] This view was widely shared by others in State institutions, victims, witnesses and civil society who consider amnesty in the current circumstances impunity.[574] As trials have only been completed against one side,

[569] For example, a militant threatened victims in Port-Bouët after the crisis until he was detained by the gendarmerie in relation to a Cellule case. The victims do not know if he was tried and convicted yet or if he will be back out on the streets: Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018.
[570] Interview record 13 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[571] Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018; Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire, 28 March 2018; Interview record 35 – interviewee, Ligue Ivorienne des Droits Humains (LIDHO), 16 October 2018; Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018; Interview record 52 – interviewees, Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.
[572] Interview record 53 – human rights defender, Regroupment Acteurs Ivoiriens des Droits de l'Homme, 26 October 2018; Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire, 28 March 2018.
[573] Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 14 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018; Interview record 17 – Prosecutor, Côte d'Ivoire, 23 March 2018.
[574] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire, 26 March 2018; Interview record 24 – interviewee, Convention de la Societe Civile de Côte d'Ivoire, 29 March 2018; Interview record 35 – interviewee, Ligue Ivorienne des Droits Humains (LIDHO), 16 October 2018; Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.

amnesty only increases the sense of unfairness and partiality.[575] As a human rights defender aptly stated, "more than 800 persons were killed in Duekoué in March 2011 by forces close to Ouattara. 20 persons were publicly implicated and were never bothered at all. It was while these victims wait for proceedings that the amnesty ordinance was taken."[576] Similarly, a victims' representative noted "they already took the amnesty law which ended everything. There is just the military left who are in prison and these trials have not yet started…on the other side, other military persons are not judged, so we will not have the entire truth".[577] The injustice is particularly acute given uncertainty over reparations.[578] Many are worried they have no enforceable right to compensation.[579] The draft Law on the Status of Victims has not been adopted and compensation in criminal proceedings requires the accused to be convicted. While a private civil suit is possible, this procedure has never been used in a criminal-related manner and is unlikely to succeed without State engagement as there is still a need for evidentiary support, albeit to a lower civil standard.

[575] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire, 26 March 2018; Interview record 24 – interviewee, Convention de la Societe Civile de Côte d'Ivoire, 29 March 2018; Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018; Interview record 42 – interviewee, Agir pour la Democratie, la Justice et la Liberte en Côte d'Ivoire (ADJL-CI), 19 October 2018; Interview record 52 – interviewees, Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.

[576] Interview record 52 – interviewee, Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.

[577] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.

[578] Interview record 42 – interviewee, Agir pour la Democratie, la Justice et la Liberte en Côte d'Ivoire (ADJL-CI), 19 October 2018; Interview record 51 – victim, Platform for Associations in Duekoué (POREVCI) & COVICI, 25 October 2018; Interview record 52 – interviewees, Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018.

[579] As an interviewee highlights, "a*mnesty was given, taking away all possibilities of examining them in court so what happens to the reparations? Do they lose their right to reparations? Even if the other rights are taken away, at least the damages would be recognised with compensation – moral injustices. Victims lose twice, first the initial losses and then they were put aside in the process*" (Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018)

One interviewee noted that "the Government opted for transitional justice without access to real traditional justice".[580] It is too late for amnesty, as the only moment it might have been appropriate was as part of the CDVR's truth and reconciliation process.[581] Indeed, victims opine that it should be up to them to decide who to forgive and pardon, not a political decision.[582] While some consider amnesty necessary for reconciliation;[583] several only support the amnesty as a means of rectifying the unfairness created by having one side languishing in detention for years while others went free.[584] Some consider amnesty should only be considered for the pro-Gbagbo who have been judged whereas to grant it to the pro-Ouattara, none of whom have yet been tried, would mean complete impunity.[585] However, others felt if Côte d'Ivoire opts for amnesty for reconciliation then it has to apply to both sides.[586]

Yet, the amnesty is clearly motivated by self-interest. As recognised by MIDH, the political strength of the Government is such that they would not feel obliged to grant amnesty to the pro-Gbagbo but "if they have to do it, it is because of their own ones who are also subject to accusations for crimes during the crisis".[587] Rather than the amnesty being truly motivated by reconciliation, this is a case where "clearly the President has taken this decision to avoid all proceedings against all those close to

[580] Interview record 53 – human rights defender, Regroupement des Acteurs Ivoiriens des Droits de l'Homme (RAIDH), 26 October 2018.
[581] Interview record 10 – former international staff member, UNOCI, 15 March 2018.
[582] Interview records 26 and 27 – victims, Collectif de Victimes Doukouré Yopougon (CVQDY).
[583] Interview record 47 – Defence Counsel, 24 October 2018.
[584] Interview record 20 – interviewees, Association des Femmes Juristes deCôte d'Ivoire, 27 March 2018; Interview record 36 – interviewee, Réseau Action Justice et Paix (RAJP), 16 October 2018;
[585] Interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.
[586] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[587] Interview record 23 - interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.

him …knowing the ICC could pronounce prosecutions against them."[588] Allies are similarly being shielded from domestic proceedings, which were already more advanced. Many are unhappy with the national transitional justice mechanisms, considering amnesty the final solution for social cohesion.[589] However, most consider amnesty another failing on top of other ineffective measures.[590] There is a fear the impunity created means violence will be repeated with the next elections.[591]

3.5 Ivorians' perceptions on independence and impartiality

Many aspects are still subject to Presidential decree rather than the Constitution taking its proper place.[592] The popular perception is of justice "captured by politics", preventing the rule of law being consolidated.[593] The concern is that "justice has a different face depending on who is President."[594] Political will is the primary, if not the only, remaining obstacle to Côte d'Ivoire having a balanced justice rather than

[588] Interview record 52 – interviewee, Actions pour la Promotion et la Defense des Doits de l'Homme (APDH), 25 October 2018.
[589] Interview record 43 – Defence Counsel, 22 October 2019 (*"Coming out of the crisis, justice did not exist for those who were charged or close to the former regime because they were being chased, on the run. Justice was reserved only for those close to the winners, those in power. This is why the Cellule d'Enquête were only interested in the victims close to those who won the war. They received "reparations". The work of the reconciliation commission – we have no idea what they have done, but there was a feeling of disdain, uncertainty, distrust…Now with the amnesty and with time, things have certainly changed and the trust can be re-established…."*).
[590] As one victim from Duekoué stated: "*There are four pillars…the research for the truth - we still don't know who did what ; the CDVR was only half way applied; the fourth pillar on criminal justice – amnesty was taken and we stopped it. So the two for me were only half way and also reparations are only half way. It is like a person who wants to marry but at the same time doesn't want to get married*." (Interview record 49 – victim, Plateforme des associations de victimes pout la paix et la reconciliation en Côte d'Ivoire (Duekoué), 25 October 2018).
[591] Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018 ("*She [Simone Gbagbo] was condemned to 20 years but we asked the state to go further to shine a light. After organisations seeking deeper justice, all actors are free as if they never did it so our concern is the fact we have denounced these grave violations, today things might come back to bite as it has served for nothing.")*
[592] Interview record 42 – interviewee, Agir pour la Democratie, la Justice et la Liberte en Côte d'Ivoire (ADJL-CI), 19 October 2018.
[593] Interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.
[594] Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.

victor's justice for crimes committed during the crisis.[595] The impunity extends to earlier incidents during the rebellion.[596] The overwhelming perception is one of victor's justice.[597] The approach has given rise to a discourse of good versus evil, hindering reconciliation.[598] The sense of disparity creates a real risk of repetition.[599]

The perception of bias carries over to an imbalance in prosecutions, where observers literally compare the number of pro-Gbagbo accused to those considered pro-Ouattara.[600] Similarly, a victims' representative noted "…everyone knows it is victor's justice in Côte d'Ivoire. None of the people from the north have been judged (…). People say it is in progress but up until now we don't see anything".[601] The imbalance in the pace of investigations and prosecutions from the Cellule's sequencing creates further unease. As a representative of LIDHO notes, "…within one to two weeks all examinations of the pro-Gbagbo were carried out but for the

[595] Interview record 40 – Observatoire Ivoirien des Droits de L'Homme (OIDH), 19 October 2018.
[596] Interview record 51 – interviewee, Platform for Associations in Duekoué (POREVCI) and COVICI, 25 October 2018.
[597] Interview record 53 – human rights defender, Regroupement desActeurs Ivoiriens des Droits de l'Homme (RAIDH), 26 October 2018.
[598] Interview record 43 – Defence Counsel, 22 October 2019 ("t*here is one side that is being gone after, who lost the war. So they are now the pariah. They are seen as the devils who caused the deaths which supposes that the others were victims who did nothing wrong. They did not kill, rape, destroy property and you can notice they were promoted.*")
[599] As one civil society activist expressed, "w*e did not have fair justice…both parties are responsible for the deaths. Both sides committed crimes. If one is jailed, the other should also be jailed. You should not jail one and say the others are neutral. People are looking at the torturers laying around and have it in their hearts and at any chance they will take vengeance as there was no balanced justice".* (Interview record 28 – interviewee, SOS Exclusion, 30 March 2018).
[600] Interview record 50 – Confederation of Victims of Côte d'Ivoire (COVICI), 25 October 2018 ("…*we observed it is mostly pro-Gbagbo to be judged and not enough persons from the other camp have been judged. Yes, a few military persons were presented but not enough. There were many high level personalities on the pro-Gbagbo side and not any on the pro-Government side. They say they started the cases, that more are implicated.*").
[601] Interview record 24 – interviewee, Convention de la Societe Civile de Côte d'Ivoire, 29 March 2018.

other side, they were not".[602] The investigation has proceeded slowly and victims have been waiting longer for the trials to take place.[603]

Because of the delay in bringing their supporters to court, there is a sense that previous statements by the Government apparently evidencing a political will was just rhetoric. Defence counsel considered "they pretended to call persons from their side but nothing was done, they were never arrested".[604] Similarly, a civil society activist noted "Côte d'Ivoire tries to kind of re-build its image through the diplomatic channels by organising so many activities, for example, the EU in Africa and La Francophonie, so there are many gatherings for image but no deep institutional reform to reinforce justice. There should be the will to have completely independent justice but it is lacking".[605] Consequently, the victims of crimes by the pro-Ouattara feel forgotten.[606] This feeling extends to how alternative justice mechanisms were conducted. A victim in Port-Bouët considered "it was the victims close to the current regime who benefit from support; it is regrettable. Victims are characterised."[607] Moreover, a divide has been created between civil society organisations, where some

[602] Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018.
[603] Interview record 35 - interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018 (*"there were investigations for both sides and they continue but for one side it is very slow. One, two or three people were judged from the pro-Ouattara but not major figures. They were heard – not judged – interviewed and released. For the other side, the procedures were so fast. But for this side it is very slow, there is no progression. No pro-Ouattara has gone to trial.").*
[604] Interview record 43 - Defence Counsel, 22 October 2019.
[605] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[606] As a member of LIDHO highlights, "p*eople in several localities have a big feeling of injustice, for example, in Bounia, a lot of victims or their family members are there but the prefect of the region is an ex-war lord, the highest administrative authority. He represents the state of Côte d'Ivoire for that region. So the population has a tendency to associate Côte d'Ivoire with that person…we see the people who should be in front of the court. This is felt particularly by those in the West who feel they were left behind". (*Interview record 35 – Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018).
[607] Interview record 54 – Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018.

groups have "easy access to the political and judicial persons and actors in charge of reparations and the others not close are left to fend for themselves".[608]

3.6 The ICC's impact – expressive effects

Empirical results suggest the ICC's impact on independence and impartiality in the national justice system is negative, largely due to the OTP's own sequencing approach and the change in investigative strategy from speedy, focused investigations to open-ended, all encompassing evidence gathering exercises. Côte d'Ivoire has adopted an identical approach, which is perceived as victor's justice due to the slow progress and darth of public actions. The impact is aggravated by insufficient outreach to improve awareness, especially concerning the CIV-II investigation. There is no sense that the Government feels at all pressed any longer from the ICC's engagement to allow a balanced justice.

3.6.1 Selectivity and sequencing

The sequencing approach and selective investigations and prosecutions by the OTP at the international level has heavily influenced the manner in which cases have been conducted nationally. One has copied the other: "both systems are disappointing our expectations…they are both going in one direction, making the same error".[609] This has created a perception of a lack of independence and impartiality on both levels: "as far as justice goes, it is the same justice that exists here".[610] Defence counsel asserted that there has been no positive impact "because the ICC consolidated the Ivorian Government to massively pursue the pro-Gbagbo persons and to hinder all procedures

[608] Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018.
[609] Interview record 40 – interviewee, Observatoire des Droits de l'Homme (OIDH), 19 October 2018.
[610] Interview record 36 – interviewee, Réseau Action Justice et Paix (RAJP), 16 October 2018.

against the pro-Ouattara persons."[611] Thus, complementarity has not had the desired effect.[612] In the same vein, the ICC's credibility has weakened, meaning it has little influence over national developments.[613]

The slow pace of the OTP's investigations in CIV-II means that it was not seen as concrete or progressive.[614] Indeed, many have come to question that there is even an investigation into the pro-Ouattara at the ICC.[615] Even those participating in the ICC's procedures were growing doubtful.[616] Similar sentiments were expressed by those interviewed from international organisations.[617] Others doubt the OTP's resolve, considering the ICC is just biding time, "waiting for the State to come to a general reconciliation process with amnesty."[618] Some observers understood the sequencing approach, even if they did not agree with it.[619] However, victims have a

[611] Interview record 37 – Defence Counsel, 18 October 2018.
[612] Interview record 37 – Defence Counsel, 18 October 2018.
[613] As a civil society activist declared, "w*e cannot talk about advancement. From the fact the ICC intervened in Côte d'Ivoire we have an impression it is because our own judges were not competent to judge but justice is not independent unless it is independent no matter what the court, no matter the judicial institution." (*Interview record 28 – interviewee, SOS Exclusion, 30 March 2018).
[614] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[615] Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018 ("*it creates a lot of frustration and hatred to see only one side on trial. People will perceive this as victor's justice…the investigation should be from both sides, to be judged equally. It's a joke. Is there really an investigation against them, do you believe that? Me, I don't.*")
[616] Interview record 35 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 16 October 2018 ("*It has affected events as the ICC does not have a good reputation in Côte d'Ivoire today. It is just Laurent Gbagbo, Ble Goude and Madame Gbagbo and it is just one camp and us as defenders of human rights, we want a Côte d'Ivoire No. 2. So we filed a lawsuit for the pro-Ouattara and think the Court heard us but up till now we still didn't have a case so it doesn't contribute at all to the social cohesion.*")
[617] Interview record 9 – interviewee, ICTJ, 13 March 2018 ("*I did not know that there was any; that is my problem. I do not know if there is even a preliminary examination. If there was, it would completely change the picture and the perception of victor's justice.*").
[618] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[619] For example, a civil society activist from Convention Societe Civile de Côte d'Ivoire stated: "*We asked a question to the ICC and received ICC members right here and asked them why are you not investigating both parties? The answer was that was a mistake they made in Kenya as when the crisis opened they just chased the President and Vice President and then Kenya stopped co-operating with the ICC so they estimate it is correct to go step by step and finish with the pro-Gbagbo while these here are in power." (*Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018).

harder time understanding.[620] Others also caution the risks of sequencing investigations go beyond the perception of bias: "The procedures from the ICC have been lopsided. After 7 years, the Prosecutor says they are looking for proof on the others but the evidence disappears over time; everyone knows the longer you wait, the harder it will be to find the evidence."[621]

Rather than encouraging reconciliation, the ICC is viewed as having achieved the opposite by reason of the approach adopted.[622] As one victim explained: "we are all Ivorians and are shocked to see one side there and one side not; it creates frustrations. When I put myself in the place of the other side, it is difficult to digest. The ICC was supposed to be more neutral, more credible".[623] The victims feel aggrieved as only the victims of one side are able to access justice.[624] Most victims interviewed expressed unity in the desire to have justice for both sides.[625]

[620] For example a victim from Duekoué considered "*the ICC is supposed to be neutral and impartial. The ICC decides to arrest one camp and for the other side they say they have changed strategy and we will take our time to have a good investigation. (…). For me, there was no real investigation, they are just in collaboration with the current Government as we would have carried out the procedures at the same time, tried them at the same time, with each to explain what they did and didn't do." (*Intervewrecord 49 – victim, Platforme des associations de victimes pour la paix et la reconciliation en Côte d'Ivoire (PAPCI) (Duekoué)).

[621] Interview record 35 – interviewee, Ligue Ivorienne des Droits Humains (LIDHO), 16 October 2018.

[622] Interview record 50 – interviewee, Confederation of Victions (COVICI), 25 October 2018; Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018; Interview record 36 – interviewee, Action, Justice and Peace (RAJP), 16 October 2018; Interview record 51 – interviewee, Association des Veuves et Mamans Victimes de Guerre en Côte d'Ivoire (AVMVG-CI); Interview record 51 – victims, Platform for Associations in Duekoué (POREVCI) & COVICI, 25 October 2018; Interview record 35 – interviewee, Ligue Ivorienne des Droits Humains (LIDHO), 16 October 2018.

[623] Interview record 50 – interviewee, Confederation of Victimes (COVICI), 25 October 2018.

[624] As a representative from APDH stated, "*the ICC are picking and choosing between the presumed authors and the victims. If the pro-Gbagbo forces are prosecuted it would bring justice for the victims close to the current President and to not pursue all the war lords close to him shows the victims of Duekoué…the population in general feels victor's justice, that there is a double standard at the ICC (…)." (*Interview record 52 – interviewee, Actions pour la Promotion et la Defense des Droits de l'Homme (APDH), 25 October 2018).

[625] Interview record 51 – victims, Platform for Associations in Duekoué (POREVCI) & COVICI, 25 October 2018; Interview records 26 and 27 – victims, Collectif de Victimes Duekouré Yopougon (CVQDY).

Many interviewees consider that fair justice requires not only the prosecution of those from both sides of the conflict but a balancing of accountability efforts, similar to the OTP's approach in the Kenya situation which it has consciously moved away from. This can be seen in the view expressed by a civil society activist that "it is very important because the crimes are the same so if they are able to identify two or three from one camp, they should do the same for the other for the truth".[626] Similarly, another human rights defender stated "I think instead of Gbagbo and Ble Goude, I think we should have Gbagbo and someone from the other side there, if not Ouattara then Soro, so that the two camps respond."[627] Many connected this to the request to surrender Simone Gbagbo, considering it unfair to send her to the ICC unless and until those from the other side are also sent to The Hague.[628] The feeling that those of the same level of responsibility should be tried by the same tribunal means that some who otherwise consider that such trials can and should be done at the national level in Côte d'Ivoire think that those most responsible from the pro-Ouattara should also be tried before the ICC.[629] The feeling is that "the ICC should judge everyone or make everyone wait here and have everyone judged here".[630] Others agreed, stating "I don't see why the pro-Gbagbo go there and the pro-Ouattara stay here".[631] However, this does not sit well with complementarity as if Côte d'Ivoire were genuinely willing and able to try future cases, it must be done domestically.

[626] Interview record 24 – interviewee, Convention de la Societé Civile de Côte d'Ivoire, 29 March 2018.
[627] Interview record 42 – interviewee, Agir pour la Démocratie, la Justice et la Liberté en Côte d'Ivoire, 19 October 2018.
[628] Interview record 42 – interviewee, Agir pour la Démocratie, la Justice et la Liberté en Côte d'Ivoire (ADJL-CI), 19 October 2018.
[629] Interview record 20 – interviewee, Association des Femmes Juristes de Côte d'Ivoire, 27 March 2018; Interview record 12 – Prosecutor, Côte d'Ivoire, 21 March 2018.
[630] Interview record 24 – interviewee, Convention de la Societe Civile de Côte d'Ivoire, 29 March 2018.
[631] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.

Some perceive the OTP's case selection as partial beyond the Ivorian situation, considering it another form of Western imperialism reminiscent of colonialism whereby African justice systems are seen as inferior and not up to the task.[632] As one interviewee explained: "people when looking at the intervention of the prosecutor, they look at the political side not the legal, they say here is the international community, they just want to send Gbagbo to the ICC because he is a pan-Africanist. They did not see the legal aspect of things so it has not had an impact on access to justice."[633] As another argued, "I don't know if there is complementarity. Would France accept? The US? To send its nationals to the ICC? Or is it just us as Africans that are sent? The African Union can have their prison also."[634] However, others discount the argument trials should instead take place on the regional level.[635]

Nevertheless, the perception that Gbagbo and Blé Goudé have been unfairly singled out due to Western interventionalism or because the ICC has not prosecuted anyone from the other side has changed the dynamic as more Ivorians are anti-ICC.[636] This

[632] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018; Interview record 53 – interviewee, Regroupment des Acteurs Ivoiriens des Droits de l'Homme (RAIDH), 26 October 2018; Interview record 37 – Defence Counsel, 18 October 2018; Interview record 21 – Prosecutor, Côte d'Ivoire, 27 March 2018.

[633] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018.

[634] Interview record 47 – Defence Counsel, 24 October 2018.

[635] Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018 (*"the AU is supported by the EU – it doesn't have the money. 50% of the money of the AU comes from international donors. The African countries do not contribute at all so where are they going to get funds to initiate an African Criminal Court? Politicians are just talking about themselves, not the victims. Maybe if the ICC didn't exist Gbagbo may even have been released.")*

[636] As a human rights defender from ADJL-CI recognised: *"the majority of people in Côte d'Ivoire feel a kind of solidarity with President Gbagbo who they see as a victim of a kind of international plot. (…) If they went against both camps people would feel a healing process but instead they feel unequal treatment. The Gbagbo camp did offend a lot of citizens but so did a lot of people from the other side. Why is it Gbagbo alone? So because of this feeling of injustice they feel close to him, attracted to him in a move of solidarity instead of judging him for what he did. If tomorrow the ICC said he was set free people would start dancing". (*Interview record 42 – interviewee, Agir pour la Démocratie, la Justice et la Liberté en Côte d'Ivoire (ADJL-CI), 19 October 2018).

indirectly influenced the decision to confer amnesty and cut the Cellule's resources as its efforts to investigate PEV cases are associated with the ICC.

3.6.2 *Communication*

The OTP's impact in Côte d'Ivoire is significantly linked to insufficient communication and outreach, meaning that "the population doesn't have a real knowledge of the ICC".[637] The methods by which the OTP engages with the local community means that its reach is limited and statements by politicians and the media filling the gap has increased the sense that the ICC is not independent or impartial.[638] This also affected Ivorians' appreciation of the *Gbagbo and Blé Goudé* trial.[639] Several interviewees indicated that they did not know the ICC had a local office in Abidjan or if they did, where it was or how they might contact the local representative.[640] Further, while the Registry has organised workshops to train civil society organisations, the format was not conducive to a two-way exchange.[641]

[637] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.
[638] Interview record 23 – interviewee, Mouvement Ivoiren des Droits Humains (MIDH), 28 March 2018 ("t*he work of the ICC affected Côte d'Ivoire as the ICC does not communicate enough on their actions in Côte d'Ivoire. It is true they have a website communication but more than half the population cannot read or write or use the internet. So they listen to politicians a lot so they think it is being used to shut the mouth of those powers".)*
[639] One community organiser notes "*when we follow the news, the evidence being shown is not sufficient. This is based on what I have seen in the foreign press. If they could better inform us of the crimes and the evidence, we could maybe better understand but it is not very clear." (*Interview record 36 – interviewee, Action, Justice and Peace (RAJP), 16 October 2018).
[640] This accords with the following sentiment: "*the ICC could engage more with civil society…. They are here, present in Cote d'Ivoire, but the majority of the population doesn't even know." (*Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018). Another interviewee agreed "*people don't even know where the ICC's office in Abidjan is, there is no postal address given – the outreach is zero" (*Interview record 10 – former international staff member, UNOCI, 15 March 2018).
[641] Interview record 36 – interviewee, Action, Justice and Peace (RAJP), 16 October 2018 ("*I have participated twice. It is more them giving information to you on how the ICC functions but there is no listening to civil society here and there is no exchange. Just the information workshops.")*

3.6.3 Quality of the ICC's procedures

The ICC served as a deterrent in Côte d'Ivoire as it has raised consciousness that it was possible for even a President to be brought before it.[642] However, the perception of the quality of the ICC's work has heavily influenced its impact. Many interviewees commented on how slow the ICC's investigations and trials are, considering them even longer than in Côte d'Ivoire.[643] Some victims even queried whether it was worth it and national trials could have been better.[644] Ivorian NGOs expressed concern that Gbagbo or Blé Goudé might die before the ICC proceedings are finally completed, resulting in enormous social unrest in Côte d'Ivoire where half the population voted for Gbagbo.[645] Just the time that the *Gbagbo and Blé Goude* trial took to commence and then be conducted until half time made victims anxious something was going wrong.[646] The relatively rare communications from the ICC, whether by the OTP or the victims' legal representatives did not do much to ease these concerns.[647] There is little understanding as to the delay. Some consider the time the process took indicates the case was badly prepared from the start.[648]

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[642] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018; Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018; Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018.

[643] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018; Interview record 51 – interviewee, Platform for Associations in Duekoué (POREVCI) & COVICI, 25 October 2018.

[644] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018.

[645] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018.

[646] Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018.

[647] Interview record 54 – victim, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port-Bouet), 26 October 2018 ("*Lawyers for the victims come two times per year. The focal point is here but when no procedure is underway until then, they don't keep us updated. We are scared will this justice really be that we are waiting for?").*

[648] Interview record 29 – interviewee, Civitas Maxima, 8 May 2018; Interview record 42 – interviewee, Agir pour la Démocratie, la Justice et La Liberté en Côte d'Ivoire, 19 October 2018.

Those following the *Gbagbo and Blé Goudé* trial also opined that the evidence presented and management of the prosecution case left much to be desired.[649] As an OIDH observer emphasised: "…you cannot keep someone in custody for 7 years when the evidence you are bringing is very low. He has a right to a fair trial – after 5 years investigating, to show such evidence? Nil. The ICC should notice the Ivorian case is very sensitive. They have to work seriously. The different proofs are very weak for us."[650]

Others also considered the length of detention and the initial grounds on which it was based at the confirmation stage violated the human rights of the accused as provisional release should have been granted.[651] Indeed, the confirmation of charges hearing led local prosecutors to question the ICC's independence and impartiality as they were shocked that the Court would order continued detention while deeming the evidence insufficient and giving the ICC Prosecutor more time to look for better evidence.[652] Defence counsel also asserted "the major principles for detainment and even for charging were not respected. There was no investigation; it was after that they tried to catch up on what they had done."[653] Another counsel concurred, deeming it "a witch hunt, a political trial."[654]

The problems stemmed from the OTP's investigative methods in relation to the *Gbagbo and Blé Goudé* case, as many consider they failed to grasp the complexities

[649] Interview record 10 – former international staff member, UNOCI, 15 March 2018; Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[650] Interview record 40 – interviewee, Observatoire Ivorien des Droits de l'Homme (OIDH), 19 October 2018.
[651] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018.
[652] Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018.
[653] Interview record 43 – Defence Counsel, 22 October 2018.
[654] Interview record 37 – Defence Counsel, 18 October 2018.

of the local context.[655] Other observers had the impression the investigation was rushed and not sufficiently thorough. However, the OTP appears to have now gone too far in the other direction given the delayed CIV-II investigation.[656] Nevertheless, some victims asserted: "I don't want to go too quickly – the ICC or domestic courts, because several procedures were not followed, with judicial insufficiencies on the Ivorian side and by the ICC".[657] Similarly, an interviewee from RAIDH noted "I think it is important to have good documentation. Maybe this is what is lacking in Gbagbo's file – to really take the time before prosecuting."[658]

However, Ivorian counterparts have not noticed any real change to the OTP's way of working on the ground, considering that the pro-Ouattara investigation is not being handled seriously as the investigators rarely go outside of Abidjan when many of the relevant atrocities occurred in the West.[659] One of the victims in Duekoué stated bluntly: "I esteemed the investigation work was not done correctly; it was a joke. They have been here eight years now. There is something wrong, be it the structure or the personnel, as they have not met me. I am not saying I am the only one with the truth but for the information I do have in my region I am at least a person that the investigators of the ICC should have at least met."[660] Even the ICC's most active supporters do not see the ICC had much of an impact on the national judiciary as

[655] For example, one community leader stated ""*There are victims, pro-Ouattara and pro-Gbagbo, and we don't tell them the difference. We say don't say if you are pro-Gbagbo or pro-Ouattara, just say what happened to you. They ask who was the perpetrator but there were several time periods. The militants from 2002 have become rebels today. Often they get lost in the information at the ICC and they put people on the list for the Prosecution and when they testify it sounds like they are witnesses for the Defence."* (Interview record 49 – victim, Plateforme des associations de victimes pout la paix et la reconciliation en Côte d'Ivoire (Duekoué), 25 October 2018).
[656] Interview record 29 – interviewee, Civitas Maxima, 8 May 2018.
[657] Interview record 49 – victim, Platforme des associations de victimes pour la paix et la réconciliation en Côte d'Ivoire (Duekoué), 25 October 2018.
[658] Interview record 53 – interviewee, Regroupment des Acteurs Ivoriens des Droits de l'Homme (RAIDH), 26 October 2018.
[659] Interview record 36 – interviewee, Action, Justice and Peace (RAJP), 16 October 2018.
[660] Interview record 49 – victim, Plateforme des associations de victimes pout la paix et la réconciliation en Côte d'Ivoire (Duekoué), 25 October 2018.

"looking at the methodology and strategy of the ICC, they no longer have the good reputation that they had in people's minds."[661]

3.7 Conclusion

The ICC has had little to no influence on the national level when it comes to independence and impartiality. Indeed, considering public perceptions, the impact has been negative. Côte d'Ivoire has mirrored the approach taken at the international level, with a sequenced approach to investigations and the disparity in duration compared to investigations against the losing side giving rise to a feeling of selective justice. The delays in the ICC's investigation alongside insufficient engagement with Ivorian stakeholders has also affected political will, as the Government no longer feels pressed to allow a balanced justice.

Nevertheless, there is still scope for change. Many other organisations and NGOs are engaged in training and capacity-building to ensure Côte d'Ivoire is able to conduct domestic proceedings for international crimes. Rather than duplicate these efforts, the OTP could take a more active role in tackling the level of willingness.[662] It could support judges and prosecutors to progress cases without fear or favour.[663] Further, in conjunction with other organisations and donor States, the OTP could increase engagement to ensure those most responsible are excluded from the amnesty and that justice takes its course.

[661] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.
[662] Interview record 28 – interviewee, SOS Exclusion, 30 March 2018.
[663] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018; Interview record 21 – interviewee, Convention Société Civile de Côte d'Ivoire, 27 March 2018.

4. Due Process – Impact on Defence Rights

This section analyses the national processes concerning Simone Gbagbo and others, considering what they show in terms of Côte d'Ivoire's capacity and willingness to conduct genuine proceedings and the ICC's impact on defence rights.

4.1 First Simone Gbagbo trial – State security case

Simone Gbagbo's first trial commenced on 29 December 2014 at the Abidjan Court of Assize, alongside 82 others including Gagbéi Faussignaux Vagba; Pascal N'Guessan Affi; Gilbert Aké N'gbo, Dogbo Blé; Adou Assoa and Hubert Oulaye.[664] However, 79 defendants were tried, as two fled and two died before it concluded.[665] While the initial charges were based on generic legal qualifications, some were properly withdrawn by the Prosecutor General following a defence challenge.[666] While the charges alleged were clear, they were general and not individualised, with the particulars and rationale for each charge inadequate.[667] Further, in the closing speech, the prosecution only enumerated the charges and did not clarify which charges were retained for each individual.[668] Nevertheless, the Presiding Judge strove to elucidate the factual allegations and reasons for the charges.[669] By the verdict pronounced on 10 March 2015, Simone Gbagbo was convicted for conspiracy against the State, participation in an insurrectional movement and a public order offence and sentenced to 20 years of imprisonment.[670] The severity of the sentencing may have

[664] See FIDH, Press Release, 'Simone Gbagbo trial: first of many', 23 October 2014.
[665] OIDH, LIDHO and MIDH, Le Group de Travail sur les Initiatives de Transition (GTIT), Rapport de suivi des process de la crise post-electorale 2010 en Côte d'Ivoire, 'Proces des pro-Gbagbo: Une justice aux ordres?', Africa Trust, 2015, copy with author, at p.4.
[666] Ibid, at pp.4 and 7.
[667] Ibid, at p.9.
[668] Ibid, at p.19.
[669] Ibid, at p.19.
[670] Judgment of the Court of Assize of Abidjan-Plateau, Côte d'Ivoire in the case of Simone Gbagbo and Others of 10 March 2015 (State Security case) – *Arrêt No. 05 du 10 mars 2015, Cour d'Appel*

reflected political interests as the Prosecution only asked for 10 years.[671] Fifty-nine of her co-accused were also convicted and sentenced to imprisonment from 5 years to 18 months, stayed indefinitely. For several, including Simone, the Court attached an order preventing them from holding public office for up to 10 years.[672]

While former officers from the FDS and alleged militants were detained throughout the trial, the majority of the accused were at liberty by the time trial commenced, having been granted provisional release.[673] Before this, Simone appeared to be given preferential treatment as she was kept under house arrest by the gendarmerie and not in prison like the others.[674] A further concern is the disparity between defendants in the enforcement of the judgment, with several of the accused leaving the courtroom at liberty upon conviction, despite being sentenced to imprisonment and for whom execution of the judgment is still pending. This indicates a political dimension in that those who have not subsequently chosen to co-operate with the Government are serving prison sentences.[675]

Notably, the CNDHCI observed the proceedings and considered that fair trial rights were respected.[676] The trial was public and well-covered by the media, international and local observers, NGOs and victims' associations.[677] The Court was mindful of the

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d'Abidjan, Cour d'Assises seant Abidjan 1ère Session de l'Annèe 2014-2015, Ministere Public v N'Gbo Ake Gilbert Marie et 82 Autres (copy with author).

[671] OIDH, LIDHO and MIDH, 'Proces des pro-Gbagbo: Une justice aux ordres?' *supra* note 665, at 23.

[672] Pursuant to Article 66 of the old Ivorian Penal Code, *supra* note 27; Article 68 Ivorian Penal Code 2019, supra note 32.

[673] OIDH, LIDHO and MIDH, 'Proces des pro-Gbagbo: Une justice aux ordres?', *supra* note 665, at 8.

[674] Interview record 10 – former international staff member UNOCI, 15 March 2018.

[675] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.

[676] CNDHCI, Annual Report 2017, *supra* note 71, at p.8.

[677] OIDH, LIDHO and MIDH, 'Proces des pro-Gbagbo: Une justice aux ordres?' supra note 665, at p.16-17, noting that daily articles appeared in Fraternité Matin, Soir Info, Notre Voie and l'Inter. However, technical problems with the microphones apparently meant the public had difficulty hearing

right to an effective defence, adjourning the trial from 26 December 2014 to 6 January 2015 to provide the defence more time to prepare. However, the defence continued to query the adequacy of disclosure, with counsel continuing to object on 17 February that they had still not received copies of all documentation submitted by the Prosecution to the Court.[678] Observers have also questioned the thoroughness of the investigation by the investigative judge, particularly the extent to which he examined potentially exculpatory circumstances.[679] A further concern is the use of the minutes of interviews from the preliminary investigation. The defence alleged that confessions were coerced, with the accused subject to torture or other inhuman treatment. However, these allegations were not probed further by the Court.[680]

Issues were also raised as to the jury composition. The Assize Court consisted of a Presiding Judge and two other professional judges as advisors.[681] However, a jury was selected from a list established in the seat of each tribunal by the prefect.[682] From this, the Presiding Judge selects six jurors and three reserves.[683] An accused or his counsel may recuse up to five of those selected, while the prosecutor may recuse three.[684] The core difficulty is that this initially relies on the constituency's make-up and trust between citizens and their prefect to encourage them to register. At the outset, the trial was adjourned due to concerns of bias as most jurors were of an ethnic origin perceived to support the current Government.[685] Even after making full

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the words of the accused and parties between 26 December 2014 and 2 March 2015 (p.23). The observers were also unable to attend the pronouncement of the verdict because the public gallery was too packed due to the level of public interest and there was no reserved seating (p.23).

[678] Ibid, at p.18.

[679] Ibid, at p.22.

[680] Ibid, at p.18.

[681] Articles 243, 245 and 250, old Ivorian CPC 1960, *supra* note 30.

[682] Articles 259, 262 and 263, old Ivorian CPC 1960, *supra* note 30.

[683] Article 288, old Ivorian CPC 1960, *supra* note 30.

[684] Article 292, old Ivorian CPC 1960, *supra* note 30.

[685] OIDH, LIDHO and MIDH, 'Proces des pro-Gbagbo: Une justice aux ordres?', supra note 665, at 7.

use of recusal, the remaining composition was largely unchanged. The Defence used an unusual tactic to highlight their concerns.[686]

The trial proceeded at pace including the examination of witnesses and the accused, with Simone appearing on 23 February 2015. The prosecution submissions commenced on 3 March 2015, followed by the defence arguments and confrontation with civil parties. Jury deliberations took 10 hours.[687] However, FIDH observed that the trial had evidential weaknesses which it considered stemmed from a poor quality investigation.[688] Indeed, trial observers note the prosecution only rarely presented supporting exhibits.[689] The management of the prosecution case was also criticised, as the order of witnesses appeared disorganised to the extent that the courthouse sometimes seemed like a parade.[690] Further, while witness evidence covered the crime base, there appeared to be little linkage evidence to demonstrate the relationship between and individual responsibility of the accused, particularly those giving orders.[691] Further, much of the evidence was hearsay, with some witnesses appearing unreliable and lacking credibility.[692]

[686] Interview record 47 – Defence Counsel, 24 October 2018 (*"…from the list presented to us, we noticed there were only names of persons from the North so naturally when we pick out names, it is only their names that could come out. There were 2 or 3 names not from the North so we recused those, since we said even if these persons were there it wouldn't matter as 9 would already have a majority. We did it on purpose. The Government was forced to have a meeting; they saw what we did and they stopped the picking of the names and they forced 2 or 3 to write to say they were sick or couldn't come to restart the picking of the names").*
[687] Ibid, at p.8.
[688] FIDH, Press Release, 'Concerns over a questionable trial', 12 March 2015.
[689] OIDH, LIDHO and MIDH, 'Proces des pro-Gbagbo: Une justice aux ordres?' *supra* note 665, at 9.
[690] Ibid, at p.22.
[691] Ibid, at pp.16 and 20.
[692] Ibid, at pp.19-20.

Shortcomings by the defence are also noted as the defence challenged the proceedings on procedural grounds and largely asserted a 'wrong place, wrong time' defence.[693] Simone's counsel also asserted parliamentary immunity based on her position as a deputy in the legislature between 2000 and 2010.[694] The Court of Assize deferred the question to the Supreme Court as a matter outside its competence and continued the trial before the point was answered.[695] However, some substantive challenges to the evidence were raised including the lack of corroboration of witness testimony and inconsistencies between witnesses.[696] For example, Michel Gbagbo was stated to be in different places at the same time.[697] The case against Admiral Vagba appeared particularly weak, with observers recalling that two witnesses appeared to give testimony but their accounts did not relate to the facts against him.[698]

The absence of protective measures for witnesses is also concerning. Observers note the Presiding Judge occasionally asked a victim to stand next to the accused[699] and often permitted the accused to pose questions directly, including to victims.[700]

At the trial's conclusion, the UN High Commissioner for Human Rights recognised its importance but urged Côte d'Ivoire to prioritise the investigation of conflict-related human rights violations and address structural concerns.[701] While Côte

[693] Ibid, at p.9.
[694] Article 67, Ivorian Constitution of 2000, *supra* note 8, provides: "*Aucun député ne peut être poursuivi, recherché, arrête, détenu ou jugé à l'occasion des opinions ou des votes émis par lui dans l'exercise de ses fonctions*".
[695] Ibid, at p.10.
[696] Ibid, at p.13.
[697] Ibid, at p.13.
[698] Ibid, at p.25.
[699] Ibid, at pp.22-23.
[700] Ibid, at p.9
[701] United Nations Office of the High Commissioner for Human Rights, Statement of Zeid Ra'ad Al Hussein, 'Côte d'Ivoire: Justice for victims of human rights violations 'long overdue' – Zeid', 11 March 2015.

d'Ivoire had taken steps to harmonise its criminal laws with the Rome Statute, further essential reforms included adopting the draft law on victim and witness protection, addressing the duration of pre-trial detention and ensuring an effective appeals process.[702] Côte d'Ivoire responded to the call to promptly proceed with further trials concerning the crisis. Unfortunately, the recommended steps to address structural deficiencies were still being addressed when Simone's second trial commenced.

4.2 Second trial – blood crimes case

The proceedings against Simone Gbagbo were severed from that of her co-accused, with the Accusation Chamber referring her case for trial in January 2016. The Prosecutor considered this would enable a more efficient trial and better managed case presentation.[703] This indicates lessons in trial management were learned from the first case. However, it is clear proceedings were rushed in response to the ICC and further work was necessary for trial readiness.

The second trial commenced on 31 May 2016 at the Abidjan Court of Assize. She was acquitted a year later, on 28 March 2017. The verdict was pronounced in her absence as she declined to attend court. Contrary to the ICC's earlier finding, observers highlighted that her second trial was visibly based on the same alleged conduct, including an incident of 16 March 2010 at the TV station, the bombing of Abobo market on 8 March 2011 with the killing of seven demonstrators and sexual violence by pro-Gbagbo militants.[704]

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[702] Ibid.
[703] Interview record 17 – Prosecutor, Côte d'Ivoire, 23 March 2018; Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018.
[704] OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des process post-crise', Abidjan, 2018, (copy with author), at p.71.

While the duration of pre-trial detention is an issue,[705] the conditions of Simone's detention during the trial were deemed rights-compliant by the CNDHCI which sent representatives to visit her in October 2016 who noted she was in good health.[706] However, the trial was delayed on several occasions.[707] This included withdrawal of the civil parties; death threats proffered by a witness against the accused during a trial session; issues with defence witnesses; the temporary withdrawal of defence counsel, requiring mediation by the Ordre des Avocats, until their final withdrawal and the designation of court appointed lawyers; and finally, the withdrawal of court appointed counsel.[708]

At the outset, counsel asserted they had not received copies of the entirety of the evidence filed by the Prosecution and some documents they had produced in support of the defence case during the investigation were missing from the casefile. However, this was contested by the Prosecutor General.[709] Counsel provided more information on the disclosure issues experienced, indicating nothing extraordinary to adversarial procedure.[710] Counsel also challenged the Court's jurisdiction and the admissibility of evidence but these arguments were dismissed.[711]

Simone was first absent from court on 16 November and her defence counsel temporarily withdrew in protest at the handling of the case. When she still did not

[705] CNDHCI, Annual Report 2017, *supra* note 71, at p.10.
[706] CNDHCI, Annual Report 2016 on the State of Human Rights in Côte d'Ivoire, published 2017, copy with author, p.7.
[707] CNDHCI, Annual Report 2017, *supra* note 71, at pp.8-10.
[708] CNDHCI, Annual Report 2017, *supra* note 71, at p.10, fn.5.
[709] CNDHCI, Annual Report 2016, *supra* note 706, p.6.
[710] Interview record 47 – Defence Counsel, 24 October 2018 (noting as one example "*photos were with the prosecutor and judge but not in our files because the problem is they put the folder at your disposal. We could get it the next day from the judge; it's up to us to notice what is missing*").
[711] OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des procès post-crise', *supra* note 704, at p.14.

appear on 28 November, the Presiding Judge initially decided to continue the trial in her absence and appointed six lawyers to represent her. However, mediation between the Prosecutor General and her counsel brought them back to court.[712]

In the course of the trial, 23 witnesses proposed by the prosecution and 12 witnesses proposed by the civil parties were heard.[713] However, many of the witnesses gave contradictory accounts and their testimony did not link Gbagbo to the criminal acts or establish her authority or control over the direct perpetrators.[714] Citing the poor quality of the prosecution case, including the incomplete investigation into Gbagbo's role in the abuses charged, even the civil parties supported by LIDHO, MIDH and FIDH withdrew support for the trial before it commenced.[715] It is queried whether this was the nail in the coffin as their participation could have made a difference to the trial outcome. While an interviewee from ICTJ noted that they did not agree with the decision at the time, it was accepted that the civil parties had better knowledge of the case.[716] Those interviewed from LIDHO and MIDH did not regret this decision, asserting that their estimation as to how the trial would go was correct as insufficient evidence was presented in court for the accused to be condemned.[717]

On 29 November 2016, the defence motioned the court to compel other witnesses to attend and asked for the trial to be adjourned to facilitate their attendance and travel to the crime sites at the Abobo market and in the Banco forest. However, the court

[712] Ibid, at p.5. The mediation was on the initiative of the President of the Ordre des Avocats.
[713] CNDHCI, Annual Report 2016, *supra* note 1594, p.6.
[714] OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des procès post-crise', *supra* note 704, at 70.
[715] FIDH, Communiqué, 'Côte d'Ivoire: Pourquoi nous ne participerons pas au procès de Simone Gbagbo', 30 May 2016.
[716] Interview record 9 – interviewee, ICTJ, 13 March 2018.
[717] Interview record 35 – interviewee, Ligue Ivoirienne des Droits Humains (LIDHO), 16 October 2018; Interview record 23 – interviewee, Mouvement Ivorian des Droits Humains (MIDH), 28 March 2018.

dismissed the motion.[718] Consequently, Gbagbo's counsel permanently withdrew. However, rather than call persons likely to testify in support of the defence, counsel had sought the attendance of high-level personalities, including Soro; Charles Koffi Diby, President of the Economic, Social, Environmental and Cultural Council; Ambassadors General Tiapé Kassarate and General Mangou; and General Bredou M'bia, then Director General of the Police.[719] Nevertheless, the Court's rationale for not compelling their attendance appears erroneous as it considered it beyond its competence to compel persons to testify based on a defence request. This rationale conflicts with the discretionary power of the judge to take all measures to discover the truth which would include compelling witnesses to attend ex officio when they fail to appear.[720] Some of these potential witnesses, even if willing to do so, were unable to appear save under the compulsion of a summons due to their official positions.[721]

Observers point to the very few defence witnesses to testify, considering they were most likely too scared for fear of reprisals.[722] However, defence counsel clarified there were actually no problems in terms of defence witnesses being too scared to testify in Côte d'Ivoire. Rather, many potential witnesses were outside the country and "it was not fear per se but they just didn't want to testify" and while others were willing, the defence did not have the means to pay their expenses.[723]

[718] OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des procès post-crise', *supra* note 704, p.5.
[719] CNDHCI, Annual Report 2016, *supra* note 706, p.6.
[720] OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des procès post-crise', *supra* note 704, at pp.7-8.
[721] Ibid, p.10.
[722] Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.
[723] Interview record 47 – Defence Counsel, 24 October 2018.

As a result of the withdrawal, the Court appointed new counsel to proceed. While concerning, it does appear to have been necessary to continue without unjustified delay.[724] Bearing in mind the earlier concerns expressed by Gbagbo's initial counsel over the service of evidence, it is disconcerting that on 11 January 2017 the court appointed counsel argued that they still had not received the complete file. In addition to the documentation provided, they requested the minutes of hearings, expert reports and documents seized at Gbagbo's residence.[725] Notably, this request for adjournment was not opposed by the Prosecutor General and the hearing was adjourned to enable the new lawyers to study the file, safeguarding the accused's right to an effective defence.[726]

Unfortunately, come 21 February, even the court-appointed defence counsel withdrew after one of the panel of three judges overseeing the trial was replaced. Those in authority decided it was a suitable time to transfer Judge Houssou to Daloa on promotion. Defence counsel pointed to Article 248 (3) of the CPC, asserting it was necessary to restart the trial due to the change in the court's composition.[727] Their withdrawal was grounded on the rejection of this motion, meaning the trial resumed with a judge who was absent from earlier trial sessions including witness testimony. The only session to follow was the verdict, where she was found not guilty.[728]

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[724] CNDHCI, Annual Report 2016, *supra* note 1594, p.6-7.
[725] OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des procès post-crise', *supra* note 704, p.9.
[726] Ibid, p.9.
[727] Ibid, p.12. Article 248 (3) old Ivorian CPC, *supra* note 30, provided: "*les conseils supplémentaires siègent aux audiences. Ils ne prennent part aux délibérations qu'en cas d'empêchment d'un conseil titulaire constaté par ordonnance motivé du président de la Cour d'Assises*".
[728] Judgment of the Court of Assize of Abidjan-Plateau, Côte d'Ivoire, in the case of Simone Gbagbo (Blood Crimes case) of 28 March 2017 – Arrêt No. 36/16 du 28 mars 2017, Cour d'Appel d'Abidjan, Cour d'Assises seant Abidjan 1ère Session d'Année 2015-2016, *Ministere Public v Ehivet Simone Gbagbo* (accusee de crime contre les prisonniers de guerre (crime de guerre) et crime contre l'humanite).

Many see the acquittal as a demonstration of judicial independence and respect for the law, in that on a fair assessment of the evidence presented a conviction would have been unsafe. However, following the acquittal, Presiding Judge Kouadjo Boiqui was transferred to Daloa. Officials emphasised this transfer was entirely regular and based on the need in Daloa and his suitability on merit for the post.[729] Yet, in the circumstances, it is queried whether the transfer was a result of the outcome. This view was shared by a representative of APDH who considered the transfer directly related to the acquittal and demonstrated "how difficult it is for a judge to be independent without any form of backlash".[730] Indeed, the decision by the Prosecutor General to appeal is consistent with this, leading to a re-trial being ordered by the Supreme Court in July 2018.[731] The Supreme Court ruling is specifically grounded on the judge's replacement during the trial.[732] A sceptic might wonder if the change was done deliberately to have another bite at the cherry in anticipation of the outcome.

As might be expected, victims are unhappy with the outcome but more surprising is the perception that the investigation and trial management were influenced by partiality on the part of the one of the prosecutors in favour of the accused.[733] Nevertheless, the Prosecutor General's appeal suggests the outcome was unexpected. On the other hand, an astute consideration of political developments in Côte d'Ivoire and the current emphasis on political dialogue and national reconciliation suggests

[729] Interview record 41, Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018.
[730] Interview record 52 – Action pour la Promotion et la Défense des Droits de l'Homme (APDH), 25 October 2018.
[731] Judgment of the Chamber of Cassation, Supreme Court of Côte d'Ivoire, Arrêt No. 131/Pe/18, 26 July 2018, copy available as Annex II to Transmission of Information from the Authorities of the Republic of Côte d'Ivoire, Situation in Côte d'Ivoire, Prosecutor v Simone Gbagbo, ICC-02/11-01/12-86-AnxII, 23 October 2019.
[732] Ibid.
[733] Interview record 26 – victim, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018 ("*the prosecutor there was already politically inclined. He was part of Gbagbo's side so I was not even trying to go there save for doing any legal process. There was no way, I would not go there*.").

that the manner in which the case was presented at trial and the verdict of acquittal may have accorded with the executive's wishes.[734] It indicates an effort to shield the accused from justice. The pronouncement of an Amnesty Decree just two weeks after the decision ordering a retrial accords with this alternative interpretation of events. It would be a significant turning point from the early days when some worried the victors were overzealous about holding their former rivals to account.

4.3 Related cases

In a further high-profile case, General Dogbo Ble, Commander of the Republican Guard, and his deputies Colonel Jean Ay and Colonel Leopold Okou Mody; Police Commissioner Osee Loguey; and six others were prosecuted for the kidnaping and murder of French citizens Stéphane Frantz Di Rippel, the Director General of the Novotel hotel and Jean Yves Lamblin, the Director General of the SIFCA Group; and citizens from Benin and Malaysia on 4 April 2011.[735] The trial proceeded at the Court of Assize in Yopougon between 31 January 2017 and 13 April 2017.[736] All those named were convicted, while four others were acquitted. In the course of the proceedings, two rulings demonstrate the court's effort to uphold the accused's rights. First, the court initially disallowed a list of 79 witnesses proposed by the Prosecution as the Prosecutor General's Office could not demonstrate it had given the accused 24 hours' notice, as required by the Ivorian CPC.[737] In a further ruling, certain prosecution exhibits were found inadmissible as the seal for the evidence bags from a

[734] OIDH, "Recueil des chroniques de l'OIDH sur l'Observation des process post-crise", *supra* note 704, at pp.72-73.
[735] See RFI, 'Kidnapped foreigners killed in Côte d'Ivoire Presidential Palace', 22 June 2011; La Depeche, 'Côte d'Ivoire: le directeur français du Novotel enlevé à Abidjan retrouvé mort', 2 June 2011.
[736] CNDHCI, Annual Report 2017, *supra* note 71, at p.9; OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des procès post-crise', *supra* note 704, at p.16.
[737] OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des procès post-crise', supra note 704, at pp.14-15; and Article 281 old Ivorian CPC, *supra* note 30.

search during which they were seized had been removed outside the presence of the accused and his defence counsel.[738]

In further proceedings, Hubert Oulaye, former Minister for Public Services and Director of Cabinet of the FPI party, was prosecuted in connection to the murder of the Nigerian blue helmets and UNOCI staff near Guiglo in 2012. It was alleged that he had planned the murders and supplied the financial means to the direct perpetrators.[739] Soon after his return from exile in 2014, he was arrested and placed in preventative detention. On 7 June 2017, the Indictment Chamber of the Court of Appeal of Abidjan granted a motion lodged by his defence counsel for provisional release, determining that he was not a flight risk in light of his ill-health and voluntary return from exile.[740] This demonstrates the independence and impartiality of the judges and their willingness to uphold the rights of the accused.

However, in the course of Oulaye's trial at the Court of Assize of Abidjan, the court ruled admissible a document comprising a "summary of hearings" conducted by the DST while he was in detention, proposed by the Prosecutor General in the absence of the full official minutes which had apparently gone missing.[741] According to observers, even the investigative judge had not seen this summary document before or the official minutes – despite asking the DST for a copy of the evidence acquired during the preliminary investigation – and as such, there were doubts as to its

[738] OIDH, Colloquium in Abidjan, Côte d'Ivoire on 'Complémentarite et Coopération pour une meilleure efficacité de la Justice Pénale Internationale en Afrique', 11-12 May 2017, Compilation of Presentations, Presentation by Rodrigue Dadje, Defence Counsel, 'Etat des lieux de la Défense dans les affaires en cours en Côte d'Ivoire', May 2017, at p.79; Article 97, old Ivorian CPC, *supra* note 30.
[739] OIDH, 'Recueil des chroniques de l'OIDH sur l'Observation des procès post-crise', *supra* note 704, at p.16.
[740] Ibid, at pp.16-17.
[741] Ibid, at p.19.

authenticity.[742] It was also not disclosed to the defence in a timely manner.[743] Nevertheless, the court accepted the document as admissible. This is particularly worrying in light of concerns raised by observers as to the weakness of other corroborating evidence.[744]

This relates to the biggest concern identified by interviewees, namely, how accused entered into the criminal justice system and their initial treatment. It was reported that all too often in the immediate aftermath of the crisis, an accused was identified by an individual from the victor's side pointing out alleged perpetrators suspected to be pro-Gbagbo in the street to DST officers.[745] They would then be hauled into pre-trial detention in the MACA among other facilities run by the DST. There are widespread reports that the DST engaged in the use of torture or other cruel, inhuman or degrading treatment of those placed in preventative detention in order to extract forced confession evidence.[746] The interviews of suspects by the DST during the preliminary investigation largely took place in the absence of a legal representative to protect the interests of the accused, despite a provision for the right to a lawyer from this early stage in the Ivorian CPC.[747] The minutes of interviews conducted by the DST would then be sent to the investigating judges to support charge.

[742] Ibid, at pp.19-20.
[743] Ibid, at pp.19-20.
[744] Ibid, at p.20.
[745] Interview record 43 – Defence Counsel, 22 October 2018.
[746] See OIDH, LIDHO and MIDH (GTIT), "Proces des pro-Gbagbo: Une Justice aux Ordres?", *supra* note 665, at p.18.
[747] Presentation by Rodrigue Dadje, Defence Counsel, 'Etat des lieux de la Défense dans les affaires en cours en Côte d'Ivoire', May 2017, supra note 738, at pp.74-75.

In order to correct mistakes made, the Prosecutor leading the Cellule opened new investigations.[748] Nevertheless, for a time the minutes from the related preliminary investigations were still relied on before the court. However, the investigation of the Oulaye case was completed prior to the Cellule's establishment in its current form. For cases now before the Cellule, preliminary interviews are done by specially trained JPOs. They report solely to the judges and the Prosecutor, in contrast to DST officers under the Ministry of Interior.

While most interviewees affirmed the possibility for ordinary persons to receive a fair trial in Côte d'Ivoire; some feel the outcome of the pro-Gbagbo cases was pre-determined.[749] One defence counsel asserted that all of the pro-Gbagbo trials which took place were unfair due to political interference, asserting that "there were a couple of magistrates who wanted to be independent but they were put to the side very quickly".[750] As another interviewee noted, "in general we have fair trials in Côte d'Ivoire but when there is a political background it is difficult; we have the impression that justice goes as the executive wants".[751] However, as a civil society activist highlighted "for someone belonging to a political organisation, even if it is fair, people will not believe it".[752] Others agreed that there have been fair trials in even sensitive cases, "but maybe this is not enough to make an impact in people's minds. It does bear fruit in some instances but you need patience".[753]

[748] ICTJ, 'Disappointed Hope: Judicial Handling of Post-Election Violence in Cote d'Ivoire", *supra* note 53, at p.13, footnote 70.
[749] Interview record 37 – Defence Counsel, 18 October 2018; Interview record 43 – Defence Counsel, 22 October 2018; Interview record 47 – Defence Counsel, 24 October 2018.
[750] Interview record 43 – Defence Counsel, 22 October 2018.
[751] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire(CNDHCI), 26 March 2018.
[752] Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018.
[753] Interview record 42 – Agir pour la Démocratie, la Justice et la Liberté en Côte d'Ivoire (ADJL-CI), 19 October 2018.

4.4 Developing a defence culture

In earlier reports, it was suggested Côte d'Ivoire lacked a robust defence culture, with lawyers' lacklustre performance affecting their clients' ability to obtain a fair trial.[754] This is far from the case today; Côte d'Ivoire has an active Defence Bar and highly engaged network of human rights defenders, especially those involved in PEV cases. As defence counsel explains, a group of counsel joined together during the preliminary stage to assist pro-Gbagbo accused in procedures throughout the preliminary, pre-trial investigation and trials. Given the numbers in detention immediately after the crisis in 2011, this was a heavy workload and very often the suspects were detained in various parts of the country at a distance from Abidjan, such as Boundiali, Bouna and Katiola.[755] While most defence counsel argue otherwise; some interviewees suggest that the ICC has, indirectly, had a positive impact on the development of a stronger defence culture.

4.5 Conclusion

Most interviewees considered all domestic processes concerning Simone Gbagbo were conducted in an effort to prevent the ICC from intervening.[756] However, rather than this effort being catalysed by a concern over surrendering Simone herself, some astutely recognised it as self-interested: "it was a parody…it was all a political strategy, just to show the ICC they could handle these types of trials, just so the war lords would not be sent to the ICC."[757] Regardless of the motivation, several members of the judiciary considered that the trials that took place are sufficient to

[754] ICTJ, 'Disappointed Hope: The Judicial Handling of Post-Election Violence in Côte d'Ivoire', *supra* note 53, at p. 27.
[755] Interview record 47 – Defence Counsel, 24 October 2018.
[756] Interview record 10 – former international staff member, UNOCI, 15 March 2018.
[757] Interview record 51 – victim, Platform for Associations in Duekoué (POREVCI) & COVICI, 25 October 2018.

demonstrate that Côte d'Ivoire "can perfectly hold fair trials….the ICC wished to have certain persons but they were judged fairly here".[758] Some may find it surprising that defence counsel agreed, "yes, it is the illustration where we can say we can judge our nationals".[759]

However, other interviewees expressed concern as to the quality of the trials, considering the prosecution case insufficiently grounded and poorly managed. Ivorian prosecutors acknowledged the first trial was not perfect but lessons were learned, and cases have since been separated for better trial management.[760] However, defence counsel asserted that the second trial was just to avoid sending her to The Hague and "there was no investigation, it was just the same old files stuck together".[761] A human rights defender agreed the process was flawed.[762] Similarly, an Ivorian lawyer added "Côte d'Ivoire lacks sufficient credibility when looking at the trials of those close to Laurent Gbagbo. The lack of documentation and proof and the quality of the witnesses, does not give satisfaction (…)."[763] Nevertheless, he considered that Simone Gbagbo has been judged and "if it is for the same crimes, I would say no, the ICC cannot judge again."[764]

[758] Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018.
[759] Interview record 47 – Defence Counsel, 24 October 2018.
[760] Interview record 18 – Prosecutor, Côte d'Ivoire, 23 March 2018 (noting "there were several persons in the same docket and…it was very difficult and hard work to judge all at the same time").
[761] Interview record 43 – Defence Counsel, 22 October 2018.
[762] Interview record 42 – interviewee, Agir pour la Democratie, la Justice et la Liberte en Côte d'Ivoire (ADJL-CI), 19 October 2018 (*"everyone acknowledged it was conducted very poorly. The instruction process was not conducted with the necessary length of time and the findings were not enough. The process has to be fair and equitable by putting the facts to her for an account.").*
[763] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018.
[764] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018.

In this regard, almost all observers of the second trial of Simone Gbagbo considered her to have been tried for the same conduct as the case against her at the ICC.[765] As a trial observer from OIDH emphasised, "the ICC is saying the facts are different but when we look – the witnesses of the trial are the same and the facts will be the same. We have to question the co-operation issue – how did the two co-operate?"[766] While Simone Gbagbo was convicted in relation to the State security case rather than for crimes against humanity, many queried the appropriateness of surrendering her to the ICC where the crimes against humanity case would be just as difficult to prove and even if convicted, she may receive a sentence less than the 20 years of imprisonment ordered in Côte d'Ivoire.[767] Indeed, even those in favour of the ICC continuing to insist on her surrender felt troubled by this.[768]

Nevertheless, some observers considered the proceedings to be nothing more than a sham, arguing the trials were not conducted independently or impartially.[769] Others considered the crimes against humanity trial also to be a sham on the basis that the prosecution was handled so badly there must have been political interference to secure the acquittal.[770] Victims considered that she should still be tried before the ICC

[765] Interview record 12 – Prosecutor, Côte d'ivoire, 21 March 2018; Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018; Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018.
[766] Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018.
[767] Interview record 13 – Prosecutor, Côte d'ivoire, 21 March 2018.
[768] Interview record 9 – interviewee, ICTJ, 13 March 2018 "*the prosecution of Simone Gbagbo was clearly for the purpose of not giving her to The Hague and how it was done demonstrates there was no real willingness and so I completely agree that the ICC should push for her transfer. But considering the 20 year sentence regarding crimes against the state…she is being punished for the wrong charges but nonetheless*").
[769] As a civil society activist opined: "*for me, the trial she went through here was denominated a sham. It does not benefit Ivorian justice. Today there are a lot of people who think she was condemned because she was the wife of Laurent Gbagbo. All the trials were a sham – all three." (* Interview record 21 – interviewee, Convention Societe Civile de Côte d'Ivoire, 27 March 2018).
[770] For example, a trial observer from OIDH considered: "*the judicial powers are not independent but strongly politicised. Either that or the magistrates from the prosecution office have really showed laxism in this trial. (…) The accused took the decision to no longer be present as for her it was all an*

considering what occurred.[771] However, for others it is not the trial itself that is the issue but the post-conviction award of amnesty by the executive.[772] Simone Gbagbo's defence counsel disagrees that post-conviction executive action means her trial was a sham rendering it still admissibile before the ICC. Taking the proceedings as whole, it could not be said that Côte d'Ivoire intentionally shielded the accused.[773]

Aside from the proceedings of Simone Gbagbo and related accused, defence rights in Côte d'Ivoire have generally been strengthened through reforms, both in terms of legislative measures and practical capacity-building. A few interviewees saw this improvement as in some way linked to the ICC's engagement, though indirectly. For example, one interviewee considered that the legislative reforms strengthening the rights of the defence were linked to the ICC to demonstrate that Côte d'Ivoire was able to conduct fair trials.[774] Even the fact the Court of Assize started working is attributed to the ICC.[775] However, most disagree that these reforms had anything to

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act, not proper." (Interview record 40 – interviewee, Observatoire Ivoirien des Droits de l'Homme (OIDH), 19 October 2018).

[771] Interview record 51 – victim, Platform for Associations in Duekoué (POREVCI) & COVICI, 25 October 2018 ("*the process showed the weaknesses of our judicial system, it showed the influence of politics over our judicial system. I am not against acquittals. I want someone to be acquitted where the evidence is not enough to condemn. But the trial had to go to the end. [There are] witnesses who care. The law was not really pronounced in this situation. After the trials, I don't think the ICC must adhere to this process. Not at all.").*

[772] Interview record 50 – interviewee, Confederation of Victims (COVICI), 25 October 2018 ("*the trial of Madame Gbagbo in Cote d'Ivoire, in general, it was already a step forward for us, that the country be able to judge itself. Unfortunately, it didn't go to the end because there was an amnesty law").*

[773] As her counsel highlights: "*complementarity only plays a role when there is a real deficiency. In the case of Simone Gbagbo, the ICC continue to request her even though the system in Côte d'Ivoire functions and she is the adversary of the current Government. She was in detention for 7 years. She was condemned to 20 years for crimes against the state and given preliminary detention and then judged by the Court of Assize for blood crimes, crimes against humanity - the same crimes the ICC wants her for now. The acquittal was challenged to the Cour de Cassation, so the ICC cannot say Cote d'Ivoire is protecting her from a court; it is not possible.*" (Interview record 43 – Defence Counsel, 22 October 2018).

[774] Interview record 26 - victim, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018.

[775] Interview record 23 – interviewee, Mouvement Ivoirien des Droits Humains (MIDH), 28 March 2018 ("*at a certain time the Court of Appeal was kind of non-existent and we didn't know them doing anything. But because the ICC deported some people, they were forced to put in place instances of*

do with the ICC, asserting they were based purely on local initiative.[776] This assessment to some extent depends on perceptions of the ICC whereby "for the pro-Gbagbo it is instrumentalised. For the pro-Ouattara it does not function as they wish so it has no influence in the functioning of the courts here."[777] While some Ivorians opine that there has been an impact on independence and impartality in that "those accused don't go through 13-14 different ways to the same result,"[778] as discussed above, this opinion is not widely held.

In many respects it is not possible to pinpoint the cause of any changes in the area of defence rights and the possibility it was directly triggered by the ICC is remote.[779] Nevertheless, the ICC has indirectly led to improvements as lawyers and ordinary citizens watched the *Gbagbo and Blé Goude* trial on TV and Ivorian lawyers represented them in the ICC proceedings, bringing "a new wave of lawyers who have taken up the challenge, a kind of ownership of the process here, for the rights of the defence, to go forth and try to get a fair trial."[780] Seeing defence lawyers able to robustly defend their clients at the ICC, obtain access to all the evidence and solicit

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appeal to judge people of a high level – it allowed this… when the ICC demanded more people, the government said we believe the national court is competent enough and we have put in place all structures now to judge").

[776] Interview record 13 – Prosecutor,Côte d'Ivoire, 21 March 2018; Interview record 37 – Defence Counsel, 18 October 2018; Interview record 43 – Defence Counsel, 22 October 2018; Interview record 47 – Defence Counsel, 24 October 2018.

[777] Interview record 53 – interviewee, Regroupment des Acteurs Ivoiriens des Droits de l'Homme (RAIDH), 26 October 2018.

[778] Interview record 54 – interviewee, Association des Victimes de la Crise Post-Electorale du District d'Abidjan (Port Bouet), 26 October 2018.

[779] For example, as a member of LIDHO notes: *"there is an improvement but not because of this. Even on the level of administration, they are starting to digitalise judicial acts. Judges take decisions with three judges not one judge. I don't know if it was inspired by the ICC or is for another reason." (*Interview record 35 – interviewee, Ligue Ivoirienne des Droits de l'Homme (LIDHO), 16 October 2018). Similarly, a judge considered: *"of course in the last years things have evolved in all areas. Sometimes people didn't use lawyers and today they do. Is this linked to the ICC? I couldn't say but it is clear that with the participation of lawyers in the cases, the rights of the defence are more and more respected."(* Interview record 41 – Senior Judge, Tribunal de Premier Instance d'Abidjan, 19 October 2018).

[780] Interview record 22 – interviewee, Organisation des Femmes Actives en Côte d'Ivoire (OFACI), 28 March 2018.

the disclosure of additional files, has inspired defence counsel to do the same in Côte d'Ivoire.[781] As a lawyer from AFJCI stated, "the lawyers just do their job with no pressure, no problems, just doing their routine job" adding "the fact that the ICC is part of our crisis somehow has broadened their minds and allowed them to understand also the existence of the African Court of Human Rights and human rights, how the legal system works."[782] However, again the perception of the quality of the ICC's proceedings has limited the extent of its influence on domestic practice.[783] In terms of access to justice more broadly, one victim noted it has improved his awareness of rights that already existed.[784] However, public awareness generally remains low, with only those who participated in the proceedings becoming more sensitised.[785]

5. Conclusion

This Chapter has shown that the ICC's impact on developments in Côte d'Ivoire has been mixed. Domestic investigations were not initially catalysed in response to the ICC's engagement but were already ongoing when the OTP commenced formal investigations at the international level. However, the ICC's engagement clearly helped to invigorate these efforts at the domestic level, in particular, in regard to investigations concerning the pro-Ouattara. Harmonisation of the Penal Code and Criminal Procedure Code with the Rome Statute and the reinforcement of national

[781] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire, 26 March 2018.
[782] Interview record 20 – interviewee, Association des Femmes Juristes de Côte d'Ivoire (AFJCI), 27 March 2018.
[783] As one defence counsel admitted "*we observed that the rights of the defence are respected because we spent a lot of time to listen to witnesses, whether they be for the defence or the civil party. But the regret is the systematic rejection of the requests for provisional release which tarnished the image of the ICC in Côte d'Ivoire." (*Interview record 47 – Defence Counsel, 24 October 2018).
[784] Interview record 27 – victim, Collectif de Victimes Doukouré Yopougon (CVQDY), 30 March 2018 ("*we discovered a hidden aspect of Ivorian justice – the right to a lawyer to be defended – I only discovered this since I came into contact with the ICC procedure and saw the amended text.").*
[785] As a civil society activist highlighted *"More than 60% of the population are illiterate and live in poverty. …What is going on at the international level is not a pre-occupation of Ivorians. Their pre-occupation is to get out of poverty." (*Interview record 28 – interviewee, SOS Exclusion, 30 March 2018).

mechanisms for the investigation and prosecution of international crimes, in particular, the Cellule, were also influenced by the ICC's activities. However, bottom-up advocacy efforts by Ivorian civil society should not be underestimated.

On the other hand, the rushed investigation and trial of Simone Gbagbo in an effort to stave off the ICC's further intervention shows that the impact on domestic justice was also negative. In turn, the perception of partiality gained from the ICC's sequenced approach, the conduct and outcome of the *Gbagbo and Blé Goudé* trial, and the disparity in the duration of investigations concerning the respective parties since a change of strategic approach has affected the ICC's ability to positively influence developments in Côte d'Ivoire. It is also queried whether the amnesty and cuts to the Cellule's resources were triggered at least indirectly by changing sentiments towards the ICC on the ground or the Government no longer feeling compelled to allow justice to function independently in addressing crimes committed during the crisis.

CHAPTER VI –

MEASURING IMPACT: LIBYA

"There may be decent trials by Libyan standards but not what we are aiming for".[1]

1. Judicial Coverage – Catalysing Normative Change

On 3 August 2011, two months before the conclusive end of the Gaddafi regime, the NTC issued a Constitutional Declaration providing a governance framework until elections.[2] 7 July 2012 marked the first elections in four decades.[3] The next two years showed much promise. However, come November 2014, Libya had "two parliaments, two governments and virtually no State"'.[4] In an assessment of February 2015 to January 2017 for Bertelsmann Stiftung's Transformation Index, Libya ranked 2.29 out of 10 for governance and 2.57 in terms of its political transformation, including the rule of law and stability of democratic institutions.[5]

1.1 Overview

As a Libyan activist put it, "everyone has a claim to legitimacy".[6] Today, there remains two main opposing sides - the GNA in the West and the HoR (supported by the LNA) in the East. The Action Plan for Libya towards a national political settlement announced by then SRSG Ghassan Salame in September 2017 envisaged

[1] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[2] Constitutional Declaration, 3 August 2011, available at: https://wipolex.wipo.int/en/text/246953 (last accessed 15 September 2019). For a consolidated version with amendments as of 2014, see: http://www.log.gov.ly/downloads/add01.pdf (last accessed 15 September 2019).
[3] The Constitutional Declaration was amended in 2012 to provide for the election by the people of a new legislature, the GNC: Constitutional Amendment No. 1 of 2012 on the amendment of Article 30 of the Constitutional Declaration, 13 March 2012.
[4] International Crisis Group (ICG), Middle East and North Africa Report No. 157, 'Libya: Getting Geneva Right', dated 26 February 2015, at p.1.
[5] BTI Country Report: Libya 2018, Gütersloh, Germany: Bertelsmann Stiftung, 2018.
[6] Interview record 34 – Libyan activist, 13 October 2018.

amending the Libyan Political Agreement (LPA);[7] holding a National Conference to agree a new unity government; and a Constitutional referendum, followed by parliamentary and presidential elections.[8] Attempts were made in the Paris meetings of 2017[9] and 2018,[10] in Palermo in 2018,[11] Cairo in 2018[12] and Abu Dhabi in 2019[13] to frame the dialogue. However, a political settlement is remote since Haftar showed disregard for the process by storming Tripoli shortly before the National Conference in April 2019.[14] Decentralisation means many services affecting citizens' daily lives have been delegated to provincial and municipal councils, governors and local committees in which there is generally a greater degree of public trust.[15] However, ambiguities in NTC Law No. 59 of 2012 on the local administration system[16] are hampering further progress.[17]

The judiciary is one of few institutions that remains unified and operating nationally. This was affirmed by the President of the Supreme Judiciary Council in August 2017[18] and in a speech reported in April 2018[19] and was confirmed by those

[7] Libyan Political Agreement (LPA), signed on 17 December 2015.
[8] UNSMIL, Statement of UN Special Representative of the Secretary General, Ghassan Salame to the General Assembly, 'Remarks of SRSG Salame at the High-Level Event on Libya', 20 September 2017.
[9] Libya Tribune, 'France, Italy and Libya's Crisis', by Karim Mezran and Elissa Miller, 29 July 2017.
[10] France24, 'Libyan factions commit to Dec 10 elections at Paris talks', 29 May 2018.
[11] Libya Observer, 'Palermo Conference for Libya starts with second-level attendees', 12 November 2018.
[12] Libya Observer, 'Leaked: Cairo meetings fail as Al-Sirraj gives in to Haftar rejection voices in west Libya', 21 March 2018.
[13] Libya Herald, 'Serraj reveals more details of Abu Dhabi Haftar agreement', by Sami Zaptia, 6 March 2019.
[14] Sky News, 'General Haftar orders forces to take Tripoli as crisis escalates', 4 April 2019; The Telegraph, 'UN postpones Libya reconciliation conference amid continuing fighting for Tripoli', 9 April 2019.
[15] Interview record 56 – international expert, 2 November 2018.
[16] NTC Law No. 59 of 2012 Concerning the Local Administration System, adopted 18 July 2012. Note also Executive Regulation (Bylaw) No. 59 of 2012 on the Local Administration System, attached to Cabinet Decree No. 130 of 2013, issued 1 April 2013.
[17] Interview record 58 – international consultant, 5 November 2018.
[18] Annex 7A to Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11-01/11-660-Corr-Red2, Defence, Second Redacted Version of Corrigendum of Defence Consolidated Reply to Prosecution 'Response to 'Admissibility Challenge by Dr Saif al-Islam Gadafi pursuant to Articles 17

interviewed in late 2018, with a Libyan judge positive that "the judiciary has suffered a lot but it is still one body".[20] Although the police are also unified, high-level policy differences in the Ministry of Justice in the East and West affects their ability to operate cohesively, with an expert noting "the Ministry of Justice in the East can block the judicial police coming to different events if they are not made aware".[21]

Further, the existence of different legislatures means prosecutors and judges are frequently faced with contradictory laws and regulations they are called upon to apply.[22] Indeed, when asked about the state of the rule of law in Libya, one interviewee asked: "Which rule and which law?"[23] Ordinary citizens and police, judges and prosecutors alike lack clarity on what law currently applies and should be enforced.[24] An old Libyan expression of "ma fis h qanum" or "there is no law"[25] could embody the chaos created by legal conflicts.

For example, a Law on Political Isolation was purportedly abolished in the East but is still legally in force in the West.[26] The status of laws on transitional justice and amnesties also remains opaque. While the fact the prevailing law requires all

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(1)(c), 19 and 20 (3) of the Rome Statute',' and Response to 'Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence' 20 November 2018 (hereafter 'Defence Consolidated Reply of 20 November 2018').

[19] Alwasat, 2 April 2018, cited in Annex 7B to Defence Consolidated Reply of 20 November 2018, ibid.

[20] Interview record 33 – Libyan judge, 5 October 2018.

[21] Interview record 56 – international expert, 2 November 2018.

[22] As a Libyan activist explained: "w*hen the government changes, the next body creates a new law without cancelling the previous law. GNC laws and decrees were issued without a right. The HoR is issuing laws and the GNA are issuing laws. The first law, a decision, was issued this year by the Government that was in power for the last two years. There is a lack of clarity over who is supposed to do what and the process itself is messy*" (Interview record 34 – Libyan activist, 13 October 2018).

[23] Interview record 55 – International expert, 2 November 2018.

[24] Suleiman Ibrahim and Jan Michael Otto (Eds), 'Assessing Legislation for Libya's Reconstruction: Project Report', Benghazi University CLSS and Leiden University VVI, 2015, at p.9.

[25] International Crisis Group, Middle East and North Africa Report No. 140, 'Trial by Error: Justice in Post-Qadhafi Libya', 17 April 2013, at p.6.

[26] All Africa, 'Libya Repeals Political Isolation Law', by Nadia Radwan, 5 February 2015.

legislation to be published in the Official Gazette provides some degree of certainty, legislation is frequently adopted with the proviso that it enters into force on issuance. The House of Representatives does not maintain a website or separate official gazette; legislation is announced through Facebook. There are also delays in new rules adopted by the Presidency Council or GNA being published.

By the LPA's preamble, all signatories resolved "that the legitimate State authorities shall have the exclusive use of force in Libya in a manner that complies with the principle of the rule of law, Libya's obligations under international human rights law and the rights and liberties of the Libyan people…".[27] All sides committed to take Libya's international obligations into account.[28] Further, they condemned human rights and international humanitarian law violations and committed to ending impunity.[29] Moreover, the LPA's Governing Principles include respect for the independence and impartiality of the judiciary and the rule of law.[30] It also includes commitments to prosecute and punish the perpetrators of international crimes and activate transitional justice and national reconciliation mechanisms.[31] However, the security environment makes this difficult to implement.

Further, efforts towards transitional justice have been affected by the polarisation of Libyan society in the narrative concerning the Revolution.[32] Inconsistent legislation

[27] Preamble paragraph 9, LPA 2015, *supra* note 7.
[28] Preamble paragraph 6, LPA 2015, *supra* note 7.
[29] Preamble paragraphs 10 and 14, LPA 2015, *supra* note 7.
[30] Governing Principles 6 and 9, LPA 2015, *supra* note 7.
[31] Governing Principles 25 and 26, LPA 2015, supra note 7.
[32] As one interviewee reflected, "s*ince the revolution in 2011, there have been two narratives which affect matters every day, depending on who is looking at it. For some there is an anti-Gaddafi revolution even today. For those who are pro-Gaddafi, it was civil war. The narratives are civil war versus uprising. In 2015, there was a resurgence of violence, a mixed uprising and a civil war post-revolution*". (Interview record 3 – Tunisian researcher, 21 November 2017).

adopted, particularly concerning amnesty, means perpetrators are not being treated equally – there is victor's justice for revolutionaries who fought the Gaddafi regime.

1.2 Constitutional framework

Post-2011, a Constitutional Drafting Assembly (CDA) was elected by a High National Elections Commission to draft a new constitution.[33] The Constitutional Declaration provided ambitious timescales, envisaging a draft within 120 days of the CDA's first session and a National Referendum within 30 days of CDA approval. A first draft in April 2016 did not have a sufficient quorum in the CDA, being rejected by representatives from Eastern Libya.[34] However, a draft was agreed on 29 July 2017 (hereafter "Draft Constitution").[35] All parties to the LPA agreed that the CDA would obtain the opinion of both the HoR and State Council on the Draft Constitution before it is put to a referendum.[36]

The 2011 Constitutional Declaration committed the new State to respect human rights and the equality of all Libyans before the law.[37] Article 31 affirmed the principle of legality, the right to the presumption of innocence and a fair trial. These provisions are similarly included in the Draft Constitution.[38] However, it provides for exceptions and derogations that are inconsistent with human rights. Notably, Article 189 permits derogations to the right to life, personal safety and dignity and fair trial rights during a state of emergency. Moreover, while the State authorities are entrusted to prevent

[33] Article 30, Constitutional Declaration 2011, *supra* note 2.
[34] Libyan Draft Constitution of 2016, draft of 2 March 2016.
[35] Libyan Draft Constitution of 2017.
[36] Article 51, LPA 2015, *supra* note 7.
[37] Articles 6 and 7, Constitutional Declaration 2011, *supra* note 2.
[38] Articles 7 (equality before the law and non-discrimination), 61 (fair trial) and 62 (principle of legality and presumption of innocence), Libyan Draft Constitution of 2017, *supra* note 35.

torture, inhuman, cruel and degrading treatment;[39] a prohibition on the admission of evidence obtained under coercion proposed earlier was removed.[40]

Among the most contentious aspects of the Draft Constitution is the proclamation that "Islamic Sharia shall be the source of legislation".[41] In turn, judicial decisions are to be issued "in the name of Allah, the Most Gracious, Most Merciful".[42] At the same time, the Draft Constitution provides that "all legislative and executive policies…shall be based on the protection and promotion of human rights".[43] It also provides that international treaties ratified by Libya are "superior to domestic law save for the Constitution" and shall be enforced "in a manner that does not conflict with the Constitution".[44] There is a risk that the judiciary could be made redundant, with judges forced to step down from a case if a party asserts something is Sharia as judges are not qualified to interpret Sharia law or comfortable making decisions in relation to it.[45] There are also different schools of interpretation, with the risk courts may adopt the more conservative interpretation.[46]

The Draft Constitution represents a renewed effort to establish control over the militias in prohibiting the formation of military or paramilitary groups and providing for a State monopoly over the use of force.[47] It also regulates the use and conditions of detention, prohibiting detention except in designated facilities for a period

[39] Article 34, Libyan Draft Constitution of 2017, *supra* note 35 (right to human dignity).
[40] Draft Article 6 of the proposals of December 2014, discussed in: International Commission of Jurists, 'The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws', December 2015, at p.74 (commenting on the earlier draft of the CDA).
[41] Article 6, Libyan Draft Constitution of 2017, *supra* note 35.
[42] Article 190, Libyan Draft Constitution of 2017, *supra* note 35.
[43] Article 66, Libyan Draft Constitution of 2017, *supra* note 35.
[44] Article 13, Libyan Draft Constitution of 2017, *supra* note 35.
[45] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[46] Interview record 32 – Libyan lawyer, 5 October 2018.
[47] Article 177, Libyan Draft Constitution of 2017, *supra* note 35.

proportionate to the seriousness of the offence and where the detainee's family are informed.[48] A National Council for Human Rights is to be competent for monitoring and reporting on human rights violations, supporting citizens to access their rights.[49] However, the powers of this body need to be clarified and strengthened to ensure its personnel will be authorised to inspect all places of detention.

In turn, the Draft Constitution commits Libya to continuing its transitional justice efforts, including promulgating a transitional justice law to cover truth-seeking, reparation, accountability and institutional reform and a body for Transitional Justice and Reconciliation to oversee implementation.[50] However, it needs to be reinforced that "accountability" includes the prosecution of those accused of gross violations regardless of their political affiliation. Moreover, its provisions could be strengthened to prevent impunity by providing that any earlier measures purporting to provide amnesty or pardon, or to confer immunity by reason of official position, for war crimes, crimes against humanity and genocide are null and void.

The Draft Constitution is inspired by the 2014 Constitution of Tunisia, with elements of Libya's Independence Constitution of 1951 but many compromises were made to reach a consensus.[51] Some interviewees said they would vote to reject the Draft Constitution if they get the chance but not because of how it is drafted but the process adopted by the CDA which they consider not representative of Libyan society.[52] In particular, the Tebu and Amazigh communities did not participate. Further, some

[48] Article 63, Libyan Draft Constitution of 2017, *supra* note 35 (titled 'procedural guarantees').
[49] Article 159, Libyan Draft Constitution of 2017, *supra* note 35.
[50] Article 181 paragraphs (1) and (2), Libyan Draft Constitution of 2017, *supra* note 35.
[51] Interview record 3 – Tunisian researcher, 21 November 2017; Interview record 55 – international expert, 2 November 2018.
[52] Interview record 34 – Libyan activist, 13 October 2018.

interviewees opined that reactivating and reforming the Independence Constitution of 1951 that Gaddafi suspended would bring greater legitimacy.[53] Others are concerned that it is not the time for a referendum given the security climate. The sequencing in relation to organising a referendum and adopting the Draft Constitution and holding elections is important. There is a risk that a new Constitution would be adopted but not respected without a national consensus.[54] However, the risk of holding elections without a framework is greater. Initially, only a two thirds majority was required in the referendum for the Draft Constitution to be referred for adoption. However, the HoR subsequently adopted a law requiring a quorum of 50 percent plus one in each of Libya's three regions of Tripolitania, Cyrenaica and Fezzan.[55] If Libyans reject the Draft Constitution, the HoR has already prepared a draft law for presidential elections without a constitutional framework. As highlighted by the Cairo Institute for Human Rights and the Libyan Platform, there is a risk that the Draft Constitution will be postponed and if elections take place - undoubtedly, with Haftar running - the stage is set "for the new president to make a constitutional declaration establishing a repressive State managed through extraordinary procedures".[56]

1.3 Transitional justice laws

Views on the transitional justice process depend on perceptions of the conflict and loyalties.[57] Civil society took a proactive role in drafting legislation on transitional

[53] Interview record 32 – Libyan lawyer, 5 October 2018.
[54] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[55] HoR Law No. 6 of 2018, adopted 26 November 2018. Attached as Annex E to ICC, PTC I, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, Defence, 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17 (1)(c) , 19 and 20 (3) of the Rome Statute', ICC-01/11-01/11-640–AnxE, 6 June 2018, ('Gaddafi Admissibility Challenge 2018').
[56] Cairo Institute for Human Rights Studies (CIHRS) and Libya Platform, 'Libya Roadmap for Human Rights Reform & Restoring the Rule of Law', 26 February 2019, at p.8.
[57] Interview record 3 – Tunisian researcher, 21 November 2017.

justice and other reforms to modernise Libyan law. However, these contributions were not sufficiently acknowledged or sometimes ignored as too progressive.[58]

NTC Law No. 4 of 2011 concerning National Reconciliation and Transitional Justice restricted the transitional justice envisioned for Libya to a process to address human rights violations committed by the Gaddafi regime since 1969.[59] The same applied to NTC Law No. 17 of 2012 on the Rules of National Reconciliation and Transitional Justice, though it foresaw a multi-faceted approach for reconciliation.[60]

GNC Law No.29 of 2013 on Transitional Justice which followed is more comprehensive in defining violations covered, the objectives for the transitional phase and implementation.[61] Most importantly, it provides that transitional justice includes not only addressing "grave and systematic violations of fundamental rights and freedoms" suffered by Libyans under the Gaddafi regime, but also "some of the effects of the 17 February Revolution". This encompasses "acts which were necessary to protect the revolution and which were marred by some behaviours that did not adhere to its principles".[62] It emphasises that the overriding objective is national reconciliation, securing peace and "to establish a State that upholds rights and is governed by [the] rule of law".[63] Yet, it does not go far enough for equal justice. Chapters on investigations and trials and the inspection of detention facilities were

[58] For example, one interview recalled that a "*draft transitional justice law prepared by civil society and outside partners was a very good law; it went to the Assembly but the one adopted is completely different*". (Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[59] Article 1, NTC Law No. 4 of 2011 Concerning National Reconciliation and Transitional Justice, adopted 16 November 2011.
[60] NTC Law No. 17 of 2012 on the rules of national reconciliation and transitional justice, issued on 26 February 2012.
[61] Article 32, GNC Law No. 29 of 2013 on Transitional Justice, adopted on 2 December 2013.
[62] Article 1, GNC Law No. 29 of 2013 on Transitional Justice, ibid.
[63] Article 1, GNC Law No. 29 of 2013 on Transitional Justice, ibid.

removed from the final draft, apparently with the objective of still shielding revolutionaries.[64]

1.4 Criminalisation

The most notable modernisation of Libyan criminal law is the criminalisation of torture, forced disappearance and discrimination through GNC Law No. 10 of 2013.[65] The failure to prevent and report torture was also criminalised: "[t]he same penalty shall be inflicted on whoever covers up an act of torture despite his ability to stop it".[66] Until then, Libya had no specific provision on torture in its Penal Code or Military Penal Code. The law is non-retroactive, only applying to cases from 2013.

However, torture is defined in Article 2 as inflicting or ordering "another person to inflict physical or mental pain on a detainee under his control in order to extract a confession for any act that such detainee has or has not committed, or because of discrimination, regardless of its type, or revenge, regardless of its motive". This definition is narrower than that in the Convention against Torture.[67] It is also inconsistent with the ICC's Elements of Crimes where torture as a war crime may include where it is for the purpose of "obtaining information or a confession,

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[64] Hala el-Atrash, 'Law 29/2013 on Transitional Justice', in Suleiman Ibrahim and Jan Michael Otto (Eds), Assessing Legislation for Libya's Reconstruction: Project Report, *supra* note 24, at p.28.

[65] GNC Law No. 10 of 2013 on the Criminalisation of Torture, Forced Disappearance and Discrimination, adopted 14 April 2013.

[66] Article 2, GNC Law No. 10 of 2013, ibid.

[67] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatmment, adopted by UN GA Resolution 39/46 of 10 December 1984, entry into force 26 June 1987, UNTS No. 24841, Vol. 1465 UNTS 112 (1987), entry into force 26 June 1987 (Article 1 defines torture as "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*").

punishment, intimidation or coercion or for any reason based on discrimination of any kind" and no specific purpose is required for torture as a crime against humanity.[68]

Libya also introduced specific measures to criminalise acts of terrorism. By Law No. 3 of 2014 on Combatting Terrorism, the House of Representatives in Tobruk criminalised acts of terrorism and introduced related offences, including membership of a terrorist organisation, participating in or contributing to a terrorist act, funding terrorism, providing refuge or otherwise assisting the perpetrator of a terrorist act.[69] However, the law is unduly wide, deeming a multitude of acts as terrorism, broader than the definition in international and regional conventions.[70] It also mandated the establishment of a special prosecution for terrorism and the specialisation of felony courts in adjudicating terrorism.[71]

There remains no provision for genocide, crimes against humanity or war crimes in Libyan law.[72] However, the Penal Code is in the process of reform and it is hoped this will be addressed.[73] Those suspected of acts which would otherwise constitute international crimes are currently being investigated and prosecuted for ordinary crimes, for example, intentional homicide.[74] The terms used in the Penal Code are vague and subject to interpretation.[75] Further, the domestic offences do not address

[68] Article 7 (1)(f) crime against humanity of torture and Article 8 (2)(a) (ii)-1, ICC Elements of Crimes, 2011.
[69] Articles 2, 3, 6, 8, 9, 10 and 11, HoR Law No. 3 of 2014 on Combatting Terrorism, issued 19 September 2014.
[70] See Articles 11 to 19, HoR Law No. 3 of 2014 on Combatting Terrorism, ibid.
[71] Articles 24 and 25, HoR Law No. 3 of 2014 on Combatting Terrorism, ibid.
[72] Note International Commission of Jurists, 'Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System', 2019, at p.47.
[73] UNSMIL, 'Supporting the Reform of Criminal Justice in Libya to Advance Stabilization and the Rule of Law', National Workshop, 28 April 2017.
[74] Articles 368 and 372 Libyan Penal Code, 1 January 1954, consolidated version with amendments.
[75] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018 (noting the risk that "in the current environment no one is going to be taking a progressive interpretation").

the specific intent required for persecution as a crime against humanity. Discriminatory intent is not a material element for any offence in the Penal Code, but may be considered as an aggravating factor.[76] As discussed, the ICC found that the absence of provision for discriminatory intent in domestic law was not decisive to prevent a conclusion that the domestic proceedings against Gaddafi and Al-Senussi addressed the same conduct, so long as it could be addressed at sentencing.[77]

Further, some crimes only apply to 'public officers'.[78] Superior responsibility for civilian and military leaders was expressly addressed by GNC Law No. 10 of 2013 concerning torture and enforced disappearance, with "any political, executive or administrative official, and any military leader or acting military leader" criminally liable for failure to prevent.[79]

As crimes during the 2011 Revolution and its aftermath are being investigated as ordinary offences, there could be a statute of limitations issue. However, the Draft Constitution affirms that the statute of limitations does not apply to torture, inhuman,

[76] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senus*si, Pre-Trial Chamber I, 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-344-Red, 31 May 2013, at para.111, (hereafter 'PTC Decision on admissibility of the Gaddafi case').

[77] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senus*si, Pre-Trial Chamber I, 'Decision on the admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-466-Red, 11 October 2013, at para.166 (hereafter 'PTC Decision on admissibility of the Al-Senussi case'); and ICC, Appeals Chamber, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senus*si, ICC-01/11-01/11-565, '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'', 24 July 2014, at para.119 (hereafter 'Appeals Judgement on Admissibility of the Al-Senussi Case').

[78] However, in its challenge to the admissibility of the Saif Gaddafi case, Libya asserted Gaddafi could be charged so long as there was proof of his exercising *de facto* authority: PTC Decision on admissibility of the Gaddafi case, *supra* note 76, at para.109.

[79] It criminalises the failure to "take the necessary measures to prevent or uncover such crimes [by persons under their control and command] while being capable thereof, or preventing referral to the authorities for discipline, investigation or prosecution" (Article 5, GNC Law No. 10 of 2013, *supra* note 65).

cruel or humiliating treatment or enforced disappearance.[80] It also provides that the statute of limitations shall not apply to the crimes of genocide, crimes against humanity or war crimes and that "it shall not be permissible to pardon them in contradiction with the provisions of the Constitution".[81] Yet, in the absence of a definition of these crimes in domestic law, it is unclear how this will be applied.

1.5 International co-operation

There is no specific framework for the exchange of evidence with other countries or international courts in the Libyan CPC of 1953 or Penal Code of 1954, as amended. While there is provision for extradition, Article 493bis (A)(d) of the Libyan CPC only permits the extradition of non-nationals. Yet, the Minister of Justice may not authorise extradition if the individual "is being heard before the Libyan judicial system for another crime preceding the extradition request or if a criminal verdict has been issued on such case".[82] However, the Draft Constitution permits the extradition of nationals based on an "international obligation of an international judicial body".[83] This enables Libyans to be surrendered to the ICC based on Libya's obligation to co-operate in light of Security Council Resolution 1970 (2011).[84]

The strict provision for investigative secrecy under the Libyan CPC and Penal Code has also affected co-operation.[85] The disclosure of information is criminalised, preventing the police, prosecutors and judges from sharing information externally.[86]

[80] Article 34, Libyan Draft Constitution of 2017, *supra* note 35.
[81] Article 36, Libyan Draft Constitution of 2017, *supra* note 35.
[82] Article 494, Libyan Criminal Procedure Code, 28 November 1953, as amended ('Libyan CPC').
[83] Article 44, Libyan Draft Constitution of 2017, *supra* note 35.
[84] UN Security Council Resolution 1970 (2011), 'Decision referring the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court', UN/S/RES/1970 (2011), dated 26 February 2011.
[85] Article 59 Libyan CPC, supra note 82, and Article 188 Libyan Penal Code, *supra* note 74.
[86] Articles 236 and 284, Libyan Penal Code, *supra* note 74.

Nonetheless, an exception was found for the ICC pursuant to the Memorandum of Understanding between the OTP and the Libyan Prosecutor-General's Office.[87]

1.6 Defence rights

Even under the Libyan CPC of 1953 as amended prior to 2011, the accused, on paper, benefitted from fairly extensive legal safeguards during investigations and trials. The problem was frequent derogation and the narrow construction of these provisions given textual ambiguities. Existing safeguards include provisions on the legality of arrest;[88] time limits to be heard;[89] the right to be informed of the charges;[90] time limits on pre-trial detention and judicial oversight.[91] Further, suspects have the right to a lawyer throughout the investigation stage;[92] the right to attend investigation procedures;[93] to a copy of documents from the investigation file;[94] and to be present during a search of their property or delegate a representative to attend.[95] Upon indictment, all accused have the right to be provided with the supporting evidence

[87] Statement of the ICC Prosecutor to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), 10th Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011), 5 November 2015, at para.50.
[88] Article 30 Libyan CPC, *supra* note 82, "no individual may be arrested or detained without an order from the legally competent authority".
[89] Articles 112 and 175 of the Libyan CPC, *supra* note 82.
[90] Article 105 Libyan CPC, *supra* note 82.
[91] Articles 112, 122, 123,175 and 176 of the Libyan CPC, *supra* note 82. Also note Law No. 3 of 2013 on amending certain provisions of the Code of Criminal Procedure, adopted 13 June 2013 (covering time-limits for provisional detention).
[92] Article 106 Libyan CPC, *supra* note 82, provides the right to have an attorney attend during the accused's examination in te investigation phase unless he was caught in flagrante delicto or the investigating magistrate/prosecutor fears that evidence will be lost. However, it provides that even if a lawyer attends "the attorney shall not speak unless authorised by the judge". Article 162 provides that the Court is to appoint defence counsel to represent a person accused of a felony before the Criminal Court if has not elected counsel. Article 339 Libyan CPC, *supra* note 82, provided that the defence lawyer shall attend the session or appoint another lawyer in his place, subject to the sanction of a fine.
[93] Article 61 and 181, Libyan CPC, *supra* note 82, provides the right for the accused, victim, civil plaintiffs and their representatives to attend all investigative procedures but allows for exceptions to this in case of urgency or if the investigating magistrate/prosecutor "deems it necessary to reveal the truth". It provides that as soon as the necessity ends, they shall be permitted to examine the investigation file.
[94] Article 68 Libyan CPC, *supra* note 82, provides for a right to a copy of the documents during the investigation unless the investigative act was conducted in his absence pursuant to a decision in this regard.
[95] Article 76 Libyan CPC, *supra* note 82, which provides this shall be done "if possible".

immediately upon referral to the Indictment Chamber.[96] At trial, defendants have the right to a public hearing;[97] to attend in person;[98] protection against self-incrimination;[99] to examine witnesses;[100] to propose witnesses in their defence[101] and to have these witnesses subpoenaed.[102] Further, reasons should be given for decisions on parties' motions[103] and the final verdict.[104]

Nevertheless, Libyan law still has significant substantive and procedural deficiencies, which to a great extent curtail the rights related above.[105] Detention practices are a particular concern. Further to the LPA, within 30 days of the GNA starting to function all parties were to release any prisoners within their custody without a lawful basis or hand them over to the official judicial authorities and to respect the exclusive right of the competent judicial authorities over measures of detention.[106] However, this has not been followed and given the current security environment and weakness of State institutions there is little hope of enforcement action against the militias operating outside official structures. Torture and inhuman treatment is systemic in detention centres under the control of the militias, including groups nominally under the Ministry of Justice or Ministry of Interior.[107] Nevertheless, there has been limited

[96] Article 209, Libyan CPC, *supra* note 82.
[97] Article 241 Libyan CPC, *supra* note 82, providing for trial to take place by public hearings though exceptionally the court may order the action to be heard wholly or partially in a closed hearing or ban certain classes from attending for reasons of public order or to maintain public morality".
[98] Article 243 Libyan CPC, *supra* note 82, on the accused's right to attend court hearings in person but it permits his exclusion for "disruptive behaviour".
[99] Article 247 Libyan CPC, *supra* note 82.
[100] Article 244 Libyan CPC, *supra* note 82.
[101] Article 245 Libyan CPC, *supra* note 82.
[102] Article 250 Libyan CPC, *supra* note 82.
[103] Article 284 Libyan CPC, *supra* note 82.
[104] Article 283 Libyan CPC, *supra* note 82.
[105] See ICJ, 'Accountability for Serious Crimes under International Law in Libya: An Assessment of the Criminal Justice System', supra note 72.
[106] Article 26, LPA 2015, *supra* note 7.
[107] See Office of the United Nations High Commissioner for Human Rights in co-operation with UNSMIL, Report titled 'Abuse Behind Bars: Arbitrary and unlawful detention in Libya', April 2018; and Amnesty International, Report titled 'Detention abuses staining the new Libya', October 2011.

progress in regulating official detention facilities managed by the judicial police.[108] Interviewees attributed the small progress that has been made in relation to prison reform and improving the conditions of detention to the capacity-building work undertaken by UNSMIL rather than these changes being catalysed by the ICC's engagement.[109]

1.7 Victim and witness protection

There are no specific measures in the Penal Code or Criminal Procedure Code for the protection of victims and witnesses. Nevertheless, prosecutors, investigating judges or the trial court may apply general provisions to safeguard witnesses. In particular, witnesses, whether in support of the prosecution case or that of the defence, may benefit from the general rules on the confidentiality of the investigation and the duty of all involved to maintain the secrecy of any investigative procedures and results.[110] This provides some protection in that their identity and testimony should not be disclosed publicly or to third parties until the trial. While the accused has the right to attend all investigative procedures, the prosecutor or judge may exceptionally interview victims and witnesses in the accused's absence, which is more likely to encourage them to attend and facilitate best evidence.[111] However, there is no ability to redact the name or other identifying details of a witness.[112] As such, as soon as the basis for investigative necessity ends, the investigating judge or prosecutor must

[108] See Human Rights Council, Report of the United Nations High Commissioner of Human Rights, 'Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya, A/HRC/43/75, 23 January 2020,at para.60.
[109] Interview record 2 – Libyan law student, 23 October 2017.
[110] Article 59 of the Libyan CPC, *supra* note 82; and Article 188 of the Libyan Penal Code, *supra* note 74.
[111] Article 61 of the CPC, applicable equally to prosecutors through Articles 172 and 181, provides that t"[t]he investigating magistrate may conduct the investigation in their absence when he deems it necessary to reveal the truth".
[112] Article 96, Libyan CPC, *supra* note 82, requires the investigative judge or prosecutor is required to record a witness' name, surname, age, profession, place of residence and relation to the accused and their testimony "without crossing out or annotations".

permit the accused to examine investigative records and upon doing so, they would be fully apprised of the existence and identities of any witnesses.[113]

While the general rule is that all trials shall be conducted in public, exceptionally, the court may order an action to be heard wholly or partially in closed session or prevent certain persons attending for public order.[114] Finally, the court may also travel to the location of the witness if they have an "acceptable excuse" for non-attendance at court.[115] Alternatively, the trial court has the power to read out the previous testimony of witnesses given during the investigation "if it is impossible to hear the witness for any reason whatsoever".[116]

Through Law No. 7 of 2014, the GNC amended Article 234 of the Libyan CPC to allow an accused to attend trial proceedings by video link where necessary for their own safety or due to the risk of flight.[117] The same law permits witnesses, experts and the prosecutor to participate in trials remotely through video link. This has the potential to significantly improve the situation of victims and witnesses at risk.

1.8 Conclusion

While there have been many reforms, in many cases the laws are not operational because they are poorly drafted, were politicised, or have been overturned by the Supreme Court and this has led to a feeling that noone is taking the law seriously.[118]

[113] However, this provision confusingly adds that "[n]o correction, crossing out, or annotations may be adopted unless certified by the judge, clerk and witness" (Article 96, Libyan CPC, *supra* note 82).
[114] Article 241 Libyan CPC, *supra* note 82.
[115] Article 254 Libyan CPC, *supra* note 82.
[116] Article 262 Libyan CPC, *supra* note 82.
[117] GNC Law No. 7 of 2014 amending some provisions of the Criminal Procedure Code, adopted 24 March 2014.
[118] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.

Even those more positive about legislative changes felt like the hard work over five years was in vain due to security reform failings leading to Libya's destabilisation.[119] A Libyan law student concurred that the "general impression is that things have notably improved but continued improvement depends on political stability".[120]

Some reforms were hampered by the swift turnover in office, especially amongst the Prime Minister and the Minister of Justice.[121] Holding office is high risk, especially when engaging in progressive reform. Ali Zeiden (PM 2012-14) was kidnapped twice, in October 2013 and August 2017;[122] while Abdullah Al-Thinni (PM 2014-16) survived an assassination attempt in 2015.[123] Further, the Ministry of Justice was stormed in 2013 after Salah Marghani (Minister of Justice 2012-14) spoke out against detention practices by the militias.[124]

While the spotlight of ICC admissibility proceedings may have incentivised reform, most progress was triggered by the work of an active Libyan civil society network and capacity-building by other international organisations. Accordingly, progress has been set-back by restrictions on civil society organisations and human rights defenders, curbing their ability to assemble to advocate for deeper rights-based

[119] Interview record 30 – Interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[120] Interview record 2 – Libyan law student, 23 October 2017.
[121] Mahmoud Jibril was interim PM in the NTC. Ali Zeiden, a human rights lawyer, was PM in the GNC from November 2012 until March 2014. He was succeeded by Abdullah al-Thinni from 2014 to 2016, until Fayez Sarraj was appointed. In turn, Ali Ashour, a Misratan judge, served as Minister of Justice from November 2011 to November 2012. Salah Marghani, a former prosecutor, was Minister of Justice from November 2012 until August 2014. Juma Drissa has served as Minister of Justice in the GNA since 2016.
[122] The New York Times, 'Show of Power by Libya Militia in Kidnapping', by Carlotta Gall, 10 October 2013; Libya Herald, 'Former premier Ali Zeiden seized in Tripoli', 13 August 2017.
[123] CNN, 'Libyan Prime Minister survives assassination attempt', by Jomana Karadsheh and Michael Martinez, 26 May 2015.
[124] Foreign Policy, 'Libya's fight for the rule of law', by Mohamed Eljarh, 4 April 2013.

reforms. A Civil Society Commission[125] has been used to control rather than support their work.[126] This is on top of difficulties already faced from the security situation which hampers joined-up working across Libya.[127]

2. Judicial Functioning – Catalysing Domestic Proceedings

2.1 Civilian justice system

The case concerning Saif Gaddafi, Abdullah Al-Senussi and 38 other regime officials was investigated by the Tripoli Prosecution Office.[128] The investigation was comprehensive, with statements obtained from over 250 witnesses and accused while 4,000 pages of written evidence included phone call records, meeting minutes, expert reports and official correspondence.[129] The charges involved serious crimes against 333 named victims.[130] This included unlawful killings in Benghazi between 12 February and the end of February 2011; Tripoli between 20 February and the end of March 2011; and Gharghur, on the Airport road and in Bab al-Aziziya and Abu Salim between 16 August and the end of August 2011.[131] The Accusation Chamber confirmed the charges against all but one defendant on 24 October 2013 and referred the case for trial. Due process issues are analysed below.

Investigations have been opened by prosecutors in Libya concerning crimes committed by members of militias and others affiliated to the various governments

[125] Cabinet Decree No. 12 (2012) on establishing a centre to support civil society organisations, 15 January 2016.
[126] Mohammed Omran, DAAM Center, 'Civil society legislation in Libya: A history of harassment, a confounded present and an unknown future', 29 November 2016.
[127] See Altai Consulting for SJD, 'Libya Civil Society Mapping', December 2015.
[128] Case 630/2012.
[129] UNSMIL, 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', 21 February 2017, at p.16.
[130] Ibid, at pp.17-18.
[131] Ibid, at pp.16-18.

after the end of the Revolution, but there is no information to indicate the existence of any ongoing investigations against revolutionaries concerning crimes committed during the 2011 Revolution.[132] This was confirmed by interviewees from different backgrounds.[133] Prosecutors and judges see their hands as effectively tied in this regard by amnesty laws.

In relation to crimes committed after October 2011, one of the most high-profile investigations concerns 'Black Saturday' in which a public protest near the Libya Shield 1 Brigade base in Benghazi against the conduct of the militia was responded to with violence, resulting in the death of 32 people.[134] The GNC requested the Prosecutor General to nominate a judge to investigate and bring the alleged perpetrators to justice.[135] National level investigations have also been opened into human trafficking, slavery and the ill-treatment of migrants, as noted in Chapter IV.

The level of professional competence of judges and prosecutors is generally considered quite high.[136] As one interviewee noted, it is not an issue of the standard of personnel but the need to empower them to take decisions.[137] However, there is still a need for further training in investigating serious crime, international criminal law and human rights standards.[138] In particular, it was suggested that some prosecutors may benefit from further guidance on evidential assessment and how to

[132] See e.g. Report of the International Commission of Inquiry on Libya, Report A/HRC/17/44 , 1 June 2011.
[133] E.g. Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018; Interview record 33 – Libyan judge, 5 October 2018.
[134] Human Rights Watch, 'Libya: No Impunity for 'Black Saturday' Benghazi deaths – Investigate Killings, Clamp Down on Unlawful Militias', 13 June 2013.
[135] Article 5, GNC Resolution No. 53 of 2013 on the tragic events that took place in Benghazi, adopted 9 June 2013.
[136] Interview record 55 – international expert, 2 November 2018.
[137] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[138] Interview record 33 – Libyan judge, 5 October 2018.

present complex cases in court.[139] There is also a need for more sensitisation and community outreach, as the judiciary is class based, with most prosecutors and judges well-educated and coming from wealthy families.[140] Witnesses from different backgrounds may find this intimidating and be deterred from coming forward.

A renewed emphasis has been placed on judicial competence and training, with all appointments conditional on the completion of a programme at the Judicial Institute unless the candidate has equivalent experience.[141] However, there is no mandatory continuous professional development programme and performance review focuses on quantitative aspects of a judge's work, namely, how many cases they have handled, rather than an assessment of the quality and complexity of matters addressed. The curriculum in the Judicial Institute also needs to be updated to include human rights and best practice in investigations, including in war crimes and trafficking cases. Moreover, Libyan capacity needs to be reinforced as a whole to prosecute SGBV, including the handling of complaints and use of forensic and medical evidence, as there are currently no specially trained police, prosecutors or judges in this area.[142]

The Police Criminal Investigation Directorate falls under the Ministry of Interior (MoI).[143] Its officers report to the Public Prosecutor who leads investigations.[144] They are entrusted with identifying victims, witnesses and suspects, examining the crime

[139] Interview record 55 – international expert, 2 November 2018.
[140] Interview record 34 – Libyan activist, 13 October 2018.
[141] Article 1 of Law No. 42 of 2012 amending Article 43 (3) of Law No. 6 of 2006 on the judiciary, adopted 16 May 2012.
[142] As a Libyan activist explained, women who are victims of SGBV may legally file a complaint "*but even officials will mark her a whore. They believe it is a shameful thing. This is not a Libyan thing, but a cultural thing*". (Interview record 34 – Libyan activist, 13 October 2018).
[143] Article 6, Cabinet Decree No. 145 of 2012 on the oganisational structure and powers of the Ministry of Interior, adopted 1 April 2012.
[144] Interview record 33 – Libyan judge, 5 October 2018.

scene, monitoring missing persons and executing court judgments.[145] In turn, the Arab and International Criminal Police Department executes international assistance requests.[146] Generally, Directorates of National Security under the MoI are also entrusted with maintaining security.[147] However, the judicial police under the Ministry of Justice (MoJ) are responsible for securing judicial offices, the Ministry of Justice, and members of the judiciary to enable them to function.[148] The judicial police also manage prisons and other correctional and rehabilitation institutions[149] under the Prosecutor's oversight.[150] The division of competencies between police operating under the MoI and MoJ adds to the complexity. Several interviewees did not fully appreciate the distinctions. Though accounts were mixed, interviewees generally spoke favourably of the professional competence of the judicial police under the MoJ and the Criminal Investigation Directorate of the MoI. However, views on other units under the MoI such as the Department for Combatting Illegal Migration were not complementary.

A particular concern expressed was the lack of training and inexperience of new police recruits, fighters integrated into units after the Revolution.[151] Some commented that, institutionally, the police units are regarded as relatively new as under Gaddafi there was not really a professional police service. They considered it presented a good

[145] Article 21, Cabinet Decree No. 145 of 2012, *supra* note 143.
[146] Article 30, Cabinet Decree No. 145 of 2012, *supra* note 143.
[147] Articles 2 (3) and 3, Cabinet Decree No. 145 of 2012, *supra* note 143.
[148] Articles 2 (8) and 6 (2), Ministry of Justice Decree No. 1960 of 2013 on adopting the organisational structure and competencies of the Judicial Police Department, 31 December 2013.
[149] The Department for Combatting Illegal Migration (DCIM), operating under the Ministry of Interior, manages migrant detention centres.
[150] Article 41, Law No. 6 of 2006 on the judiciary, adopted 5 March 2006, General People's Congress, provides that "judicial police officers shall be subordinate to the Public Prosecution as relates to the duties of their position". They also co-ordinate technical co-operation with international organisations, including the ICC: Article 12 (c), Decree No. 1960 of 2013, *supra* note 148.
[151] Interview record 2 – Libyan law student, 23 October 2017; Interview record 32 – Libyan lawyer, 5 October 2018.

opportunity to build-up capacity without having to challenge an old bureaucracy to make reforms, such as in Egypt or Tunisia.[152] However, many officers are from the Gaddafi era and continue to use old methods that are not human rights compliant, with an undue focus on obtaining confession evidence.[153]

There is also a need for more strategic planning to progress investigations.[154] Some improvements have already been made with the Ministry of Interior working to tackle a disparity in resources between different regions, for example, ensuring that the police in Misrata have the same type of resources as the police in Jufra.[155] Nevertheless, those more recently engaged with the judicial police reported an increased level of understanding about human rights conventions.[156] They also reported progress in that the judicial police have become more proactive in implementing measures to improve compliance with international standards.[157]

2.2 Military justice system

GNC Law No. 11 of 2013 amended the Military Penal Code and Code of Military Procedure to provide that only official members of the military and military prisoners would fall within the jurisdiction of the Military Prosecutor and courts, with all other cases going to the Public Prosecution and regular courts.[158] In effect, all cases concerning non-State armed groups are to be investigated and prosecuted by the civilian justice system. While the general prosecution is competent to investigate the

[152] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[153] Interview record 33 – Libyan judge, 5 October 2018; Interview record 11 – Libyan lawyer, Lawyers for Justice in Libya, 16 March 2018.
[154] Interview record 55 – international expert, 2 November 2018.
[155] Interview record 55 – international expert, 2 November 2018.
[156] Interview record 56 – international expert, 2 November 2018.
[157] Interview record 56 – international expert, 2 November 2018.
[158] GNC Law No. 11 of 2013 amending the Military Penal Code and Code of Military Procedure, issued 18 April 2013.

events of 'Black Saturday', members of the army fall within the Military Prosecutor's jurisdiction. As such, in the same Resolution of 2013 related above, the GNC required the Chief of Staff and Ministry of Defence to investigate its officers for violating military regulations.[159]

However, Law No. 4 of 2017 on amending certain provisions of the Military Penal Code and the Code of Military Procedure ("Terrorism Law 2017"), adopted by the HoR on 28 November 2017 presents a worrying change.[160] It purports to repeal GNC Law No. 11 of 2013[161] and prescribes that military courts will adjudicate over all crimes committed not only by military personnel but also "civilians working for the Libyan Army during a state of mobilisation", "military captives", "armed militias" and "terrorist offenders".[162] It further mandates that all ongoing proceedings whether during the investigation or trial stage, be transferred to the competent military prosecution and military court.[163] The extension to "terrorist offences" is particularly worrying as based on the definitions in Law No. 3 of 2014 on Combatting Terrorism, many acts will fall within its scope.[164] There is a high risk it will be construed broadly to encompass civilians perceived to be against the LNA.

While the ICC has warrants against Al-Werfalli, neither the ICC nor the Libyan judiciary have publicly opened cases against anyone further up the LNA command structure. Most significantly, in a video posted on social media, General Haftar is

[159] Articles 2 and 6, GNC Resolution No. 53 of 2013, *supra* note 135.
[160] Libyan House of Representatives, Law No. 4 of 2017 on amending certain provisions of the Military Penal Code and the Code of Military Procedure, adopted 28 November 2017 (hereafter 'Terrorism Law 2017'), copy with author.
[161] Article 4, HoR Law No. 4 of 2017 (Terrorism Law 2017), ibid.
[162] Articles 1 and 2, HoR Law No. 4 of 2017, ibid, amending Article 2 of the Military Penal Code and Article 45 of the Military Code of Criminal Procedure respectively.
[163] Article 3, HoR Law No. 4 of 2017 (Terrorism Law 2017), ibid.
[164] For example, Articles 11 to 19, HoR Law No. 3 of 2014 on Combatting Terrorism, supra note 69.

giving a speech on or around 18 September 2015 to LNA forces engaged in Operation Dignity and instructs them to take no prisoners.[165] Haftar continues with similar rhetoric in another speech on or around 25 August 2017 while the LNA was engaged in a siege of Derna.[166] Further concerning reports have surfaced.[167]

Subsequent to the ICC's First Arrest Warrant, a spokesman for the LNA declared that as of 17 August 2017, Al-Werfalli had been suspended from his functions, arrested and placed under investigation by the Military Prosecutor.[168] In a statement released on the LNA's Facebook page and read-out to the media, the spokesman referred to the ICC's allegations and stated that the Military Prosecutor had already opened an investigation on 2 August 2017 on Haftar's order.[169] He was interrogated by the Military Prosecutor in August 2017.[170] Thereafter, the LNA released a press statement indicating he would not be surrendered to the ICC.[171]

A statement by the LNA also asserted that its General Command had reinforced the message to its troops of the need to respect international humanitarian law, human rights and the teachings of Islamic Sharia which included "banning self-revenge,

[165] He declares: "*Never mind consideration of bringing a prisoner here. There is no prison here. The field is the field, end of story"*. (You Tube, video of General Khalifa Haftar on or around 18 September 2015, posted 10 October 2015)
[166] Video of speech of General Khalifa Haftar, report of 26 August 2017, available at: https://www.justsecurity.org/wp-content/uploads/2017/09/Attachment-A-Derna-statement-August-2017.mp4?_=1 (last accessed 25 April 2019).
[167] See Just Security, 'Smoking Gun Videos Emerge: US Citizen, Libyan Warlord Haftar Ordering War Crimes', by Ryan Goodman and Alex Whiting, 19 September 2017.
[168] Al Jazeera, 'Libya: Khalifa Haftar ally Mahmoud Al-Werfalli arrested', 18 August 2017.
[169] Libyan Express, 'Libyan eastern military says Al-Werfalli is under military investigation', 17 August 2018.
[170] ICC, Situation in Libya, *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, PTC I, 'Second Warrant of Arrest', issued pursuant to Article 58 (1) of the Rome Statute, ICC-01/11-01/17-13, 4 July 2018 ('Al-Werfalli Second Warrant of Arrest'), at para. 28.
[171] Libya Prospect, 'Al-Mesmary: We won't surrender Al-Werfalli to ICC', 24 August 2017.

respecting freedoms and handing over the terrorists to the competent authorities".[172] A specific reference was made to the ICC, indicating that its engagement catalysed action at the national level to enforce compliance with international humanitarian law and indirectly served to deter the commission of further abuses.

Yet, Al-Werfalli was released as early as 30 November 2017, if indeed he had ever been detained.[173] Multiple reports indicate that he was still at large in the second half of 2017, with reports of his involvement in further attacks in Benghazi in September and October 2017.[174] Moreover, in an interview on or around 30 September 2017, Haftar reportedly asserted there was no evidence against Al-Werfalli despite videos being widely available on social media.[175] However, Al-Werfalli's reported release in November 2017 appears to have come after he made threats against the LNA's Chief of Control and Judicial Authority and asserted that Haftar was not sufficiently supporting the Al-Saiqa Brigade.[176] He also asserted that others loyal to Haftar were trying to assassinate him.[177] The apparent effectiveness of these public statements by Al-Werfalli in enabling him to escape accountability indicates the inability of the military justice system or the LNA's own internal disciplinary mechanisms to prosecute him and/or an unwillingness to do so.

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[172] Libyan Express, 'Libyan eastern military says Al-Werfalli is under military investigation', 17 August 2018, supra note 169.
[173] Al-Werfalli Second Warrant of Arrest, supra note 170, at para.24.
[174] Bellingcat, 'What Werfalli Did – Haftar's Commander Continues Executions in Defiance of ICC Arrest Warrant', by Christian Triebert, 9 February 2018. See also Marsad, 'Benghazi's Serial Killer Al-Werfalli Strikes Again', reporting from The Libya Observer by Abdullah Ben Ibrahim, 14 October 2017.
[175] The Libya Observer, 'No evidence against Mahmoud Al-Werfalli, Khalifa Haftar claims', by Housam Najjair, 30 September 2017.
[176] The Libya Observer, 'Serial killer Al-Werfalli lambastes close aide to warlord Khalifa Haftar', 15 November 2017.
[177] The Libya Observer, 'Serial killer Al-Werfalli claims Dignity Operation wants to terminate him', 21 November 2017.

Al-Werfalli was again arrested on 7 February 2018, after his alleged role in the killing of ten people on 24 January 2018 in front of the Bi'at al-Radwan Mosque in Benghazi, the subject of the ICC's Second Arrest Warrant.[178] Al-Werfalli purported to surrender to the LNA's military police in a video of 6 February 2018.[179] On 7 February 2018, an LNA spokespman confirmed that he was arrested in connection to the events.[180] He was reportedly arrested by the 106 Forces Brigade commanded by Haftar's son, Khalid Haftar. The LNA spokesman announced he would not be handed over to the ICC but the case against him would be handled by the Libyan justice system.[181] This again shows action being taken in direct response to the ICC's arrest warrant.

Yet, he was released only a day later on 8 February 2018, with some claiming the investigation by the military police had already been completed.[182] He apparently returned to the LNA Headquarters in the following days with the investigation continuing while he was released on bail.[183] Other reports suggested he had escaped detention, with Al-Werfalli very publicly entering central Benghazi in July 2018 under escort by heavily armed loyalists.[184] As noted by the ICC's Pre-Trial Chamber, Al-Werfalli commands some public support in Benghazi, with his supporters

[178] The Libya Observer, 'Serial killer Werfalli welcomes UN envoy in Benghazi with new summary executions', by Abdullah Ben Ibrahim, 24 July 2018.
[179] News 24, 'ICC-wanted Libya commander 'hands himself in' to strongman's forces', 7 February 2018.
[180] Al-Werfalli Second Warrant of Arrest, supra note 170, at para. 26.
[181] Reuters, 'Case of commander wanted by ICC opens rift in east Libyan forces', by Aiden Lewis, 15 March 2018.
[182] Libyan Express, 'Al-Werfalli released after one-day long investigation', 8 February 2018.
[183] Reuters, 'Case of commander wanted by ICC opens rift in east Libyan forces', by Aiden Lewis, 15 March 2018, *supra* note 1825.
[184] The Libya Observer, 'ICC fugitive Mahmoud Al-Werfalli makes a cinematic prison break', 4 July 2018. See also Middle East Monitor, 'Libya war criminal Werfalli escapes Haftar prison', 13 July 2017 (reporting on a statement by the LNA that al-Werfalli had escaped).

blocking roads with burning tires in a demonstration against his arrest in February 2018.[185] This again evidences inability and/or unwillingness to prosecute him.

Noting reports of local level investigations against Al-Werfalli, the ICC's Pre-Trial Chamber exercised its discretion to consider admissibility pursuant to Article 19 (1) of the Rome Statute.[186] However, it held that it is a situation of inactivity, finding that Al-Werfalli was not being or had not been investigated in Libya for the purposes of Article 17(1)(a)-(b) of the Rome Statute as there had not been "tangible, concrete and progressive investigative steps" in the investigation reportedly underway by the Military Prosecutor.[187] The Court noted that the only apparent investigative step was Al-Werfalli's interview by the Military Prosecutor in August 2017 in relation to the subject-matter of the First Arrest Warrant. For the conduct in issue for the Second Arrest Warrant, no witnesses had been interviewed and the military authorities had also not conducted a forensic examination of the crime scene.[188] Indeed, whatever investigation that was conducted by the military authorities is already over, with reports that a Court Martial in Benghazi dismissed the case against him on 6 January 2019, annulling the domestic warrant for his arrest.[189] Moreover, in July 2019 Haftar promoted Al-Werfalli from Major to Lieutenant Colonel.[190]

The ICC Prosecutor has routinely issued statements warning parties to the conflict in Libya that investigations are ongoing and further arrest warrants could be issued. For

[185] Al-Werfalli Second Warrant of Arrest, supra note 170, at para.26. See The Libya Observer, 'Werfalli released after threats from Sahawat fighter "Makhadda" to wipe out "The General Command"', by Abdullah Ben Ibrahim, 8 February 2018.
[186] Al-Werfalli Second Warrant of Arrest, *supra* note 170, at paras 21-23.
[187] Ibid, at paras 27-29.
[188] Ibid, at para.28.
[189] Libyan Express, 'Libya's Benghazi court removes arrest warrant of Al-Werfalli', 7 January 2019.
[190] Middle East Eye, 'Libya's Haftar promotes accused war criminal wanted by international court', 9 July 2019, (with link to the LNA's Official Facebook page with the announcement).

example, in a statement released on 16 April 2019 in relation to the escalation of violence in Tripoli, Fatou Bensouda urged all parties and armed groups to comply with international humanitarian law.[191] She reminded commanders that they could be held criminally responsible for crimes committed by their subordinates for failure to prevent or repress their commission. She added "I will not hesitate to expand my investigations and potential prosecutions…will full respect for the principle of complementarity". The statement appears to have the LNA particularly in mind. In stepping up the message, the Prosecutor has publicly stated that further warrants are being prepared.[192] The deterrent factor is tangible but unless and until the ICC publicly expands the investigation to Haftar and others from the LNA General Command, impunity at the highest level will continue to filter down to undermine local efforts towards deterring serious crimes.

2.3 Fact-Finding and Reconciliation Commission (FFRC)

Libya has also established a Fact-Finding and Reconciliation Commission ('FFRC). However, the extent that the FFRC envisaged by Law No. 17 of 2012 was to operate as a nationwide truth and reconciliation commission is contested.[193] The FFRC has a mandate for victims' reparations, though initially this was only envisioned for victims of the Gaddafi regime.[194] NTC Law No. 17 of 2012 gave the FFRC a mandate over incidents from 1969.[195] However, this was revised by GNC Law No.29 of 2013.[196] It is no longer limited to events from 1969 to 2011, but may consider all violations until

[191] Statement of ICC Prosecutor, Fatou Bensouda, in relation to the escalation of violence in and around Tripoli, Libya, 16 April 2019.
[192] 19th Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011), 5 May 2020, para.18.
[193] International Crisis Group, Middle East and North Africa Report No. 130, 'Divided We Stand: Libya's Enduring Conflicts', 14 September 2012, at p.32.
[194] Article 4, NTC Law No. 4 of 2011 Concerning National Reconciliation and Transitional Justice, supra note 59.
[195] Article 1, NTC Law No. 17 of 2012, *supra* note 60.
[196] Article 7, GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61.

"the end of the transitional period as of the election of the legislature based on the permanent constitution".[197] The FFRC was given a fixed-term mandate of four years with the possibility of a year's extension,[198] short in light of the scope. Indeed, its mandate would have ended by now, yet its work has barely commenced.

The FFRC will also investigate violations committed after the regime's fall, including by tasking "a specific bureau to fact-finding concerning the events that accompanied the 17 February Revolution".[199] The work is to be public, with the commission to "collect and publish the perspectives of the victims", facilitate an understanding of the root causes and issue a report that "shall be widely published in the media".[200] However, in the confinement of reference to publication in specific subparagraphs rather than an overarching provision, there is some doubt that the work of the bureau investigating the events that accompanied the 17 February Revolution or subsequent violations will be publicised. Article 8 paragraph (4) simply tasks this bureau "to record information in a manner that preserves the rights of all".

The FFRC is empowered to make binding decisions on compensation (to be distributed through a Victims' Compensation Fund), memorialisation, treatment, rehabilitation, or the provision of social services.[201] However, while victims of "grave and systematic human rights violations" are eligible for assistance;[202] this appears to

[197] Article 3, GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61.
[198] Article 9, GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61.
[199] Article 8 (4), GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61.
[200] Articles 7 and 8 (2), GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61.
[201] Article 7, GNC Law No. 29 of 2013 on Transitional Jusitce, *supra* note 61; and Articles 14 and 15, NTC Law No. 17 of 2012, *supra* note 60.
[202] Article 23, GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61. This is defined in Article 2 to include defined to include victims of "killing, abduction, physical torture, or the confiscation or destruction of funds, if committed as the result of an order issued by a person acting with a political motive, as well as breaches of fundamental rights that result in severe physical or moral repercussions".

be restricted to "violations…to which Libyans were subjected by the State apparatuses under the former regime".[203] There is thus a risk of creating two categories of victims – that of the former regime and that of the victor's.

To achieve its mandate, the FFRC is to communicate with civil society and co-operate with other organisations working on justice and reconciliation matters.[204] Further, it is to co-ordinate with local reconciliation committees and "wise individuals in the regions" in order to "restore the national fabric and to achieve the conditions for reconciliation between these regions".[205] Yet, there has been little to no co-ordination to date.

A budget was allocated to the FFRC for 2014.[206] Yet, the Transitional Justice Law was never fully implemented.[207] The LPA commits all parties to implementation.[208] Not everyone was content about this, with some considering it flawed and requiring revision to prevent impunity.[209] Nevertheless, the FFRC's establishment is without prejudice to prosecutions and victims' right to seek justice through the courts.[210] Indeed, it has the power to refer cases for criminal investigation.[211]

[203] Article 1, GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61.
[204] Article 7, GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61.
[205] Article 8 (6), GNC Law No. 29 of 2013 on Transitional Justice, *supra* note 61.
[206] GNC Law No. 14 of 2014 on adopting the State's General Budget of 2014
[207] Noted in Marwan Tashani, 'Transitional Justice Chaos in Libya: The Controversial Case of Saif al-Islam Gaddafi', Legal Agenda, 5 January 2017.
[208] Article 26 (5) of the LPA December 2015, *supra* note 7. Note one English translation of the LPA refers to this as Law No. 9 of 2013 on Transitional Justice, but the correct reference is to Law No. 29 of 2013 on Transitional Justice, *supra* note 61.
[209] Libya Women's Platform for Peace, 'The Political Accord through a Human Rights Lens', by Zahra Langhi, undated [appears to be 2016], at pp.5-6 and 12.
[210] Article 12, NTC Law No. 17 of 2012, *supra* note 60.
[211] Articles 3 (5), 4 (1) and (3)(d), NTC Law No. 17 of 2012, *supra* note 60.

Most people interviewed for this research were not aware that the FFRC has actually been established. Several interviewees believed that the truth-seeking mechanism was only discussed but never materialised.[212] However, a Commission was set-up and seven retired judges were appointed.[213] The appointments were made by the NTC in 2012. There is dissatisfaction about those selected as commissioners, with one interviewee noting that they are conservative and unaware of, or at least do not promote, human rights, especially as it concerns the rights of women and children.[214] Another noted "I don't think they understand the meaning of transitional justice" and observed that the FFRC does not appear to be doing anything.[215] In March 2013, UNDP reported that while the commissioners had been appointed, "[t]here has been little public discourse and consultation on the process, the FFRC has yet to be fully functional and has requested more assistance in the implementation of its mandate".[216] There has been little traction since.

2.4 Event specific investigation bodies

The GNC set-up a committee to investigate the Abu Salim massacre, establish the number of victims, verify their deaths and propose reparations.[217] The committee is judicial in nature, but is without prejudice to the power of an investigating judge or prosecutor to initiate criminal proceedings.[218] Indeed, criminal proceedings followed

[212] Interview record 32 – Libyan lawyer, 1 October 2018; Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[213] Interview record 33 – Libyan judge, 5 October 2018.
[214] Interview record 33 – Libyan judge, 5 October 2018.
[215] Interview record 34 – Libyan activist, 13 October 2018.
[216] UNDP Libya, 'From past to present: Transitional Justice in Libya and the way forward', in Newsletter dated March 2013, pp. 3-4.
[217] GNC Resolution No. 59 of 2013 on the Abu Salim prison massacre, issued 26 June 2013.
[218] Article 1, GNC Resolution No.59 of 2013, ibid; and Law No. 31 of 2013 on the Abu Salim Prison repealing and replacing GNC Decision No. 59 of 2013, issued 18 December 2013. Note an additional committee was created to address problems faced by dependants in obtaining death certificates and other unresolved issues: Minister of Justice Decision No. 69 of 2014 on establishing a committee and determining its functions, issued 16 January 2014.

but resulted in the acquittal of all defendants.[219] Another Fact-Finding Committee was set-up to investigate events in the Ghargour district of Tripoli on 15 November 2013.[220] A peaceful protest against the militias' conduct there was met with violence, allegedly by Misratan groups, with at least 43 people killed and 460 wounded.[221]

2.5 Other reparation efforts

Among the earliest steps, NTC Law No. 50 of 2012 provided for the compensation of former political prisoners on a monthly basis, addressing past regime abuses.[222] A monthly allowance and other benefits were also conferred on the families of martyrs from the Revolution.[223] However, it left the Ministry of Assistance to Families of Martyrs and Missing Persons to establish the rules and identify eligible beneficiaries.[224] The GNC provided similar support to those wounded supporting the Revolution and civilians injured in attacks by the former regime.[225] Further, a General Commission for the Search and Identification of Missing Persons was established to identify the missing, while a Central Committee for Tallying Beneficiaries is to ascertain the beneficiaries amongst the families of martyrs.[226] It only applies to those

[219] The trial concluded on 15 December 2019 in Tripoli. Abdullah Al-Senussi was among those tried and acquitted. See Report of the United Nations High Commissioner of Human Rights, 'Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya, A/HRC/43/75, supra note 108, at para.67.
[220] GNC Presidency Office Decree No. 19 of 2013 on forming a fact-finding committee and defining its functions, issued 31 December 2013. Note the English translation incorrectly cites 25 November as the date of the events but the original Arabic cites 15 November.
[221] Human Rights Watch, 'Libya: Militias Kill Unarmed Protestors – 43 Dead, Many Wounded, as Security Forces Stand By', 17 November 2013. Note subsequent reports put the death toll higher: Middle East Eye, ''A very big, long war': Tripoli residents brace themselves as Haftar approaches', 18 April 2019.
[222] NTC Law No. 50 of 2012 on the compensation of political prisoners, adopted 11 June 2012.
[223] Cabinet Decree No. 85 of 2012 on assisting and honouring the families of martyrs and missing persons, issued 3 March 2012.
[224] Article 3, Cabinet Decree No. 85 of 2012, *ibid*.
[225] Law No. 4 of 2013 on the issuance of provisions relating to War of Liberation victims with permanent disability, adopted 26 February 2013.
[226] Articles 4 and 5, GNA Law No. 1 of 2014 on Assistance to Families of February 17 Revolution Martyrs and Missing Persons, adopted 9 January 2014.

who fought on the side of the victors during the Revolution who died or went missing between 15 February 2011 and 23 October 2011.[227]

Reports indicate there may be thousands of victims of rape committed during 2011. Yet, due to social taboo, a legislative proposal to recognise their suffering could not be agreed in the General National Congress.[228] Nevertheless, the bill was adopted by the Council of Ministers as a ministerial decree, Decree No. 119 of 2014 on addressing the situation of victims of rape and other sexual violence.[229] Through this measure, victims of sexual violence may seek compensation in the form of a monthly grant and access to a range of services, including special grants for housing, education and health care. Further, Decree No. 904 of 2014 issued by then Minister of Justice Salah al-Marghani provides for a compensation fund for addressing sexual violence cases which began with an endowment by the Ministry of Justice.[230] This fund is administered by the Ministry of Social Affairs. However, while providing assistance to victims in pursuing the perpetrators of the harm caused to them and putting them on trial is referenced in Decree No. 119;[231] there is nothing specific to address legislative deficiencies that make it difficult for them to do so.[232] Further, in the absence of designated medical centres to provide assistance to the victims of sexual violence, the support intended is not being fully implemented.

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[227] Article 2, GNA Law No. 1 of 2014, ibid.
[228] Marwan Tashani, 'Laws on the Judiciary in the Aftermath of the Revolution', in Suleiman Ibrahim and Jan Michael Otto (Eds), Assessing Legislation for Libya's Reconstruction: Project Report, *supra* note 24, at p.27.
[229] Council of Ministers Decree No. 119 of 2014, adopted 19 February 2014, link to English translation available at: FIDH, 'Libya adopts an unprecedented decree protecting victim of sexual violence', 19 February 2014.
[230] Ministerial Decree No. 904 of 2014, adopted 11 June 2014. See FIDH, 'Libya: a new step towards reparation for victims of sexual violence', 11 June 2014.
[231] Article 3 (12), Decree No. 119 of 2014, *supra* note 229.
[232] Jazya Gebril, 'Victims of Sexual Violence in Libya: Assessing Protection Mechanisms', Legal Agenda, 9 March 2016.

Most of the efforts towards reparation appear to only provide redress to one side, fostering resentment by the victims of crimes committed by revolutionaries during the Revolution or militias post-October 2011. However, Decree No. 119 of 2014 addressing the situation of victims and rape and sexual violence is drafted in terms which mean it is possible to interpret eligibility to include victims of perpetrators from all sides in that it provides that "[t]he category of victims and rape within the scope…are those who suffered gross bodily assault or sexual attack, or suffered the attempt to do that, during the War of Liberation" as well as such victims of Mu'ammar al-Gaddafi and his sons during the regime.[233] The fund for the provision of reparations to victims of sexual violence is also accessible to victims regardless of the perpetrator's background. However, this does not appear to be widely understood, with the general perception being that it is solely intended to compensate rape victims of the Gaddafi regime.[234]

2.6 Traditional systems

Due to actual and perceived difficulties in accessing the courts, Libyans are making greater use of traditional systems. The tribal systems have been particularly used in Eastern Libya since 2014.[235] Similarly, citizens in Sabha have relied on local dispute resolution due to a lack of courts thousands of miles from Tripoli and Benghazi.[236] Tribal initiatives are also facilitating national reconciliation. Most notably, a dialogue committee on reconciliation between Tawerghans and Misratans resulted in an

[233] Article 1, Decree No. 119 of 2014, *supra* note 1927.
[234] Interview record 2 – Libyan law student, 23 October 2017.
[235]For example, a Libyan lawyer reported there are "*no police, just men in fatigues in the streets and people don't know if they are militia or with the Ministry of Defence or Interior or if they answer to a government, internationally recognised or at least with local buy-in. For example, a lot of them were with the Benghazi Shura Council […]. If the formal justice system won't work or would take 20 years, people think they are better off resorting to a justice system which at least functions. They speak to tribal elders and reach an agreement and receive some sort of reparation*". (Interview record 32 – Libyan lawyer, 5 October 2018).
[236] Interview record 56 – international expert, 2 November 2018.

agreement reached on 31 August 2016 for the return of the displaced and the reparation of those affected.[237] It provides that both sides shall work towards reconciliation and helps to end collective punishment by mandating the prosecution of individuals in fair trials and the release of those detained without legal basis. The model is now being followed in dialogue between the Mashashiya tribe and Zintan and may be extended to the dispute between the Tebu and Al-Zawiya tribes to tackle displacement in Kufra.

2.7 Conclusion

Given that no Libyans have been surrendered to the ICC, the Court's main function in Libya has been as a deterrent and to a lesser degree, a catalyst for domestic investigations. Some consider the ICC has had limited to no impact on preventing the violation of international humanitarian law and human rights,[238] the problem being the lack of enforcement of its arrest warrants.[239] Others disagree. For example, from quantitative research and empirical analysis examining 2011, including the event count for civilian casualties and news coverage, Hillebrecht concludes that the ICC had a statistically significant effect on the number of casualties and deterred government-sponsored civilian casualties during the conflict.[240] In turn, one interviewee considers that arrest warrants for some, along with "the threat of engagement for others has been significant, alongside asset freezes".[241] My analysis

[237] Minutes of Misrata-Tawergha Agreement on the Return of the Displaced and Compensation of those Affected 31 August 2016.
[238] Alison Pargeter, on record reply to author's question on the ICC's impact at Chatham House, 'Libya: Can the UN-led process succeed?' 24 January 2018.
[239] Interview record 58 – international consultant, 5 November 2018 ("*Werfalli has a warrant issued against him and he is free. Most people the ICC is looking to bring to justice have not been so the sense is that the ICC has a very limited ability to bring people to justice and has the ability to exacerbate tensions which may bring further destabilisation*").
[240] Courtney Hillebrecht, 'The Deterrent Effects of the International Criminal Court: Evidence from Libya', 42 (2) Journal of International Interactions 616-643 (2016), at p.632.
[241] Interview record 55 – international expert, 2 November 2018.

indicates that the ICC has had a limited deterrent and catalytic impact in Libya beyond 2011, in particular regarding the LNA's reaction to the arrest warrant for Al-Werfalli. Nevertheless, rather than the limited effect being attributed to the ICC in and of itself, the limited impact in this regard is due to the weak support by the international community of the ICC's efforts, with contradictory positions taken by States, especially those providing diplomatic and military support to Haftar.[242] As highlighted by one interviewee:

> "Nothing has been done by the Libyans and the international community's reaction has taken the wind out of the warrant. Initially Al-Werfalli defended himself and Haftar said he would take action and now he sees he doesn't have to – it shows the ICC is not effective".[243]

UN and EU sanctions concerning Libya include an arms embargo, a prohibition on illicit exports of oil and petroleum and asset freezes.[244] In turn, resolutions adopted by the UN Security Council have endorsed the GNA as the legitimate Government and resolved to use sanctions against those individuals and entities who threaten Libya's stability.[245] However, to date sanctions have only been put in place against individuals from the Gaddafi regime;[246] suspected terrorist and trafficking groups;[247] Ibrahim Jadran of the Petroleum Guard;[248] and Salah Badi, commander of the anti-GNA Al-Somood Front Fakr, Pride of Libya and Misratan Al Marsa Central Shield Brigade, who supported restoring the National Salvation Government of Khalifa

[242] Cairo Institute for Human Rights, 'Peace and Democratic Transition in Libya: A Dream Deferred or an Everlasting Nightmare?', June 2018, at p.14.
[243] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[244] UN Security Council Resolutions 1970 (2011); 1973 (2011), 2146 (2014), 2174 (2014), 2273 (2016), 2292 (2016), 2298 (2016), 2312 (2016), 2357 (2017), 2362 (2017) and 2441 (2018). At the EU level, restrictive measures were adopted to implement the UN resolutions without going further: European Council Decision 2011/137/CFSP of 28 February 2011, European Council Regulation No. 2014/2011 of 2 March 2011, European Council Decision 2015/1333 of 31 July 2015, and European Council Regulation No. 2016/44 of 18 January 2016.
[245] UN Security Council Resolutions 2174 (2014), 2213 (2015), 2259 (2015), 2298 (2016) and 2441 (2018).
[246] Pursuant to UN Security Council Resolution 1970 (2011), *supra* note 84.
[247] Suspected traffickers were added to the UN sanctions list on 7 June 2018.
[248] Ibrahim Jadran was added to the UN sanctions list on 11 September 2018, including an asset freeze and travel ban.

Ghwell.[249] No sanctions have been adopted by the UN, the EU or any States autonomously concerning the LNA, Khalifa Haftar or even Al-Werfalli, the subject of two ICC arrest warrants. This is despite the findings and recommendations of the Panel of Experts to the Libya Sanctions Committee.[250]

The majority of interviewees considered that the ICC has had no impact in terms of domestic access to justice for victims.[251] One interviewee even considered that the ICC's impact on this had been negative.[252] Many considered that the ICC could and should do more in terms of capacity-building, particularly training judges and prosecutors on international crimes, case strategy and trial management.[253] Moreover, greater engagement with Libyan civil society is essential.[254]

The impact has also been limited due to the OTP's low visibility in Libya, obviously due to concerns over the security of personnel and need to maintain confidentiality. For example, a Libyan law student stated: "the work of the ICC has not affected anything. They have issued warrants and created news to talk about" but that on the ground "it is as if there are no arrest warrants" and she was "not sure if the ICC investigators ever came to Libya".[255] Similarly, another added that while the first

[249] Salah Badi was added to the UN sanctions list on 16 November 2018, including an asset freeze and travel ban.
[250] See UN Security Council, Final Report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), S/2018/812, dated 5 September 2018, at paras. 19-61.
[251] Interview record 2 – Libyan law student, 23 October 2017; Interview record 3 – Tunisian researcher, 21 November 2017; Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018; Interview record 32 – Libyan lawyer, 5 October 2018; Interview record 55 – international expert, 2 November 2018.
[252] Interview record 34 – Libyan activist, 13 October 2018.
[253] Interview record 30 - interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018; Interview record 32 – Libyan lawyer, 5 October 2018; Interview record 33 – Libyan judge, 5 October 2018; Interview record 34 – Libyan activist, 13 October 2018; Interview record 55 – international expert, 2 November 2018; Interview record 56 – international expert, 2 November 2018.
[254] Interview record 34 – Libyan activist, 13 October 2018.
[255] Interview record 2 – Libyan law student, 23 October 2017.

arrest warrant created momentum in relation to the Gaddafi regime "nothing happened until last year, at least publicly, so on the ground people felt the ICC was not engaged at all. We work with the ICC and there are some great people working very hard…the problem is the lack of outreach. It is a one-way relationship".[256] Nevertheless, public release of the arrest warrant for Al-Werfalli facilitated human rights advocacy. Some considered "publication of the warrant gives weight to advocate with the UN that Haftar should not be part of the political process".[257] However, given divisions in the UN and EU, it does not appear to be making much difference.

The ICC's impact in Libya has also been adversely affected by its inability to formally engage in co-operation other through than the GNA and the Prosecutor-General. As such, opportunities to influence non-State armed groups operating disciplinary mechanisms are minimal. For policy reasons, the same applies to other international organisations meaning that wider capacity-building and efforts to engage with stakeholders are not filling the gap.

3. Catalysing Genuine Proceedings - Independence and Impartiality

3.1 Appointment, promotion, transfer or removal of judges and prosecutors

Post-2011 reforms are significant improvements from the Gaddafi-era, with judicial independence entrenched by the Constitutional Declaration[258] and reaffirmed in the

[256] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[257] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[258] Article 32, Constitutional Declaration of 2011, *supra* note 2.

Draft Constitution.[259] However, executive interference remains common. Further, the judiciary is still recovering from badly designed lustration policies which removed experienced judges and prosecutors when Libya needed them the most.

3.1.1 Regulatory framework

The same framework applies to the appointment, promotion, sanction and removal of judges and prosecutors. Prosecutors oversee investigations and prosecutions, directing the judicial police[260] and supervising the conditions of detention in facilities under the judicial police.[261] However, in serious felony cases, the case may be delegated to an investigative judge.[262] Today, the Prosecutor-General, like the President of the Supreme Court, remains in office upon the agreement of the House of Representatives and the State Council.[263] However, under the Draft Constitution, the Prosecutor-General will be appointed by Presidential decree for a fixed six year term upon nomination by the Higher Judicial Council (HJC) from among the judges of the Court of Cassation, the presidents of the Court of Appeals and public attorneys of the highest rank.[264] The HJC will replace today's Supreme Judicial Council (SJC). It will retain sole competence over the appointment, promotion, dismissal, transfer and discipline of members of the judiciary, including judges and prosecutors.[265]

[259] Article 118, Libyan Draft Constitution of 2017, *supra* note 35. However, it does not go far enough to shield the judiciary: Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[260] Article 41, Law No. 6 of 2006 on the judiciary, *supra* note 150, providing "Judicial police officers shall be subordinate to the Public Prosecution as relates to the duties of their functions".
[261] Articles 52 and 172, Libyan CPC, *supra* note 82.
[262] Article 51, Libyan CPC, *supra* note 82.
[263] Article 15, LPA 2015, *supra* note 7.
[264] Article 129, Libyan Draft Constitution of 2017, *supra* note 35.
[265] Articles 120 (titled 'Guarantees for Members of Judiciary') and 125 (titled 'Competences of the Council'), Libyan Draft Constitution of 2017, *supra* note 35.

Prosecutors are still perceived as part of the executive and not independent in practice.[266] Further, the Minister of Justice continues to retain powers which detrimentally affect prosecutors' operational independence. For example, the Minister may direct prosecutors in specific cases, controlling the right to initiate an investigation and authorise a prosecution.[267] Ministerial authorisation is required to lodge charges for acts prejudicing the 17 February Revolution.[268]

However, judicial appointments are today determined by the SJC rather than the Minister.[269] The SJC's structure and composition was also reformed so that the Minister of Justice no longer sits on the Council. Nevertheless, the SJC continues to include members of the Law Department, Public Defender Department and Department of State Litigation,[270] all operating under the direct hierarchy of the Ministry.[271] However, the SJC as a separate budget,[272] an improvement from its prior dependency on the Ministry.[273] In turn, promotion decisions are to be made based on seniority and competence.[274]

[266] Interview record 34- Libyan activist, 13 October 2018; Interview record 55 – international expert, 2 November 2018.
[267] Article 224, Libyan Penal Code, *supra* note 74. Namely, investigations into attacks on foreign Heads of State, other foreign representatives or against the flag of another State or international organisation can only be initiated with Ministerial approval: Articles 219-222, Libyan Penal Code.
[268] Articles 178 and 195, Libyan Penal Code, *supra* note 74.
[269] Article 3, Law No. 4 of 2011, amending Law No. 6 of 2006 on the judiciary, adopted 16 November 2011.
[270] Note Article 1, Law No. 4 of 2011, *ibid*, which defines a "judicial body" as including the Judicial Inspection Department, Courts, Public Prosecution, Lawsuit Authority, Law Department and Public Attorney Department.
[271] Further to GNC Law No. 14 of 2013 concerning SJC elections, it includes the Prosecutor General, Head of the Judicial Inspectorate, Counsellors from the Supreme Court and each Court of Appeal and a member on behalf of the Public State Litigation, Public Defender Department and Law Department: Article 1, GNC Law No. 14 of 2013 amending some provisions of the law on the judiciary, adopted 27 May 2013.
[272] Article 1, GNC Law No. 14 of 2013, ibid.
[273] See ICG, 'Trial by Error: Justice in Post-Qadhafi Libya', *supra* note 25, at p.16, fn. 63.
[274] Article 47, Law No. 6 of 2006 on the judiciary, supra note 150.

Judges and prosecutors may only be dismissed or removed from their position following a disciplinary trial.[275] The SJC has sole competence for adjudicating on challenges to final administrative decisions and disputes regarding judicial salaries, pensions and bonuses.[276] The SJC may impose disciplinary sanctions, including reprimand, withholding a bonus, denying promotion for 1-3 years, transfer or dismissal.[277] However, reports indicate that the separation of powers is not being respected in practice, with judges often criticised by the executive.[278]

Prosecutors may be transferred to other locations by decision of the SJC President on the Prosecutor General's proposal.[279] However, by exception, the Prosecutor General retains the power to transfer prosecutors to another district for up to three months, renewable.[280] Judges may also be delegated to work in a different court or judicial body for up to one year by decision of the SJC, on the proposal of the Head of the Judicial Inspection Department.[281] This authority has been misused on several occasions to transfer judges without their consent as a means of disciplining them.[282]

3.1.2 Impact of lustration

In the early days, a High Commission for the Application of Standards of Integrity and Patriotism was established to vet candidates for GNC leadership positions, public institutions and private companies.[283] This process isolated at least 160 people.[284]

[275] Article 82, Law No. 6 of 2006 on the judiciary, supra note 150.
[276] Article 6, Law No. 6 of 2006 on the judiciary, *supra* note 150.
[277] Article 94, Law No. 6 of 2006 on the judiciary, *supra* note 150.
[278] Interview record 3 – Tunisian researcher, 21 November 2017.
[279] Article 39 (1) and (2), Law No. 6 of 2006 on the judiciary, *supra* note 150.
[280] Article 39 (2), Law No. 6 of 2006 on the judiciary, *supra* note 150.
[281] Article 53, Law No. 6 of 2006 on the judiciary, *supra* note 150.
[282] International Commission of Jurists, 'Challenges for the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality', July 2016, at p.48.
[283] Interim NTC Law No. 177 of 2011 on forming the High Commission for the Application of Standards of Integrity and Patriotism, December 2011, as amended by: Interim NTC Resolution No.

Thereafter, the GNC decided to use lustration to reform and clean-up more broadly, through the removal and exclusion of persons exercising specified functions under Gaddafi.[285] In May 2013, the GNC adopted Law No. 13 of 2013 on Administrative and Political Isolation ("PIL") with disastrous effects.[286]

The law was extremely broad, expressly including "any member of the revolutionary…appellate courts or prosecutors", and "any person who committed or contributed in any way to the…imprisonment…of Libyan citizens for the service of the former regime" between 1 September 1969 and 23 October 2011.[287] Given the ordinary work of a police officer, prosecutor and judge during the regime, these terms effectively meant anyone practising one of these occupations - however briefly and regardless of the seriousness of a human rights breach or the length of imprisonment - could be covered. Indeed, analysis of the law shows the exclusionary impact was

192 of 2011 on determining and applying integrity and patriotism standards when assuming leadership positions, 16 December 2011; GNC Law No. 26 of 2012 on the High Commission for the Application of Standards of Integrity and Patriotism, 4 April 2012; GNC Law No. 39 of 2012 on the amendment of Law No. 26 of 2012 on the High Commission for the Application of Standards of Integrity and Patriotism, 2 May 2012; GNC Law No. 45 of 2012 amending Law No. 26 of 2012 on the High Commission for the Application of Standards of Integrity and Patriotism, 22 May 2012; and GNC Law No. 53 of 2012 on amending Law No. 26 of 2012 on the High Commission for the Application of Standards of Integrity and Patriotism, 14 June 2012.

[284] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.

[285] GNC Resolution No. 17 of 2012 on approving the principle of institutional reform and political and administrative isolation, adopted 25 December 2012. It appointed a committee of GNC members to prepare a draft law: GNC Resolution No. 2 of 2013 on forming a committee and determining its functions, adopted 7 January 2013.

[286] See e.g. Ibrahim Sharqieh, Brookings Doha Centre Analysis Paper No.9, 'Reconstructing Libya: Stability Through National Reconciliation', December 2013, at p.26.

[287] Articles 1 (1)(11), 1 (2)(1) and 1(2)(4), NTC Law No. 13 of 2013 on Administrative and Political Isolation, issued 8 May 2013.

greater than Iraq's de-Baathification process.[288] It immediately led to strikes by prosecutors, judges and other lawyers on judicial committees in protest.[289]

All interviewees expressed regret in relation to the PIL. One interviewee noted that the impact of lustration on law enforcement "was so bad we said they must be doing this on purpose to destroy Tripoli".[290] Another described it as "the worst decision in the whole history of Libya", relating that its unfairness was so acute given that Gaddafi was in power for 42 years and "people worked in the system so as not to starve".[291] At least 70% of judges in Libya were excluded, draining the system of qualified and experienced practitioners.[292] Even in cases where people were able to retain their jobs, it affected their career prospects. For example, police officers were refused promotions because they were trained during Gaddafi.[293]

A Commission for the Application of Public Office Criteria established by the SJC[294] examined a questionnaire all office holders or candidates were obliged to complete.[295] If they determined the PIL applied, they could be excluded from office, including "membership in any judicial body"; "leadership positions in security and military institutions"; or "head of department and above in authorities, institutions,

[288] Marieke Wierda and Mieczyslaw Boduszynski, 'Accounting for the Past or Avenging in the Present: Transitional Justice and Libya's Political Isolation Law', 15 (1) Georgetown Journal of International Affairs 112-120 (2014), at p. 117. See also Roman David and Houda Mzioudet, 'Personnel Change or Personal Change: Rethinking Libya's Political Isolation Law', Brookings Doha Center – Stanford University Project on Arab Transitions, Paper Series No. 4, March 2014.
[289] Ibrahim Sharqieh, 'Reconstructing Libya: Stability Through National Reconciliation', *supra* note 286, at p.13.
[290] Interview record 2 – Libyan law student, 23 October 2017.
[291] Interview record 34 – Libyan activist, 13 October 2018.
[292] Interview record 33 – Libyan judge, 5 October 2018.
[293] Interview record 34 – Libyan activist, 13 October 2018.
[294] Supreme Judicial Council Decision No. 57 of 2013 on applying the standards and conditions stipulated in Articles (1) and (5) of Law No. 13 of 2013 on Administrative and Political Isolation, issued 5 June 2013.
[295] Article 15, NTC Law No. 13 of 2013 on Administrative and Political Isolation, *supra* note 287.

services…wholly or partially-owned by the State of Libya or in any institution thereof…".[296] As such, the whole of the justice sector was affected.

Those affected only had ten days from a decision by the Commission to appeal to the administrative judiciary of their local Court of Appeal and if necessary, a further ten days to appeal to the Supreme Court from notification of the Court of Appeal's decision.[297] Many judges and prosecutors subject to exclusion decisions did successfully appeal through the courts, especially in Tripoli.[298] However, many members of the judiciary did not appeal because they considered the whole process disrespectful.[299] Moreover, the Constitutional Declaration was amended to provide that excluding citizens covered by the PIL from office would not violate the right to equality, preventing constitutional challenge for those unsuccessful on appeal.[300]

Today, the current status of the PIL is unclear and according to interviewees, may differ between East and West. According to some MPs and the spokesperson for the House of Representatives, representatives voted to repeal the law on 2 February 2015.[301] However, other reports indicate the vote was void as the new draft law amending it was not submitted through the Constitutional and Legislative Committee and an insufficient number of parliamentarians voted for the motion for it to go through in accordance with the Fifth Amendment to the Constitutional Declaration,

[296] Article 2, subparagraphs (2), (4), (5) and (6), NTC Law No. 13 of 2013 on Administrative and Political Isolation, *supra* note 287.
[297] Article 12, NTC Law No. 13 of 2013 on Administrative and Political Isolation, *supra* note 287.
[298] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[299] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[300] Constitutional Amendment No. 5 of 2013, amending Article 6 of the Constitutional Declaration of 2011.
[301] All Africa, 'Libya Repeals Political Isolation Law', by Nadia Radwan, 5 February 2015; and BBC News, 'Libya revokes bill which banned Gaddafi-era officials from office', 2 February 2015.

with only 62 members voting in favour rather than the required 101.[302] Nevertheless, almost all of the Libyan judges who were affected by the Political Isolation Law were able to resume their positions around the end of 2016 after an initiative by the SJC to bring them back into the system and/or they successfully appealed.[303]

Given the PIL's broad reach, the judicial system was drained of institutional knowledge and experience at a critical time. Even though it is no longer applied, the interruption of work and delays in appeals and reinstatement significantly hampered Libya's progress in tackling criminality arising from the Revolution and its aftermath.

3.2 Security situation

At the core of Libya's difficulties is a governance deficit, with multiple groups fighting to control national resources.[304] There have been problems in defining a national identity to unify diverse regions and tribal, ethnic and religious groups alongside delays in consolidating post-Revolution structures.[305] Discord even continues over who deserves the coveted status of "revolutionary" or "thuuwar", in terms of who participated in the rebellion against Gaddafi from the beginning in February 2011 and who defected later.[306] The security situation has escalated so much that in March 2018 it was described by the UN High Commissioner for Human

[302] Al Wasat, 'Political Isolation (vote) is void procedurally', 8 February 2015.
[303] Interview record 33 – Libyan judge, 5 October 2018.
[304] ICG, 'Holding Libya Together: Security Challenges after Qadhafi', *supra* note 66.
[305] ICG, "Libya: Getting Geneva Right", *supra* note 4.
[306] Ibrahim Sharqieh, 'Reconstructing Libya: Stability Through National Reconciliation', *supra* note 286, at p.1; and Libyan Women's Platform for Peace, 'Libya after Seven Years of Impasse: Prospects for the Transitional Period and the Roadmap', May 2018, at p.103, noting that more people identify with tribal, regional or ethnic units than a national identity.

Rights as one of "near complete lawlessness throughout the country, with almost total impunity for even the most serious crimes".[307]

The LNA in particular has been linked to gross violations of international humanitarian law yet the international community remains divided in its response. In a report by the Panel of Experts to the UN Libya Sanctions Committee in 2018, seven different militias under the LNA were named for sanctions violations and disregard for human rights and international humanitarian law.[308] While the LNA and its Operation Dignity coalition earned a reputation for combatting terrorism, alliances of convenience have been made. For example, Salafists have been integrated into the police in Eastern Libya.[309] While Haftar cited terrorism as a motive for attacking Derna in 2016 and Tripoli in 2019, some of those under fire helped drive out ISIS.[310]

The urgent need for security sector reform is a major obstacle to establishing the rule of law, especially the failure of efforts to disarm and demobilise militia fighters.[311]

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[307] UN Human Rights Council, 37th Session, Statement of the UN High Commissioner for Human Rights, High Commissioner's Global Update of Human Rights Concerns, 7 March 2018.

[308] UN Security Council, Final Report of the Panel of Experts on Libya established pursuant to resolution 1973 (2011), supra note 250, at paras. 19-61. This includes the Fathi Arhaim Brigade, which undermined the National Oil Corporation by blockading the Sirte basin; LNA Brigade 106 which attacked the Benghazi branch of the Central Bank of Libya in 2017 and reportedly shared the funds among the LNA top commanders and also sieged Derna, indiscriminately shelling residential districts and conducting summary executions; the Awliya' Al-damm Abu Hudaymah group, whose commanders have close links to Mahmud Al-Werfalli and operate an illegal detention centre in Benghazi where suspects are subject to arbitrary arrest, enforced disappearance, torture and summary execution; LNA Brigade 152 also allegedly engaged in torture and killings in illegal detention centres; the LNA Aim Mara Martyr Brigade, engaged in forced displacement from Derna; the Subul Al-Salam Brigade, involved in the smuggling of migrants along the Chad and Sudan route into Europe; and LNA Brigade 432, which operates a migrant camp at al-Qarryat in Kufrah linked to human rights abuses.

[309] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.

[310] Digital Journal, 'Op Ed: Haftar attacks Libyan Islamists who cleared ISIS from Derna', by Ken Hanly, 11 May 2016.

[311] See Ibrahim Sharqieh, 'Reconstructing Libya: Stability Through National Reconciliation', *supra* note 286, at p.16 (noting: "*Visiting Tripoli it is immediately apparent that Libya is governed by two states operating in parallel: the official state, represented by the elected GNC and Cabinet; and the revolutionary state, which holds the real military power. In these circumstances, a reconciliation process is a non-starter").*

Accounts of arbitrary arrest and enforced disappearances are widespread.[312] To date, the main approach taken to handling the proliferation of armed groups has been to integrate them into official structures. Some say they could not see any other way and the problem was the failure to create a common culture and norms to replace militia affiliations.[313] Regardless, the level of civilian control over these groups remains weak and according them official status has undermined efforts to establish the rule of law.

For example, in 2012, the NTC created the Libya Shield Force as a temporary reserve force of revolutionaries and army reservists.[314] Similarly, the GNC resolved to enrol militia members into the official security forces and/or authorised them to operate as they were if they were "directly affiliated with the Libyan Army or the police, or work for any of their lawful components".[315] Further, the GNA created a Special Deterrent Force (also known as the "Radaa Forces"), under the authority of the MoI. The Radaa Forces were allied to the Presidency Council yet became synonymous with human rights abuses in Tripoli, including arbitrary arrest and detention.[316] Interviewees noted that the Radaa were very conservative so people were more reluctant to engage with them than the regular police.[317]

[312] See Amnesty International, 'Detention Abuses Staining the New Libya', 2011; Amnesty International, 'Militias Threaten Hopes for New Libya', 2012; and Amnesty International, 'Vanished Off the Face of the Earth: Abducted Civilians in Libya', August 2015.
[313] Interview record 56 – international expert, 2 November 2018.
[314] NTC Resolution No. 47 of 2012 on Establishing a Military Force, issued 19 June 2012. The LSF reported to the Army Chief of General Staff.
[315] Articles 1 and 2, GNC Resolution No. 127 of 2013 dissolving armed units and adopting certain provisions thereon, 30 December 2013.
[316] See OHCHR and UNSMIL, 'Abuse Behind Bars: Arbitrary and Unlawful Detention in Libya', supra note 107, at pp.18, 20-21 and 36.
[317] Interview record 56 – international expert, 2 November 2018.

In 2018, the Presidency Council dissolved the Radaa Forces, integrating its members into a new Deterrence Apparatus for Combatting Organised Crime and Terrorism (DACOT).[318] The decree gives the DACOT authority to use police powers, including the interception of telecommunications, search and arrest. Amnesty International immediately called for the decree to be withdrawn, questioning the approach of "blindly integrating militia members into institutionalised security forces without ensuring accountability for past abuses".[319]

The strength of the armed groups operating policing functions is such that those in the formal chain of command have difficulty keeping them in check. Formal police structures are regularly attacked, as illustrated by the abduction of the Head of the Police Criminal Investigation Unit in Benghazi in January 2013.[320] This followed the murder of the brother-in-law of a police officer in December 2012 after the officer spoke out against the rule of the militias in Benghazi.[321] As one interviewee explained, "in theory there are Libyan Police but in practice they have no power as militias are running the country and sometimes they are considered police, they are militias but recognised by the Ministry of Interior as policemen. From outside they are still militias, controlled by one government or another".[322]

Armed groups were also embodied with State authority to manage prisons and other detention centres they were de facto operating, bringing them nominally under the authority of the MoJ or MoI. For example, the NTC created the Zintan Reform and

[318] Decree No. 555 of 7 May 2018.
[319] Amnesty International, Public Statement, 'Libya: Decree integrating Radaa Forces into the new security apparatus overlooks need for accountability', MDE 19/8629/2018, 21 June 2018.
[320] International Crisis Group, 'Trial by Error: Justice in Post-Qadhafi Libya', *supra* note 25, at p.28.
[321] Ibid, p.28.
[322] Interview record 3 – Tunisian researcher, 21 November 2017.

Rehabilitation Institution where Saif Gaddafi was detained, delegating authority to the Zintan Brigade to manage it.[323] Saif continued to be held in preventative detention by order of the public prosecutor.[324] However, requests to the Zintan Brigade to bring Gaddafi to Tripoli for trial went unexecuted. In December 2014, the Libyan Attorney-General's Office requested the Chief of the Judicial Police in Zintan to take all necessary measures to transfer Saif to Tripoli for trial and enable a decision to be rendered in his case.[325] He responded four months later to the effect that it was impossible as "since July 2014, the prisons located in the town of Zintan are no longer under the Government's authority or legitimacy".[326]

In other instances, those officially delegated authority for managing a detention centre objected to the provisional release of suspects and delayed implementing prosecution orders or ignored them.[327] Nevertheless, in some instances the State was able to gain control. For example, twenty prosecutors were transferred to Misrata to screen detainees at three detention centres to assess whether there were grounds for detention, including sufficient evidence to prosecute, or to order their release and oversee enforcement.[328]

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[323] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi*, OTP, Public Redacted Version of 'Prosecution response to 'Admissibility Challenge by Dr Saif al-Islam Gadafi pursuant to Articles 17 (1)(c), 19 and 20 (3) of the Rome Statute' filed on 28 September 2018, (ICC-01/11-01/11-653-Conf)', ICC-01/11/-01/11-653-Red, 11 October 2018, para.27 ('OTP's Response to Gaddafi Admissibility Challenge 2018').

[324] Order of 21 November 2011 issued by the Deputy Prosecutor in the Office of the Prosecutor-General in Tripoli, extended multiple times.

[325] Attorney General's Office to Chief of the Judicial Police, Ref. No. 470/S, dated 15/12/2014, LBY-OTP-0065-0438, p.0087, Annex 8.1 to OTP's Response to Gaddafi Admissibility Challenge 2018, *supra* note 323.

[326] Chief of the Judicial Police to the Attorney-General, Ref. No. 8.9.1648, dated 14/4/2015, LBY-OTP-0440, Annex 8.2 to OTP's Response to Gaddafi Admissibility Challenge 2018, supra note 323, p. 0088.

[327] ICG, 'Trial by Error: Justice in Post-Qadhafi Libya', supra note 25, at pp.31-33.

[328] ICG, 'Trial by Error: Justice in Post-Qadhafi Libya', supra note 25, at p.33, fn.145.

As the majority of those integrated into official structures in such a way lack knowledge and training on criminal procedure and human rights standards, it is unsurprising violations occur.[329] As they come under the official umbrella this has further tarnished the public's confidence in the justice system.[330] One interviewee noted that many signed-up to receive a salary but there was no real vetting, that the militias were able to influence appointments to leadership positions and the MoI and MoJ did not have effective control of their behaviour.[331] Nevertheless, others indicated that the judicial police and MoJ have done a better job than the MoI and demonstrable improvements have been seen in terms of establishing control.[332]

As the public associates militias with the police, victims and witnesses are more reluctant to report crimes or continue participating in related criminal proceedings. It is difficult for anyone from the East to even travel, in light of a resolution issued by the House of Representatives requiring those travelling from Eastern Libya to obtain a permit from the security services, effectively, the LNA in Benghazi.[333] This necessitates attending an intrusive vetting interview.[334] Civil society organisations are also not able to work freely, with one activist arrested twice since the 2011 Revolution, on each occasion by a different militia.[335] He also recalled being arrested during the Gaddafi era. In each instance, he was only released after well-connected

[329] Amnesty International, 'Libya: Rule of the Gun – Abductions, Torture and Other Militia Abuses in Western Libya', 2014; HRW, 'The Endless Wait: Long-Term Arbitrary Detentions and Torture in Western Libya', 2015.
[330] See USIP, 'Perceptions of Security in Libya', Peaceworks report, PW108, by Naji Abou-Khalil and Laurence Hargreaves, April 2015.
[331] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[332] Interview record 56 – international expert, 2 November 2018.
[333] DAAM Center, 'Constitution and Human Rights in Countries of the Arab Revolution – Tunisia, Egypt and Libya', by Ahmad Fawzi, Salem Ghalib, Sameh Samir, Ragab Saad, Sabri Hassan and Mohammed Omran, October 2017, copy with author, at pp.97-117 (in Arabic). Initially fatwas issued between 2013 and 2015 restricted women's ability to travel without being accompanied by a male guardian while a decree adopted by the House of Representatives on 16 February 2017 prevented women from travelling abroad alone.
[334] Interview record 32 – Libyan lawyer, 5 October 2018.
[335] Interview record 34 – Libyan activist, 13 October 2018.

contacts vouched for him. Often civilians are arrested for the simple reason that they originate from one city or another, which is taken as an indication of their affiliation.

Moreover, the judicial authorities lack the means to protect victims and witnesses in the current security conditions even if they were willing to come forward. As one interviewee put it succinctly, victims cannot be expected to come forward "when the militias are strong enough to kidnap the Prime Minister and negotiate his release".[336] A Libyan judge agreed "most victims are terrified, especially when the suspect is from an armed group, so many don't even proceed to or bring a complaint and there is no follow-up".[337] Victims and witnesses are scared of coming forward whether it concerns local or ICC investigations; the security problem affects both levels.[338]

The sense of impunity for the militias, especially those considered 'thuuwar' regardless of crimes they may have committed during or after the Revolution, has further fuelled the deteriorating security situation.[339] As noted by the ICG, "the State's unwillingness or inability to look into the unlawful killing of prisoners of war throughout 2012 has contributed to the fighters' feeling of operating above the law…[and] inevitably carries the risks of entrenching lawlessness and becoming a trigger of violence".[340]

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[336] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[337] Interview record 33 – Libyan judge, 5 October 2018.
[338] As a Libyan lawyer explained, "*they don't want the publicity of going to the ICC either. If you are living in Libya and trying to access international mechanisms, militias are going to threaten you. Victims and witnesses are worried about confidentiality*". (Interview record 32 – Libyan lawyer, 5 October 2018).
[339] ICG, 'Holding Libya Together: Security Challenges after Qadhafi', *supra* note 66, at p.26 ("*…power remained with the thuuwar to the detriment of the NTC, the cabinet, ministries and often, due process*"). See also Report of the International Commission of Inquiry on Libya, Report A/HRC/19/68 of 8 March 2012, at p.20, para.112.
[340] ICG, 'Trial by Error: Justice in Post-Qadhafi Libya', supra note 25, at p.28.

In turn, armed groups operate disciplinary procedures in parallel to the official civil and military justice systems.[341] For example, a Misratan group arrested Tawerghans in 2011 and sought to try them in their own war crimes unit.[342] In the early days post-Revolution in some municipalities, "local councils attached legally qualified prosecutors to brigades in order to oversee their activities, but this was largely discretionary and some councils chose instead to rely on individuals trained in internal security as opposed to legal matters".[343] Similarly, the LNA has its own investigation procedures, though tied to the military justice system.

The militias also affect the legislative process. For example, militias in Tripoli blocked the MoJ for two weeks to put pressure on the parliament to adopt the Political Isolation Law.[344] The militia also pressured parliamentarians by putting 200 coffins outside the parliament as a threat if they did not vote yes.[345] The impact of this cannot be underestimated, with Sharqieh arguing the Law "shatters the country's social cohesion, wipes out the State's institutional memory and increases the odds that domestic instability will spill into neighbouring countries".[346] As discussed above, it also had a significant impact on the judiciary. In turn, there are divergent views on the decision by the Libyan Supreme Court in 2014 on the unconstitutionality of the elections to the HoR, which opened the door to increasing

[341] ICG, 'Libya: Getting Geneva Right', supra note 4, at p.11; ICG, 'Trial by Error: Justice in Post-Qadhafi Libya', *supra* note 25, at p.18.
[342] ICG, 'Holding Libya Together: Security Challenges after Qadhafi', *supra* note 66, at p.28.
[343] ICG, 'Divided We Stand: Libya's Enduring Conflicts', *supra* note 193, at p.32.
[344] International Centre for Counter-Terrorism, Research Paper, 'Dignity and Dawn: Libya's Escalating Civil War', by Daveed Eartenstein and Nathaniel Barr, February 2015, at p.4.
[345] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[346] Sharqieh, 'Reconstructing Libya: Stability Through National Reconciliation', *supra* note 286, p.1.

destabilisation. Some attribute the decision to the influence of the militias who disputed valid elections because they lost.[347]

The prevailing security situation is such that most interviewees considered it nearly impossible for the justice system to operate effectively, yet the problem is circular. As expressed by a participant in a perception survey by the Libyan Women's Platform for Peace, the first step towards reconciliation is "establishing security, activating judicial institutions, the strong and legal prosecution and punishment of criminals and of anyone who infringed on public and private freedoms. After that, reconciliation…can be discussed".[348] Yet, the judicial system and security institutions in Libya are presently "frail and dysfunctional, rendering their ability to implement democratic processes much more fantastical than feasible".[349] The only thing possible in the current security climate is to document the abuses and prepare cases to be dealt with by the courts once Libya is more stable.[350]

3.3 Independence and impartiality of the police, judges and prosecutors

In general terms, prosecutors and judges and others engaged in investigations are protected by the Libyan Penal Code. For example, it criminalises insulting judges and influencing the course of a case, including the judge, prosecutor or investigators.[351] This covers threats or efforts to intimidate. The Libyan authorities have also taken practical steps to prevent corruption and the influence of judges and prosecutors

[347] Interview record 2 – Libyan law student, 23 October 2017.
[348] Quoted in Libyan Women's Platform for Peace, 'Libya After Seven Years of Impasse: Prospects for the Transitional Period and the Roadmap', *supra* note 306, at p.59.
[349] Cairo Institute for Human Rights Studies, "Peace and Democratic Transition in Libya: A Dream Deferred or an Everlasting Nightmare?", *supra* note 242, at p.8.
[350] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[351] Articles 273 and 274 Libyan Penal Code, *supra* note 74.

through financial pressure by raising their salaries.[352] However, public perception of the ability of those in the justice system to operate independently and impartially is low.[353] The judiciary has also found it difficult to shake off perceptions of a lack of independence based on experiences during the Gaddafi era where "people had no expectation the judge would treat their case in any way other than the authorities wished".[354] Despite the issues, some still see the judicial police as "relatively independent" though the incorporation of more officers from the militias has affected this.[355] Indeed, from the victims' perspective, many are "terrified of the police" as "the odds are that the person they would be reporting to is with the same militia or knows the perpetrators".[356] Personal security is also a significant concern for members of the judicial police, who come under threat in particular when trying to provide court security and transporting prisoners from the prisons to the courts.[357]

Even if in practice judges and prosecutors maintain professional independence, there is a perception that they are affiliated. Previously, this would be pro-Gaddafi or pro-Revolution but in the current political division, it is also a case of pro-Haftar or the Islamists. Contradictory decisions have been made by different judges, for example, on the legitimacy of the parliament, which are interpreted as indicating a leaning to one side or the other.[358] One interviewee suggested the establishment of a committee within the Prosecutor-General's Office "to monitor what is going on, to look to the

[352] Cabinet Decree No. 521 of 2013 on raising salaries for staff in judicial bodies, adopted 8 September 2013.
[353] In the words of a Libyan law student: "*There are many good lawyers and judges and other professionals in the judicial sector. However, there is a lot of bribery and nepotism. It is possible to avoid trial if you know someone from or you are in an armed group.*" (Interview record 2 – Libyan law student, 23 October 2017).
[354] Interview record 55 – international expert, 2 November 2018.
[355] Interview 56 – international expert.
[356] Interview 11 – Libyan lawyer, NGO Lawyers for Justice in Libya (LFJL).
[357] Interview 56 – international expert.
[358] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.

files and for things to be in place unaffected by politics" as well as greater transparency to improve public confidence as to the independence and impartiality of investigations.[359]

Libyan prosecutors generally have the will to investigate and prosecute all suspects regardless of political affiliation but in the current security climate, they are unable to investigate those linked to the militias due to a lack of personal security. They are under constant threat, with no close protection. The former Prosecutor General Abd al-Aziz al-Hasadi was assassinated in February 2014.[360] In October 2019, a judge's home in Benghazi was raided by an armed group seeking the release of an associate from detention.[361] As one interviewee emphasised "if you don't provide security to a judge, don't expect him to be fully functional. They are vulnerable. Also for prosecutors and [private] lawyers. Everyone in the judicial system".[362]

The security situation and its effect on the judiciary changed over time, with four periods clearly discernible: February 2011 – April 2011, April 2011 to February 2012, February 2012 to July 2014 and July 2014 to present. While the conflict in 2011 initially saw the judicial system collapse, prosecutors and courts regained functionality in Benghazi to the East in April 2011 and gradually resumed operations in Tripoli and the West from February 2012.[363] It is considered that from 2012 until

[359] Interview record 34 – Libyan activist, 13 October 2018.
[360] Human Rights Council, Report of the United Nations High Commissioner for Human Rights, on the situation of human rights in Libya and on related technical support and capacity-building needs, A/HRC/28/51, 12 January 2015, at para.48.
[361] Report of the United Nations High Commissioner of Human Rights, 'Situation of human rights in Libya, and the effectiveness of technical assistance and capacity-building measures received by the Government of Libya, A/HRC/43/75, supra note 108, at para.55.
[362] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[363] Euro-Mediterranean Human Rights Network, The Reform of Judiciaries in the Wake of the Arab Spring, Chapter 6 on Libya, by Marwan Tashani (Judge, Benghazi), Abdul Fattah Milad Ibrahim

July 2014, the Libyan judiciary had both the ability and willingness to handle investigations and prosecutions, including crimes committed during the Revolution by either side. Whether they were given sufficient support and resources by the legislature and executive to do so independently and impartially is another matter. From July 2014, the security situation has deteriorated to the extent that the justice system has substantially collapsed in several areas.

The Prosecutor General's Office and central courts in Tripoli have been shelled on several occasions since 2014 but they continue to operate.[364] However, where police stations and courthouses do continue to function, the capacity of the police and security services to assert authority varies subject to political allegiances and dynamic conditions on the ground concerning disputes between armed groups.[365] Some consider the justice system in Libya to effectively be "suspended" so far as criminal matters are concerned as to their knowledge the system is only functioning in low-level civil and family matters and even property matters are not being dealt with as they are regarded as too contentious.[366] Those on the ground say the courts are still functioning in some form in most municipalities and judges and prosecutors are working but only on cases without any political dimension.[367]

At present, given the militias' strength, judges and prosecutors are reluctant to go anywhere near a case concerning individuals affiliated to an armed group. Those

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(Prosecutor, Tripoli) and Tareq Al-Hadi Al-Wesh (Prosecutor, Misurata), 11-12 February 21, Rabat, at p.81.

[364] E.g. Human Rights Council, Report of the United Nations High Commissioner for Human Rights, on the situation of human rights in Libya and on related technical support and capacity-building needs, A/HRC/28/51, 12 January 2015, at para.48, reporting shells hitting in August 2014.

[365] Interview record 58 – international consultant, 5 November 2018.

[366] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.

[367] Interview record 34 – Libyan activist, 13 October 2018.

interviewed shared credible reports that prosecutors and investigative judges who opened such cases have received death threats to themselves or members of their family or significant intimidation to close the file. Some prosecutors were prevented from opening the casefiles in the first place, being threatened by militias while trying to lodge complaints at the courthouse. In some cases, the militias even confiscated the papers from the prosecutors. In another instance, a prosecutor who summoned a militia member for an interview was threatened by others, resulting in no interview taking place. In other instances, a judge would issue an order but after being threatened decide not to continue the case.[368]

Many prosecutors and judges who did not give in to these threats and continued to work independently and impartially were forced to request a transfer to a different prosecution office or court, for example, moving from Benghazi to Tripoli. This followed attacks on police stations and the bombing of the Benghazi courthouse in 2012, an act of retaliation for attempts to prosecute revolutionaries.[369] Some judges and prosecutors were abducted and killed.[370] Others have been forced to leave Libya entirely until the security situation improves. They retain their functions and are prepared to return when the situation stabilises.

Those prosecutors and judges who continue to work in Libya today are still assigned cases considered sensitive due to the political or military affiliation of the suspects but take no active investigative steps, with the file effectively gathering dust. As one judge explained, "the presence of militias has affected the possibility of giving orders

[368] Interview record 3 – Tunisian researcher, 21 November 2017.
[369] ICG, 'Trial by Error: Justice in Post-Qadhafi Libya', supra note 25, at p.30.
[370] See HRW, 'Libya's Justice Pandemonium', by Hanan Salah, 14 April 2014 (noting seven judges and prosecutors had been assassinated as of April 2014).

and proceeding to final judgments and executing them on the ground. As for the system of punishment and recalling people who were responsible for crimes – war lords – there is no system".[371] Judges and prosecutors who remain "do what they can do, they are able but you can't ask them to investigate militia members…the security system needs to return first".[372]

While many interviewees spoke in high regard for the Prosecutor-General, most doubted his authority to administer justice throughout the national territory.[373] Others noted that the Prosecutor-General in Tripoli had shown courage in "going after terrorists from Sirte" and that the process seemed to be transparent but thought it was only possible as it concerns foreign fighters with "no inside backing" and prosecutors are not free to investigate those who have inserted themselves into politics.[374] Likewise, another interviewee commented "the General Prosecutor would have to be a very brave man to take action against Al-Werfalli – he cannot until security is set up and it is safe to do that".[375]

Reports also indicate increasing political interference with prosecution offices. For example, an interviewee asserted that in 2018 the Prosecutor General issued an arrest warrant for the CEO of a Telecoms company from Misrata, upon the request of one of the militias in Tripoli and the CEO fled Libya as a result and is unable to return.[376] He noted that the current security situation means that even the Prosecutor General

[371] Interview record 33 – Libyan judge, 5 October 2018.
[372] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[373] As a Libyan lawyer opined: "*I think he is trying to implement reforms. He says he has authority throughout the country but from what I can tell there is little connection between East and West, even though this supposedly doesn't affect the judiciary*". (Interview record 32 – Libyan lawyer, 5 October 2018).
[374] Interview record 2 – Libyan law student, 23 October 2017.
[375] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[376] Interview record 34 – Libyan activist, 13 October 2018.

cannot be fully independent of the executive because "he would be kidnapped" by the militia if he went against their known wishes.[377] He recalled that the Head of the Legislative Court was kidnapped for issuing a decision against a member of the militia in Tripoli. It was considered that "even if they wanted to be independent, they don't believe they can be".[378]

3.4 Political will

3.4.1 Amnesties

The Liberation Declaration issued in Benghazi on 23 October 2011 refers to establishing "a state of law" and upholding the "values of justice".[379] Yet, there were early indications that the justice envisaged might not include holding those from the victor's side accountable for crimes committed during the fight to escape Gaddafi's regime.[380]

In due course, the NTC pronounced Law No. 35 of 2012 on the Amnesty of Particular Crimes, pardoning crimes committed before 2 May 2012 on certain conditions.[381] Crimes committed by the Gaddafi family and their close associates were expressly excluded.[382] Persons accused of kidnapping, torture and rape; or the importation and

[377] Interview record 34 – Libyan activist, 13 October 2018.
[378] Interview record 34 – Libyan activist, 13 October 2018.
[379] Liberation Declaration, National Transitional Council, Benghazi, Libya, 23 October 2011.
[380] The Liberation Declaration emphasised that:
"through the sacrifice of the pure, guiltless blood of martyrs, the great Libyan people managed to break their shackles, seize their freedom and dispel the darkness of the hateful dictatorship. Today they declare that the dictator is dead and his hated despotic regime has fallen, never to return. The page has been turned on tyranny and a new historical phase has made it possible for this nation of fighters to rebuild the State and society in a free and modern way, which was made pure by the souls of the martyrs, the blood of brave fighters and the struggle and suffering of noble men."
[381] Article 3, Interim NTC, Law No. 35 of 2012 on the Amnesty of Particular Crimes, adopted 2 May 2012.
[382] Article 1(1), Interim NTC Law No. 35 of 2012, *ibid*.

trafficking of illegal narcotics were also excluded.[383] Moreover, the law only provided for a conditional amnesty or pardon, with a perpetrator required to repent their crimes before the competent criminal division; return objects used in the commission of the crime, including any weapons; return funds in the case of embezzlement; and mandated "reconciliation with the victim or the guardian thereof or the avenger of blood".[384] It is also conditional on not committing a further offence with intent within five years in which case any criminal proceedings which had been dropped shall resume or in the case of convicted persons, the sentence shall be executed.[385] A "competent judicial body" was entrusted with the power to interpret the amnesty law and determine disputes concerning the applicable beneficiaries.[386]

In turn, Law No. 37 of 2012 criminalised as glorification of the tyrant "whosoever expresses anything considered as prejudicial to the 17 February Revolution".[387] Article 4 of Law No. 38 of 2012 on Some Procedures Concerning the Transitional Phase further clarified that "[t]here is no penalty for necessities of the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to save or protect the revolution".[388] As stated by Libyan judge Marwan Tashani, this effectively "opens the floodgates to impunity and gives legal cover for a specific category of society, allowing them to commit violations without accountability".[389] A Libyan activist concurs, convinced that "the law wiped away crimes" and that the

[383] Article 1, Interim NTC Law No. 35 of 2012, ibid.
[384] Article 2, Interim NTC Law No. 35 of 2012, ibid.
[385] Article 3, Interim NTC Law No. 35 of 2012, ibid.
[386] Article 4, Interim NTC Law No. 35 of 2012, ibid; as amended by NTC Law No. 51 of 2012 dated 11 June 2012.
[387] Article 2, Interim NTC Law No. 37 of 2012 on Criminalisation of the Glorification of the Tyrant, adopted 2 May 2012.
[388] Article 4 of Interim NTC Law No. 38 of 2012 on Some Procedures Concerning the Transitional Phase, adopted 2 May 2012.
[389] Tashani, 'Transitional Justice Chaos in Libya: The Controversial Case of Saif al-Islam Gaddafi', supra note 207.

effect of impunity encourages them to commit further crimes.[390] At the time Law No. 38 of 2012 was adopted, the Libyan Ministry of Justice stated that it was not intended as a wholescale amnesty for any crimes committed which relate to the Revolution but the reality is that it has been interpreted as such, with prosecutors and judges applying it as a reason for not prosecuting revolutionaries.[391]

By Decision No. 109 of 2013 of the Minister of Justice on agreement with the Public Prosecutor and Minister of Interior, a committee was formed to implement the amnesty, determine the beneficiaries under Law No. 35 of 2012 and submit recommendations to the Minister of Justice.[392] The committee included the Deputy Minister of Justice for Judicial Police Affairs, the Deputy Minister of Interior for Security Affairs, a representative of the prosecution nominated by the Public Prosecutor and a representative of the High Security Committee nominated by the Minister of Interior.[393] However, there is no information about who, if anyone, was deemed eligible for amnesty. Given its scope, any beneficiaries would largely, if not exclusively, come from one side - those who supported the Revolution.

However, further amnesty measures followed which limit the accountability of both sides, with Law No. 6 of 2015 regarding the General Amnesty, issued by the House of Representatives in the East on 7 September 2015.[394] It was passed a month after Saif Gaddafi's conviction by the Tripoli Court of Assize.[395] However, Law No. 6 was

[390] Interview record 34 – Libyan activist, 13 October 2018.
[391] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[392] Article 2, NTC Minister of Justice Decision No. 109 of 2013 on the Establishment of a Committee for Setting the Rules and Mechanisms for the Implementation of Law No. 35 of 2012 on General Amnesty, issued 28 January 2013.
[393] Article 1, NTC Minister of Justice Decision No. 109 of 2013, ibid.
[394] Article 11, HoR Law No. 6 of 2015, supra note 55.
[395] Judgment of the Tripoli Court of Assize, Case No. 630/2012, 28 July 2015, English translation attached as Annex B to ICC, Situation in Libya, *The Prosecutor v Saif Al-Islam Gaddafi*, Defence,

considered null and void by the Libyan General Prosecutor's Office since it was promulgated in an irregular procedure by the HoR.[396]

Law No. 6 purports to cancel the execution of Law No. 35 of 2012[397] and provides for a general amnesty for all Libyans who perpetrated crimes from 15 February 2011 to 7 September 2015, subject to conditions.[398] These include written repentance and a commitment not to reoffend; compensating victims of financial crime; reconciliation with the victim/s; disarming and handing-in weapons; and property restitution.[399] Further, terrorism, drug trafficking, sexual assault, murder, kidnapping, forced disappearance and torture, cross-border offences and corruption are expressly excluded.[400] Moreover, commission of a felony within five years will render any amnesty null and void.[401] Criminal proceedings in progress before a competent judicial authority may be halted by executive decision, undermining judicial independence.[402] The amnesty also applies to those convicted of the crime where the sentence has been executed.[403] In such cases, the amnesty provides that the conviction will be expunged from the record.[404] This means the beneficiary would not be prevented from exercising certain professions or political office by reason of a

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Admissibility Challenge by Dr Saif al-Islam Gadafi pursuant to Articles 17 (1)(c), 19 and 20 (3) of the Rome Statute, ICC-01/11-01/11-640, 5 June 2018, ref. LBY-OTP-0062-0280, ('Libyan Judgment Case No. 630/2012, 28 July 2015'). Annex A (Arabic original) is ICC-01/11-01/11-640-AnxA.

[396] Annex 8, ICC-01/11/-01/11-653-Anx8-Red, Response of the Libyan Attorney General's Office to the Prosecutor's Request for Assistance, ref. S544 dated 18 September 2018, annexed to OTP's Response to Gaddafi Admissibility Challenge 2018, supra note 323, at pp. LBY-OTP-0065-0080 to LBY-OTP-0082, on the irregularity of Law No. 6 of 2015. This reflects the position of the Government of Libya, the GNA, as reflected in the OTP's Response to Gaddafi's Admissibility Challenge, at para.146.

[397] Article 11, HoR Law No. 6 of 2015, *supra* note 55.

[398] Article 1, HoR Law No. 6 of 2015, *supra* note 55.

[399] Article 2, HoR Law No. 6 of 2015, *supra* note 55.

[400] Article 3, HoR Law No. 6 of 2015, *supra* note 55.

[401] Article 7, HoR Law No. 6 of 2015, *supra* note 55.

[402] Article 6, HoR Law No. 6 of 2015, *supra* note 55.

[403] Article 4, HoR Law No. 6 of 2015, *supra* note 55.

[404] Articles 1 and 4, HoR Law No. 6 of 2015, *supra* note 55.

criminal conviction. Reports suggest that Saif Gaddafi intends to run as a candidate in Libya's next Presidential elections, originally scheduled for 2018.[405]

All prosecutors are required to apply the General Amnesty in accordance with further instructions to be issued by the Prosecutor General, while disputes are to be determined by the competent court.[406] However, the amnesty is without prejudice to victims' right to restitution and compensation.[407] The HoR declared that the amnesty was for political prisoners, motivated by the need to unify Libyans.[408] Yet, as highlighted by Marwan Tashani, it was passed "at a time of political division and military conflict, when the entire transitional justice bill should have been redrafted and reactivated rather than issuing a highly controversial amnesty law".[409]

Public statements indicating Gaddafi had been released appeared from 8 July 2016.[410] A subsequent statement by the Abu-Bakr Al-Siddiq Brigade stated that he was released on 10 June 2017.[411] Yet, according to a submission filed by the Gaddafi's counsel before the ICC, he had already been released earlier, on or around 12 April 2016, which coincides with a letter purportedly issued by the outgoing Minister of Justice on 10 April 2016.[412] Counsel for Gaddafi argued that he fell within the scope of Law No. 6, as apparently confirmed by a statement from Colonel al-Atiri,

[405] The Duran, 'Saif al-Islam Gaddafi to run for President of Libya in 2018: A family spokesman has broken the news on Egyptian television', 17 December 2017.
[406] Articles 8 and 9, HoR Law No. 6 of 2015, *supra* note 55.
[407] Article 10, HoR Law No. 6 of 2015, *supra* note 55.
[408] Statement of Aquila Saleh, House of Representatives, reported by A News, 'After 5 year halt, Libyan House of Representative(sic) held its first meeting', 15 April 2019.
[409] Tashani, 'Transitional Justice Chaos in Libya: The Controversial Case of Saif al-Islam Gaddafi', *supra* note 207.
[410] Interview of Colonel Al-Atiri on France 24, 'Exclusive: Prison leader of Saif-al Islam Gaddafi confirms his release', 8 July 2016, LBY-OTP-0065-0109, Annex 19 to OTP's Response to Gaddafi Admissibility Challenge 2018, *supra* note 323.
[411] Statement of the Abu-Bakr al-Siddiq Battalion, The Guard Company, 10 June 2017, LBY-OTP-0064-0980, Annex 13 to OTP's Response to Gaddafi Admissibility Challenge 2018, *supra* note 323. See also France 24 "Gaddafi's Son Saif 'released by Libyan militia'", 11 June 2017.
[412] Gaddafi Admissibility Challenge 2018, supra note 55, at para.26.

Commander of the Abu-Bakr Al-Siddiq Brigade in Zintan concerning his release.[413] A letter requesting Saif's release was issued by the outgoing Minister of Justice of the Government in Al-Bayda, Mr Omrane, to the Zintan Prosecutor's Office dated 10 April 2016, with a copy sent to Colonel Al-Atiri. This shows a shocking level of interference with the judiciary and runs contrary to the separation of powers in Libya's Constitutional Declaration.

Nevertheless, the attempt to interfere was withstood by the Zintan Public Prosecutor on 17 April 2016, not least because the proceedings in Tripoli were under the jurisdiction of the Prosecutor-General's Office.[414] Even aside from its disputed validity, the Prosecutor General confirmed that the amnesty does not apply to Saif as his case does not meet its terms.[415] The Presidency Council has also asserted that he cannot benefit from the General Amnesty.[416] Despite the Zintan Prosecutor's reply, a further letter was then apparently issued by Mr Omrane to Colonel Al-Atiri directing Saif's release, in total disregard for the justice system. However, the authenticity of this letter has been widely disputed. Some believed that the amnesty of Law No. 6 had only been conferred on Gaddafi.[417] However, reports indicate that other former Gaddafi regime officials have also benefitted from the amnesty. Notably, on 12 June 2017, it was reported that the Tripoli Revolutionaries' Brigade led by Haitham

[413] Gaddafi Admissibility Challenge 2018, supra note 55, Annex C, not yet publicly available.
[414] Letter from the Zintan Public Prosecutor's Office to the Minister of Justice in the Al-Bayda Transitional Government dated 17 May 2016, LBY-OTP-0064-0983, Annex 11 to OTP's Response to Gaddafi Admissibility Challenge 2018, *supra* note 323, not yet publicly available.
[415] OTP's Response to Gaddafi Admissibility Challenge 2018, *supra* note 323, para.8, with Annexes 3, 4, 5, 6, and 8 containing responses from the Libyan authorities. Note in particular Annex 8, ICC-01/11/-01/11-653-Anx8-Red, Response of the Libyan Attorney General's Office to the Prosecutor's Request for Assistance, *supra* note 396, at p. LBY-OTP-0065-0077.
[416] Libya Herald, 'Presidency Council Says Charges Too Serious for Saif to be Pardoned', 10 July 2016.
[417] ICC, Situation in Libya, *The Prosecutor v Saif Al-Islam Gaddafi*, Amicus Curiae, Observations by Lawyers for Justice in Libya and the Redress Trust pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/11-01/11-654, 28 September 2018, at paras. 16 and 44.

Tajouri had released 30 former regime officials from detention based on the amnesty issued by the House of Representatives.[418] This included two army brigadiers and three colonels.

Some consider that the Gaddafi trial was a farce from the start all to provide an appearance of due process because the militias still cared about international perception, even if the undertaking was not genuine: "the trial of Saif Gaddafi was a paper trial by the General Prosecutor's Office as the militias were holding him – it was a charade made to look like a real process and then when the militias released him, they rushed through an amnesty law".[419]

3.4.2 ICC's impact on political will

Kersten argues that the ICC's intervention in Libya consolidated "widespread perceptions of the conflict as a one-sided revolution between 'good' opposition forces and an 'evil' regime that needed to be removed by force".[420] This dynamic may indeed have initially taken shape with the public investigation against only one side of the conflict culminating in the arrest warrants against Mu'ammar Gaddafi, Saif Gaddafi, Al-Senussi and Al-Tuhamy. The one-sided nature of the enquiry created the strong perception of victor's justice and did not provide any real incentive to the new Libyan authorities to investigate crimes that may have been committed by opposition forces during the Revolution or its aftermath. However, this dynamic partly changed with the unsealing of the Al-Werfalli arrest warrant.

[418] Libya Investment, 'Tajouri releases Qaddafi people imprisoned for six years', 12 June 2017.
[419] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[420] Ibid, p.124.

Nevertheless, many interviewees expressed scepticism about the investigation of Al-Werfalli by the Military Prosecutor in Benghazi, considering the LNA lacks the will to see him genuinely investigated and prosecuted. As one interviewee noted, "it won't be a fair trial because he is part of Haftar's army and he will be prosecuted under Haftar's law".[421] Others concurred, considering his trial by the Military Tribunal would not be impartial or in line with international standards.[422] Yet, interviewees also questioned the ICC's impartiality based on the absence of arrest warrants for commanders higher up the chain, notably Khalifa Haftar.[423] An international expert agreed the ICC should be looking at Haftar, though considered it ran the risk of completely derailing the prospect of a political compromise.[424]

Further, while many support the ICC's focus on Al-Werfalli, others in the East contest it as a demonstration of selective justice. As one interviewee noted, the LNA "has got them out of complete hell. The minority support what he did, murdering people he said were ISIS. The majority are disgusted by what he did but also believe senior officials in Western Libya should also have been indicted. Even-handed justice."[425]

Another interviewee was also upset that the ICC has chosen to focus exclusively on officials of the LNA, saying "there are other criminals in the West" and that nothing had been achieved in the West in the last three years whereas "at least in the East they

[421] Interview record 33 – Libyan judge, 5 October 2018.
[422] Interview record 32 – Libyan lawyer, 5 October 2018.
[423] As one Libyan lawyer stated: "*We are satisfied with the arrest warrant of Al-Werfalli […]. My question is why the ICC is not going after Haftar and using Article 28. It is a cop out – is the state willing and able or not?*" (Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[424] Interview record 55 – international expert, 2 November 2018.
[425] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.

managed to get the airport working and allowed for the seaport to start working again".[426] She also raised the prospect of sequencing, arguing that while those involved in summary executions should be prosecuted, that the ICC should wait until Libya is stable and not intervene "while there is a war on terrorism ongoing as it undermines efforts to make people safe", noting that before the LNA enforced order in Benghazi there were "constant assassinations, cities being taken over, decapitations and heads found in garbage bins".[427] In regard to the ICC's case selection, she also considered that "crimes since 2011 are much worse in number and type than crimes that were committed during the Revolution".[428] A Libyan activist similarly opined that "it was right to issue the warrant but there should be a hundred warrants before him".[429] The perception of partiality in the selection and prioritisation of cases by the ICC has limited its impact on the domestic system where real incentives are needed to build the political will for equal accountability.

3.5 Conclusion

Libya's initiation of discussions with the ICC Prosecutor - which led to the ICC expanding its investigation into crimes committed by the militias[430] - is a positive indication of political will to prevent impunity, moving beyond a narrow focus on historic abuses. The risk that the recognised government seeks to use the ICC as a

[426] Interview record 2 – Libyan law student, 23 October 2017.
[427] Interview record 2 – Libyan law student, 23 October 2017.
[428] Interview record 2 – Libyan law student, 23 October 2017.
[429] Interview record 34 – Libyan activist, 13 October 2018.
[430] In July 2014, the former Minister of Justice, Salah Margani, reportedly sought the OTP's assistance in pursuing those responsible for current abuses by the militias: Libya Herald, 'Libya looks to the International Criminal Court to prosecute militias', by Moutaz Ali, 19 July 2014. See also HRW, 'Letter to the ICC Prosecutor Regarding Accountability for Serious Crimes in Libya', 11 November 2014.

tool to exert pressure on opponents is discernible.[431] However, this does not mean there is an unwillingness to secure justice for the victims of rebel crimes. Moreover, it could evidence a belief in the ICC's ability to have an impact as a deterrent, preventing the commission of further crimes. However, discussions are different to a positive referral and no Article 12 (3) declaration was filed.[432] Though the ICC already had jurisdiction, this circumstance may evidence a will to prevent impunity but reserve Libya's position to prosecute domestically when conditions on the ground allow.

Several interviewees predicted Libya will challenge the admissibility of the Al Werfalli case in due course. While some were sceptical about whether it has the ability and willingness, interviewees noted "Libya wants to prove it is able to handle cases internally".[433] Others commented on the general preference by Libyans to have the national justice system prosecute as soon as it is able due to significant mistrust of international organisations.[434] It is considered that those efforts made in Libya to secure acountability were catalysed by bottom-up civil society engagement and mobilisation rather than the ICC's intervention. The key issue now for Libya's peaceful transition is the need for equal justice. Crimes committed by the opposition during the revolution must not be overlooked by Libya or the ICC. A civil society interviewee agreed: "Both sides should be investigated. There should be

[431] Mark Kersten, 'Justice in Conflict: The Effects of the International Criminal Court's Inventions on Ending Wars and Building Peace', Oxford Scholarship Online, 2016, Chapter 6, 'Peace, Justice and the ICC's Intervention in Libya', at pp.157-158.
[432] The Libyan National Transitional Council issued a letter relating its commitment to co-operate with the ICC following the Security Council Resolution but asserting that the Libya has primary jurisdiction over Saif Gaddafi and that Libya was willing and able to try him: Situation in Libya, Prosecutor v Saif Al-Islam Gaddafi, ICC-01/11-01/11-34-Anx, Letter from Mustafa Abdel Jalil, Chairman of the NTC to the ICC dated 23 November 2011, annexed to Decision to Add Document to Case Record (ICC-01/11-01/11-29-Conf-Exp, 7 December 2011.
[433] Interview record 2 – Libyan law student, 23 October 2017.
[434] Interview record 3 – Tunisian researcher, 21 November 2017.

accountability from the moment of the Revolution. There are more than 12,000 dead from the Revolution".[435]

To some extent, the ICC's limited impact in Libya on access to justice domestically in this regard is also due to external factors. Most significantly, there is a lack of consistency between what Libya hears from different States and international organisations, undermining both the ICC's engagement and domestic rule of law efforts. For example, interviewees raised concerns that UNSMIL appear to be moving towards accepting amnesty, which could entail "reconciliation without real accountability…and now some are saying only some will be held accountable. They want to let some fighters off accountability. You will smell this. This would mean impunity. The UN should fight, not reinforce it".[436]

Locally, some consider that as the public image of the revolutionaries is so different today, the amnesty is no longer supported and would not have been adopted if it were proposed now. For example, one interviewee noted that in 2011 they were highly regarded but today the title of thuuwar has been "usurped" by those who have since taken up arms.[437] Despite this, an international expert considered a general amnesty to be a genuine option to address the issues Libya faces but that it "cannot be seen as a self-interested act" so would have to apply to other groups and not just revolutionaries.[438] In this regard, an international consultant stated that conferring Gaddafi amnesty "probably reflects the prevailing political and ethical culture in

[435] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[436] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[437] Interview record 55 – international expert, 2 November 2018.
[438] Interview record 56 – international expert, 2 November 2018.

Libya".[439] However, almost all Libyans interviewed were wholeheartedly against amnesty, regardless of who it is accorded to. At most, a Libyan activist stated that an amnesty could be justified in some instances but with a proper assessment and strict conditions and no beneficiaries should be able to hold political office.[440]

4. Due Process – Impact on Defence Rights

This section analyses the domestic processes concerning Saif Gaddafi and Abdullah Al-Senussi, considering what they show in terms of Libya's capacity and willingness to conduct genuine proceedings and the ICC's impact on defence rights.

4.1 Proceedings against Gaddafi and Al-Senussi

The Gaddafi, Al-Senussi and 36 other regime officials were charged and sent before the Accusation Chamber in September 2013.[441] Three hearings occurred in Saif's absence, concluding on 24 October 2013.[442] The trial commenced 24 March 2014.

Amendments to the Libyan CPC[443] enabled Saif to participate in four trial sessions by video link from Zintan.[444] However, he was only assisted by defence counsel in one of these sessions after the appointment of a member of the Libyan Public Attorney's

[439] Interview record 58 – international consultant, 5 November 2018.
[440] Interview record 34 – Libyan activist, 13 October 2018.
[441] UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, p.18. Two related cases were later attached to the main case, 630/2012 for trial before the Court of Assize. The prosecution of one accused, Nuri al-Hadi al-Taher al-Jatlawi, former Director of the General Administration, Central Patrols, was also suspended by the prosecution due to his mental health.
[442] UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, p. 18.
[443] GNC Law No. 7 of 2014 amending the Libyan Criminal Procedure Code, supra note 117.
[444] Specifically, on 27 April 2014, 11 May 2014, 25 May 2014 and 22 June 2014: Libyan Judgment Case No. 630/2012, 28 July 2015, supra note 395, LBY-OTP-0051-0296, LBY-OTP-0051-0298, LBY-OTP-0051-0299 and LBY-OTP-0051-0300.

Department to represent him.[445] Thereafter, the video link failed following damage to the transmitter stations.[446] Nevertheless, the trial continued with Saif represented in his absence by his appointed counsel in seven sessions.[447] He was absent and unrepresented for eight sessions.[448] After the Zintan Brigade still refused to transfer him to Tripoli, the Court of Assize deemed Saif a fugitive and continued in his absence, though his appointed counsel still attended.[449] Saif was subsequently convicted in absentia on 28 July 2015 and sentenced to death by firing squad.[450]

However, eight co-accused who also initially participated by video-link for security reasons - from the Al-Jawiya Reform and Rehabilitation Institution in Misrata - were considered to have been tried in person.[451] Al-Senussi was also convicted and sentenced to death. All but four other defendants were convicted.[452] Seven others were also given a death sentence,[453] eight were sentenced to life imprisonment, while

[445] Abd al-Salam al-Hashani, who first represented him in the session of 22 June 2014.
[446] Libyan Judgment Case No. 630/2012, 28 July 2015, supra note 395, p. 0302.
[447] Libyan Judgment Case No. 630/2012, 28 July 2015, supra note 395, pp.0316, 0309, 0312, 0323, 0334 and 0353. 14 December 2014, 11 January 2015, 25 January 2015, 8 March 2015, 12 April 2015, 3 May 2015 and 20 May 2015.
[448] Libyan Judgment Case No. 630/2012, 28 July 2015, supra note 395, pp. 0302, 0303-0306, 0306-0309, 0319-0321 and 0331-0334. 2 October 2014, 2 November 2014, 28 November 2014, 8 February 2015 30 March 2015, 13 April 2015, 20 April 2015 and 20 May 2015
[449] Libyan Judgment Case No. 630/2012, 28 July 2015, *supra* note 395, p.75.
[450] Libyan Judgment Case No. 630/2012, 28 July 2015, *supra* note 395, LBY-OTP-0051-0281 and LBY-OTP-0051-0631.
[451] E Dr Mark S Ellis, International Bar Association, 'Trial of the Libyan Regime: An investigation into international fair trial standards', November 2015, at pp.28-29.
[452] The following were acquitted: (1) Amer Ali Madi al-Abani, Colonel, Operations Division, Military Intelligence; (2) Abdul Ati Ibrahim al-Obeidi, Secretary-General of the People's Committee for External Relations and International Co-operation; (3) Ali al-Maqtuf al-Zawi, Chief of Staff of the Head of External Security; and (4) Muhammad Khalifa Muhammad al-Wa'er, Head of Technical Operations Department, External Intelligence: UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, pp.57-60.
[453] Those sentenced to death are: (1) Saif al-Islam Gaddafi; (2) Abdullah al-Senussi; (3) Al-Baghdadi al-Mahmudi, Secretary of the General People's Committee; (4) Mansur Daw, Commander of the Popular Guard; (5) Abu Zeid Dorda, Head of External Security; (6) Milad Daman, Head of Internal Security in Tripoli; (7) Omran Muhammad al-Ferjani, Commander, Coastal Guard and Ports' Security; (8) Awaydat Ghandur al-Nubi Abu Sufa, Director of Administrative and Financial Affairs, Liaison Office, Revolutionary Committees; and (9) Mondher Mukhtar al-Ghneyni, Clerk, General People's Committee for Security.

the remainder were sentenced to shorter terms and fines.[454] This shows an effort to weigh individual responsibility.

Where a trial takes place in absentia, the verdict is automatically annulled and the case reheard in the accused's presence once he makes himself available or is arrested.[455] An accused may appeal a final verdict rendered by courts of the last degree to the Court of Cassation.[456] In felony cases, the Court of Assize is the court of last degree.[457] However, a verdict in absentia is not final until the penalty expires,[458] and where the penalty is death, it is not extinguished by the lapse of time. Where the trial was in presentia and the accused is sentenced to death, the case is automatically referred to the Court of Cassation.[459] In a new admissibility challenge, Saif's ICC counsel argued he should be considered as tried in his presence, with the verdict therefore final, as the sessions which took place in his own absence and that of his counsel only directly concerned his co-accused and/or were not important.[460] The ICC disagreed, relying on the findings of the Libyan court.[461]

The trial was generally acceptable in that it cannot be said that any due process violations were "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice" – sham proceedings - under the

[454] UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, pp.57-60.
[455] Article 358 Libyan CPC, *supra* note 82.
[456] Articles 381and 384 Libyan CPC, *supra* note 82.
[457] Article 376 Libyan CPC, *supra* note 82.
[458] Article 357 Libyan CPC, *supra* note 82.
[459] Article 385bis Libyan CPC, supra note 82.
[460] Gaddafi Admissibility Challenge 2018, supra note 55, para.41 (arguing "substantive issues were not discussed" in the missed sessions).
[461] PTCI Decision on Admissibility of Gaddafi Case 5 April 2019, *supra* note 1879; and Appeals Chamber Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17 (1)(c), 19 and 30 (3) of the Rome Statute" of 5 April 2019, 9 March 2020.

high threshold required to render the same case admissible before the ICC on the ground of unwillingness under Article 17 (2)(c) of the Rome Statute.[462] UNSMIL consider the trial breached Libyan law and international fair trial standards.[463] Ellis also concludes that "on balance, shortcomings in the proceedings and the volatile security situation have severely compromised the fairness of the trial".[464] However, on further analysing the due process issues raised, it is considered that the high threshold has not been met so as to now render the Al-Senussi case admissible based on a substantial change of circumstances. Gaddafi's case continues to be admissible, but for reasons unconnected to due process; namely, his unavailability to the recognised authorities and the purported amnesty which led to his release.

First, issues arose during the investigation which also affected the fairness of the trial. Principally, the accused were initially interviewed by the militias that arrested and detained them before their interrogation by the prosecutor.[465] These interviews took place without lawyers present to safeguard their interests.[466] Al-Senussi, Al-Baghdadi al-Mahmudi, Abu Zeid Dorda and al-Maruk Muhammad al-Mabruk also claimed they were subject to torture or other cruel and inhuman treatment and made statements during interview based on coercion.[467] While the Court did not find this made out, one interviewee following the trial considered that as the definition of torture in

[462] Noting Appeals Judgement on Admissibility of the Al-Senussi Case, supra note 77, at para.230. Indeed, this was argued by Gaddafi's Defence in an admissibility challenge lodged under Articles 17(1)(c), 19 and 20 (3) of the Rome Statute: Gaddafi Admissibility Challenge 2018, *supra* note 55, at paras.91-101. Pre-Trial Chamber I, by majority, rejected the admissibility challenge. Admissibility was upheld by the Appeals Chamber.
[463] UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, p.22.
[464] Ellis, 'Trial of the Libyan Regime: An investigation into international fair trial standards', supra note 451, at p.55.
[465] UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, at pp.2 and 27-28.
[466] Ibid, at p.37.
[467] Ibid, at p.29.

Libyan legislation is inadequate, it was not possible for observers to be confident that testimony was not still given under duress.[468]

It is however unclear whether any such statements were used as part of the evidence against them. Notably, the Prosecutor-General's Office asserted that only interviews conducted or authorised by the Prosecutor were held, were conducted at the public prosecution office, and only these minutes formed part of the casefile.[469] It also challenged claims of detention irregularities, as all were held pursuant to prosecution orders in facilities run by groups officially authorised by the MoJ.[470] Moreover, Ellis found allegations of torture and mistreatment were not corroborated, though he noted that the conditions in detention could be improved.[471]

Further, Al-Senussi's lack of legal representation during the investigation stage was already considered by the Appeals Chamber and was held not to be so fundamental as to render Libya unwilling to genuinely investigate or prosecute him.[472] As such, the same would apply by analogy to his co-accused Muhammad Ahmad al-Sharif and Abdul Hamid Ammar Awhida.[473] In the event, all accused were represented by counsel at trial and given the freedom to choose their own lawyer. The Court

[468] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[469] UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, at p.28; and Letter from the Libyan Attorney General's Office to ICC Chief Prosecutor Fatou Bensouda dated 13 July 2017 responding to the UNSMIL report on the trial, ICC-01/11-01/11-653-Anx16- Red, Annex 16 to the OTP Response to the Gaddafi Admissibility Challenge 2018, *supra* note 323, dated 11/10/2018, LBY-OTP-0064-0941 to LBY-OTP-0064-0964, at LBY-OTP-0064-0948.
[470] Letter from the Libyan Attorney General's Office to ICC Chief Prosecutor Fatou Bensouda dated 13 July 2017 responding to the UNSMIL report on the trial, ICC-01/11-01/11-653-Anx16- Red, Annex 16 to the OTP Response to the Gaddafi Admissibility Challenge 2018, *supra* note 323, LBY-OTP-0064-0941 to LBY-OTP-0064-0964, at LBY-OTP-0064-0947 to LBY-OTP-0064-0950.
[471] Ellis, 'Trial of the Libyan Regime: An investigation into international fair trial standards', *supra* note 451, at pp.49-50.
[472] Appeals Judgment on Admissibility of the Al-Senussi case, *supra* note 77, at para.191.
[473] Their trial accused asserted that as they were interviewed by the prosecutor during the investigation without legal representation it invalidated the investigation but this argument was dismissed by the Court of Assize: UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, at p.37.

appointed public defenders to represent any accused unable to find or to afford a private lawyer.[474] Indeed, Ellis found the Court to be proactive in ensuring they had counsel as soon as possible.[475] When any counsel failed to appear without notification of their absence or a reasonable excuse, the Court fined them fifty Libyan dollars.[476] Further, defence counsel were active in Court and challenged the prosecution when necessary, safeguarding the accused's right to an effective defence.[477] While the security conditions were extremely challenging and indications that counsel may have faced threats and intimidation are credible, this situation is common to conflict or post-conflict environments especially with politically sensitive matters and could not be attributed to a particular deficiency in the Libyan system.[478]

Some following the trial have raised concerns about the clarity of the charges since the accused were charged together for a multitude of offences and the basis alleged for their individual responsibility was not sufficiently clear.[479] However, reports indicate that the judges took time to clarify the charges against each accused during the first sessions. While counsel experienced an initial delay in the disclosure of evidence by the prosecution, the judges took ongoing steps to ensure they were given access to the documentation, initially ordering inspection, then electronic copies on a CD and eventually, that the defence counsel experiencing problems with the CDs could make photocopies of the documents sought.[480]

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[474] Ellis, 'Trial of the Libyan Regime: An investigation into international fair trial standards', *supra* note 451, at p.33.
[475] Ibid, at p.34.
[476] Ibid, at p.30.
[477] Ibid, at p.37.
[478] Ibid, at pp.24 and 37.
[479] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[480] UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, at pp. 34 and 41; Ellis, 'Trial of the Libyan Regime: An investigation into international fair trial standards', supra note 451, at pp. 37, 40-41.

Further, UNSMIL observers criticised the Court for limiting the number of defence witnesses that were allowed to testify and the time permitted for them to do so, affecting the equality of arms.[481] However, Ellis considered that there was "no indication that the Judges treated the prosecution and the defence differently".[482] Indeed, the security situation affected both prosecution and defence witnesses, meaning that none of the 238 witnesses from whom the prosecution obtained testimony during the investigation attended Court.[483]

Defence witnesses were particularly reluctant to attend given that the trial was held in the Al-Hadba compound controlled by an armed group which fought against the Gaddafi regime, securing the premises for the MoJ.[484] Nevertheless, the Court appears to have been mindful of the difficulties for all witnesses, adjourning hearings and taking "a liberal approach in admitting written affidavits and witness statements in lieu of live testimony" for both defence and prosecution witnesses.[485] Further, the ability to examine witnesses by video link facilitated matters significantly. The accused's limited ability to cross-examine witnesses undoubtedly affected the fairness of the trial process. However, it should be borne in mind that the Libyan system is predominantly based on a written procedure rather than the adversarial proceedings familiar to common law systems. Further, the measures adopted by the judges went some way to mitigate the impact of the situation on procedural fairness.

[481] Ibid, at pp.44-45.
[482] Ellis, 'Trial of the Libyan Regime: An investigation into international fair trial standards', *supra* note 451, at p.43.
[483] UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, at pp. 18 and 43.
[484] Ibid, at pp.21-22.
[485] Ibid, at p.42.

While Ellis was unable to draw a conclusion in relation to some matters without knowing the reasons for the Court's decision when reporting in November 2015; the written verdict is now publicly available and provides the grounds for the judgment, including the imposition of the death penalty.[486] This goes towards mitigating the impact of issues concerning publicity, given the difficulty for the public to attend the proceedings and technological problems with the live transmission on television.[487]

Aside from the ICC, multiple regional and international bodies have requested or ordered the suspension of the death sentences against Gaddafi, Al-Senussi and seven others subject to life sentences given due process concerns.[488] Libya has confirmed that none of the death sentences have been executed. Gaddafi has the right to a re-trial. All other accused had the right to appeal the judgment to the Supreme Court sitting as a Court of Cassation. The appeal is pending.

In May 2013, Fatou Bensouda highlighted that trying Gaddafi and Al-Senussi could be a "Nuremberg moment" and "seal the primacy of the rule of law, due process and human rights for future generations".[489] The impact of the national trial at this point in time is limited. However, this is largely due to external factors beyond the judicial system, primarily, the deteriorating security situation and lack of a political settlement which has led to those opposed to Tripoli turning to Saif as a potential way out of the

[486] Libyan Judgment Case No. 630/2012 dated 28 July 2015, *supra* note 395.
[487] Noting Ellis, 'Trial of the Libyan Regime: An investigation into international fair trial standards', *supra* note 451, at pp.18-19.
[488] African Court of Human and Peoples' Rights, order dated 10 August 2015 to preserve the life of Saif al-Islam and a fair trial, App No. 002/2013; African Commission on Human and Peoples' Rights, Request dated 17 November 2015 requesting suspension of the death sentences, ACHRP/PROVM/LBY/581/15/1868/2015, Com No. 581/2015; United Nations Working Group on Arbitrary Detention, Complaint of 27/01/2016, Opinion No. 4 of 2016 dated 19 April 2016, cited in UNSMIL, Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012), *supra* note 129, pp.52-53.
[489] UNifeed, UN Security Council, 22nd meeting, 8 May 2013, Briefing from Fatou Bensouda, Prosecutor of the International Criminal Court.

chaos. Nevertheless, it still represents a giant leap forward for Libya in demonstrating the potential for even the most-sensitive prosecutions to be handled nationally.

However, aside from the non-finality of the judgment against Saif Gaddafi, the purported conferral of amnesty post-conviction though Law No. 6 is an indicator of unwillingness. Yet, as it was not conferred by the recognised State authorities this cannot be conclusively determined. There has been no decision by the Libyan Supreme Court, the competent judicial authority for terminating his case.[490] Moreover, Saif would be excluded from benefiting from the amnesty under its terms due to the nature of the crimes he was charged, which included murder.[491] It would certainly not prevent his prosecution for crimes against humanity. In this regard, it is noted that the ICC Pre-Trial Chamber found "there is a strong, growing, universal tendency that grave and systematic human rights violations – which may amount to crimes against humanity by their very nature – are not subject to amnesties or pardons under international law" which would lead to impunity.[492] Further, granting amnesty contravenes a State's positive obligation to investigate, prosecute and punish the perpetrators of core crimes and denies victims the right to truth, access to justice, and to request reparations.[493] While the Appeals Chamber upheld admissibility on other

[490] Note the ICC Pre-Trial Chamber rejected defence claims in regard to decisions purportedly being rendered by the Tobruk Court of Appeal and Al-Bayda Court of Appeal in relation to the amnesty law.[490] Indeed, the Defence merely provided the ICC with letters dated 31 October 2018 from clerks of the Tobruk Court of Appeal and Al-Bayda Court of Appeal which confirmed that Law No.6 of 2015 is being implemented by the courts, not decisions in Gaddafi's case: Defence Consolidated Reply of 20 November 2018, *supra* note 18, para.39, and Annex 5 thereof, ICC-01/11-01/11-660-Anx5, *supra* note 1683; and PTCI Decision on Admissibility of Gaddafi Case 5 April 2019, *supra* note 1879, paras.57-78.
[491] PTCI Decision on Admissibility of Gaddafi Case 5 April 2019, *supra* note 1879, at paras.56-59.
[492] PTCI Decision on Admissibility of Gaddafi Case 5 April 2019, *supra* note 1879, para.61.
[493] Ibid, para.77.

grounds and thereby omitted to consider this point, the separate and concurring opinion of Judge Luz del Carmen Ibáñez Carranza is to the same effect.[494]

4.2 Fair trials in the current security climate

Examining subsequent trials of those accused of crimes during the Revolution reveals that any improvement concerning defence rights is limited. Most notably, a follow-up trial of some 121 accused loyal to Gaddafi referred for trial in August 2015 concluded at the Tripoli Court of Assize in August 2018 in relation to the killing of protesters in the 'Abu Salim Highway Massacre' in August 2011, Case No. 2015-1477 (the 'Triq al-Sareeh case'). From those accused, 45 were convicted and sentenced to the death penalty; 54 were convicted and sentenced to five years of imprisonment; and 22 were acquitted.[495] This mass trial gave rise to due process concerns, including over the alleged torture or inhuman treatment of the accused by the militia which initially arrested and detained them.[496]

Notably, some interviewees considered that it was impossible for anyone to have a fair trial in Libya, taking into account legislative gaps and the need for further capacity-building. For example, a Libyan lawyer at an NGO stated that she could not think of a single fair trial in Libya before or post-Revolution, clarifying "there may be decent trials by Libyan standards but not what we are aiming for".[497] She did not

[494] Situation in Libya, *The Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11-01/11-695-AnxI, Appeals Chamber, Separaate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza on the Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17 (1)(c), 19 and 30 (3) of the Rome Statute", 22 April 2020, paras. 139-144 and 165.

[495] Marsad, Middle East Online, 'Libya sentences 45 to death over 2011 uprising killings', 16 August 2018.

[496] HRW, 'Libya: 45 Sentenced to Death for 2011 Killings: Due Process Concerns in Mass Trial', 22 August 2018.

[497] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.

think that either side would get a fair trial in Libya, noting "some might have a better outcome but not because of the process being fair".[498] In turn, others considered that although some accused may be able to receive a fair trial, Libya's judicial system was not ready to handle a trial like that of Saif Gaddafi and Al-Senussi as it was so sensitive that "even Tunisia and Egypt couldn't handle it" and that it would have been better for both to go to the ICC.[499] One interviewee commented that she "previously had the opinion that the Libyan system should prosecute Libyans but that changed the day [Muammar Gaddafi] was killed. I don't believe the Zintan militia cared about this not happening to Saif; they held him for their political agenda".[500] The main issue identified was independence and impartiality. A Libyan activist noted disagreement with the ICC's decision concerning Al-Senussi on the grounds that the outcome of the trial in Tripoli appeared to be a given, commenting that "if Saif was tried in the East, he would be found innocent".[501]

However, many interviewees distinguished the situation applicable at the time of the ICC's admissibility decision concerning the cases of Saif Gaddafi and Al-Senussi and that prevailing today. While a fair trial is not currently possible in Libya in sensitive cases given the current security situation, "in 2011 and the beginning of 2012, it was different".[502] While it is still possible to have a fair trial today in small criminal cases concerning ordinary citizens, it depends on the region and the type of case and where the accused is affiliated to political parties or the militia it is not possible.[503]

[498] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[499] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Centre (DAAM Center), 1 October 2018.
[500] Interview record 32 – Libyan lawyer, 5 October 2018.
[501] Interview record 34 – Libyan activist, 13 October 2018.
[502] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[503] Ibid.

Similarly, a Libyan lawyer asserted that "in 2011 there was a serious appetite for reform and everyone was positive such reforms were feasible but the security and political climate are interfering".[504] They considered that the inadequacies revealed by the Libyan trial of Saif Gaddafi showed that Libya was not ready to try him, but reaffirmed they "would have had a completely different opinion in 2011".[505]

Others agreed that the ability to obtain a fair trial depends on the level of sensitivity of the case, the person involved and when the trial takes place. They opined that "under one government there was more space to have a fair trial. Now with two governments and the security situation, there is less possibility to monitor fairness".[506] They considered that "from 2012 until the end of 2013 there was a kind of right and fair process going on because everyone was filled with a spirit of democracy".[507]

The different outcomes of Libya's admissibility challenge in regard to to the cases of Saif Gaddafi and Al-Senussi are considered a contradiction with a Libyan judge opining the ICC would have been better to "take both or none". He acknowledged that "right now, Libya is unable to do such cases. However, until mid-2013, Libya was able to do so, it could even try Saif".[508] He added "2012 offered the most promise – this was the best year in Libya".[509] A Libyan lawyer agreed, "the decision on Al-Senussi regarding Libya being willing and able was true at the time. Now the

[504] Interview record 32 – Libyan lawyer, 5 October 2018.
[505] Interview record 32 – Libyan lawyer, 5 October 2018.
[506] Interview record 34 – Libyan activist, 13 October 2018.
[507] Ibid.
[508] Interview record 33 – Libyan judge, 5 October 2018.
[509] Interview record 33 – Libyan judge, 5 October 2018.

situation is chaotic, more actors are involved. We were not actually at war then."[510] Likewise, an international expert concurred that "in 2013, people had begun to have a degree of confidence in the system and that it was being put right".[511]

Interviewees disagreed on whether the conclusion of the trial by the Tripoli Court of Assize should be the final word. One interviewee considered the decision on Al-Senussi should now be revisited in light of how the trial was handled domestically.[512] However, another distinguished the two cases, stating that in regard to Al-Senussi: "it is harder to make the case that his trial was so obviously inadequate that it should be completely disregarded. My hesitation is that no one ever felt he would not be convicted and he was so widely detested, there are doubts the trial could be a genuine test of the facts of the case, so there is an uneasy feeling".[513]

Others noted that the trial in Tripoli appeared to cover the same conduct as that in issue at the ICC, be based on the same evidence and as such, now "they have been tried in Libya; that should be the end of the matter".[514] Another raised the issue of complementarity, considering that once the Libyan system has given a final ruling then the ICC cannot act.[515] There is scepticism that the ICC would do any better than the Libyan system, but for different reasons. For example, one Libyan stated "You need evidence. If the ICC isn't issuing a warrant for the others, it means they don't have the capacity to gather the evidence which exists and so the process is

[510] Interview record 32 – Libyan lawyer, 5 October 2018.
[511] Interview record 55 – international expert, 2 November 2018.
[512] Interview record 32 – Libyan lawyer, 5 October 2018.
[513] Interview record 55 – international expert, 2 November 2018.
[514] Interview record 34 – Libyan activist, 13 October 2018.
[515] Interview record 33 – Libyan judge, 5 October 2018.

jeopardised. Libya has the evidence but there is an issue of partiality".[516] Similarly, an international consultant considered that it would still be preferable for trials to be conducted in Libya on the basis that the ICC's current track record is an issue.[517] This demonstrates that the quality of the OTP's interventions are as important as the cases selected when it comes to domestic impact.

4.3 Conclusion

Kersten asserts "the OTP's pursuit of 'positive complementarity' in Libya has failed", arguing that the ICC has had no positive influence over the Libyan authorities.[518] He further claims that the Libya case "clearly demonstrates that the capacity of the ICC to produce positive effects on post-conflict peace and justice is severely limited".[519] However, views on the ICC's impact on defence rights were polarised in interviews conducted of those who followed the domestic proceedings.

One Libyan lawyer considered that as the trial of the Gaddafi officials was high-profile and well covered in the media, it had an impact but this is hard to measure.[520] She noted that there are another six or seven cases stuck in limbo and defence counsel continue to receive threats.[521] Others expressed concern that the domestic process may have had the consequence of making Saif Gaddafi "a victim and a criminal at the same time". In particular, they noted "Saif was without a finger. There is no trust in a fair court. He was on TV saying one thing but it is obvious they tortured him, cut his

[516] Interview record 34 – Libyan activist, 13 October 2018.
[517] Interview record 58 – international consultant, 5 November 2018 ("*the ICC is in theory a means of bringing people to justice but in practice it could be destabilising in Libya and not achieve its objectives*").
[518] Mark Kersten, 'Justice in Conflict: The Effects of the International Criminal Court's Inventions on Ending Wars and Building Peace', Oxford Scholarship Online, 2016, Chapter 7, 'Justice after the Revolution: The ICC and Post-Gaddafi Libya', at p.155.
[519] Ibid, at p.161.
[520] Interview record 32 – Libyan lawyer, 5 October 2018.
[521] Ibid

finger off".[522] This reflects the sentiments expressed by Trahan who argues that in ruling the *Al-Senussi* case inadmissible, the ICC thereby gave a 'green light' to the domestic proceedings despite the existence of the death penalty, "facilitating or legitimising the Libyan process where the violations occurred".[523]

Similarly, another interviewee who strongly disagreed with the findings of the ICC's Pre-Trial Chamber and Appeals Chamber in the *Al-Senussi* case considers that by finding the Libyan proceedings to be "good enough" that "the ICC is effectively saying there are two tiers of a trial" with some eligible for a trial at the ICC in accordance with international standards and others left for trial domestically with a basic level of due process.[524] In turn, she considered that it was a lost opportunity for the ICC to have a real impact on strengthening the rights of the defence. Moreover, the OTP's continued stance that there has not been a change of circumstances to justify revisiting the admissibility determination was deemed another lost opportunity to push for change.[525] However, others do not consider the domestic trial of Al-Senussi a failure but are "not sure it had the calming and sobering effect one might have hoped" and as such they "would be hard pushed" to say that the ICC's decision to defer to the domestic level had actually affected the way the Libyan justice system functions in practice.[526] Nevertheless, it is hoped that in time it will be found to have moved the rights of the accused in the right direction.

[522] Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[523] Jennifer Trahan, 'The International Criminal Court's Libya Case(s) – The Need for Consistency with International Human Rights as to Due Process and the Death Penalty', 17 (5) International Criminal Law Review 1-41 (2017), at pp.21 and 34-35.
[524] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[525] Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018.
[526] Interview record 55 – international expert, 2 November 2018.

5. Conclusion

Interviewees were inconclusive about the ICC's impact on the domestic justice system in Libya. Many were adamant that the ICC has not had any impact on the ground. One Libyan activist was emphatic that "in Libya nobody gives a shit about the ICC. Nobody cares".[527] In particular, interviewees considered that the ICC has had no impact in strengthening access to justice for victims at the domestic level[528] or on domestic legal reform.[529] While some positive reforms were initiated, these have largely been triggered through the mobilisation of Libyan civil society or international development initiatives rather than catalysed by the ICC.

However, the ICC's intervention is perceived as having had some value as a deterrent,[530] although views on this are mixed and ongoing violence suggests otherwise.[531] The *Al-Werfalli* arrest warrant also provided an incentive to the judiciary in Eastern Libya to investigate.[532] The deterrent and catalytic value would be greater if the ICC was seen to be closer to the ground, with the best way of doing this in the current security climate being to open an office in neighbouring Tunisia.[533] In turn, it is necessary for the OTP to increase its direct engagement with affected communities both within and outside Libya.

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[527] Interview record 34 – Libyan activist, 13 October 2018.
[528] Interview record 2 – Libyan law student, 23 October 2017; Interview record 3 – Tunisian researcher, 21 November 2017; Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018; Interview record 32 – Libyan lawyer, 5 October 2018; Interview record 55 – international expert, 2 November 2018.
[529] Interview record 2 – Libyan law student, 23 October 2017; Interview record 11 – Libyan lawyer, NGO Lawyers for Justice in Libya, 16 March 2018; Interview record 30 – interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018.
[530] Interview record 30 - interviewee, Democratic Transition and Human Rights Support Center (DAAM Center), 1 October 2018; Interview record 33 – Libyan judge, 5 October 2018.
[531] Interview record 34 – Libyan activist, 13 October 2018.
[532] Interview record 32 – Libyan lawyer, 5 October 2018.
[533] See Cairo Institute for Human Rights Studies and Libya Platform, 'Libya Roadmap for Human Rights Reform & Restoring the Rule of Law', *supra* note 56, at p.14, calling for the ICC to open a local office in Libya or if this is not possible, then in Tunisia.

CHAPTER VII

LESSONS FOR THE ICC FROM CÔTE D'IVOIRE AND LIBYA

This Chapter uses the empirical findings from Côte d'Ivoire and Libya to critically reflect on the catalytic effects of complementarity. Next, it illuminates the lessons that may be drawn from this experience for the reform of the ICC towards achieving a greater impact on the rule of law at the local level.

1. Triggering Effects on Domestic Proceedings

The ICC has influenced domestic investigations and prosecutions in both countries. In Côte d'Ivoire, investigations into both sides for crimes committed during the 2010-2011 crisis were already triggered domestically from the work of the CNE, its report being followed-up by formal investigations by the Cellule. However, the ICC's engagement helped to invigorate domestic investigations against the pro-Ouattara in that its interest meant that blockages that had been delaying progress were lifted, namely, there was suddenly political will to allow such investigations to proceed. Unfortunately, this did not last. The ICC's interest also triggered action in Libya, albeit by a non-State armed group, in that the LNA reportedly opened an investigation through the military justice system in regard to Al-Werfalli. The overwhelming factor behind these changes was the coercive effect of complementarity, in that both Côte d'Ivoire and Libya took these steps in an effort to prevent the ICC's further intervention. However, it is questionable whether these efforts were always genuine.

Moreover, in some respects the ICC's impact has been negative in that domestic proceedings have been rushed in order to demonstrate compliance to successfully

challenge admissibility before the ICC. For example, Simone Gbagbo's acquittal for crimes against humanity followed a rushed investigation and early indications as to how the trial would be managed led to even the civil parties withdrawing. This was despite them having waited several years for justice and not being sure they would have another opportunity for redress.

The analysis in Chapters V and VI shows that questions even linger in relation to the prosecution of those who observers feared the national authorities may be overzealous to convict. In relation to Simone Gbagbo in Côte d'Ivoire and Saif Gaddafi in Libya, it is considered that the initial efforts to investigate and prosecute were in good faith. Yet, post-conviction executive action in granting amnesty indicates a change towards shielding the accused, ostensibly in the name of national reconciliation. Nevertheless, in the case of Libya, this must be qualified as the validity of the amnesty passed by the House of Representatives in the East is contested.

Arguably, the lack of adequate or at least, sustained, engagement by the OTP with the domestic judiciary in Côte d'Ivoire, especially after a strategic change in 2015, may have contributed to this outcome. It is clear there is a different approach being taken to the CIV-II investigation compared to the Gbagbo and Blé Goudé investigation in the use of sequencing and the move from focused to in-depth investigations, inevitably more time consuming. The need for ongoing co-operation is evidently at the forefront, though the OTP's lack of resources also continues to present challenges. Regardless of the motivation behind the approach taken, the perception of justice by the affected communities is also important. This is the most significant influence on

the ICC's limited impact on the rule of law in Côte d'Ivoire. Indeed, the analysis shows that the appearance of independence and impartiality at both the international and local levels is almost as important as actually ensuring due process, especially given the level of polarisation between the affected communities.

The amnesty in Côte d'Ivoire follows a build-up of anti-ICC sentiment by some communities around the perception that it represents Western neo-colonialism and that former President Laurent Gbagbo, a pan-African, has been unfairly targeted for prosecution by an international court. The delays and lack of much visible action in relation to the pro-Ouattara has meant that some have embraced the amnesty as a means of restoring the balance between divided communities. In this regard, they point to the context in which many accused considered pro-Gbagbo were kept in lengthy pre-trial detention since the crisis, while those considered pro-Ouattara - aside from the domestic indictments which are not publicly available – have not been arrested and detained and in some cases, have even been promoted. Similar sentiments are felt by some Libyans in that while the ICC has issued warrants against former Gaddafi regime officials and Al-Werfalli, for his actions in the East; there are no known warrants against militias in the West supporting the GNA.

Both Côte d'Ivoire and Libya have adopted a multi-pronged approach to addressing the past in terms of transitional justice mechanisms. As well as formal justice in the form of criminal investigations and prosecutions by the civilian and military justice systems, both States have turned to quasi-judicial mechanisms, administrative mechanisms in the form of commissions, restorative justice and victims' reparations. For example, Côte d'Ivoire established the judge-led CNE as a quasi-judicial

mechanism while Libya set-up event specific bodies. In turn, the CDVR and CONARIV in Côte d'Ivoire were entrusted to look into the root causes of the crisis, hear victims and witnesses and recommend reparations. The Fact-Finding and Reconciliation Commission in Libya has been set-up towards the same end. In this context, some argue that the ICC has unduly focused on formal mechanisms rather than recognising alternative approaches to transitional justice as acceptable local choices. For example, in their amicus curiae observations concerning Saif Gaddafi's admissibility appeal, the Libyan Cities and Tribes Supreme Council asserted that the ICC should accept the local decision to accord him amnesty for national reconciliation.[1]

However, in both countries the efforts towards alternative justice appear superficial. While Côte d'Ivoire's CDVR and CONARIV are seen as having failed to achieve their ambitious mandates and victims feel significant uncertainty in regard to outstanding reparations, in Libya many do not even know the FFRC has been established and it is barely functioning. In both countries, it is the formal mechanisms that most victims continue to look to in hope of redress. Moreover, it is the formal investigation and prosecution of those accused of gross abuses that has had the greatest impact on the establishment or consolidation of the rule of law through fighting impunity. The backlash against the criminal processes ongoing at the domestic level in Côte d'Ivoire and Libya is considered political opportunism as beneath the rhetoric of reconciliation is a fear of 'own side' prosecutions.

[1] ICC, Situation in Libya, *The Prosecutor v Saif Al-Islam Gaddafi*, Written Observations of the Libyan Cities and Tribes Supreme Council pursuant to Rule 103 and the Decision on requests for leave to file observations pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/11-01/11-679, 28 October 2019, at paras. 15-16, 18, 38 and 42 (in relation to Gaddafi's appeal against admissibility).

The results from Côte d'Ivoire, in particular, support Chehtman's theory that building the capacity and will to pursue genuine local investigations and prosecutions depends on creating the right institutional dynamics between the international and domestic levels with results varying based on whether the relationship was one of collaboration, competition, resentment or indifference.[2] The dynamics of the relationship between the ICC and Côte d'Ivoire has varied over time between all four. While there is evidence of collaboration throughout, over time the balance has clearly shifted to a competition between jurisdictions with the critique of the local justice system in the Simone Gbagbo admissibility proceedings fostering resentment as the outcome was seen as a declaration of the inadequacy of the Ivorian system.[3] Additionally, some interviewees commented on an attitude of superiority exhibited by their ICC counterparts in their interactions. Moreover, perceptions over the Gbagbo and Blé Goudé trial means that presently a high level of indifference is clearly discernible.

Moreover, much has been made of the 'carrot' and 'stick' incentives of complementarity to catalyse local prosecutions.[4] Yet, the ICC's handling of admissibility challenges by Côte d'Ivoire and Libya (regarding Gaddafi) means complementarity has had limited impact in terms of directly incentivising and rewarding local rule of law reform. The situation compares to that in Bosnia and

[2] Alejandro Chehtman, 'Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia', (2013) 49 (2) Stanford Journal of International Law 297-329, at 320.
[3] Interview record 13 – Prosecutor, Côte d'Ivoire, 21 March 2018; Interview record 16 – Prosecutor, Côte d'Ivoire, 22 March 2018; Interview record 43 – Defence Counsel, Côte d'Ivoire, 22 October 2018.
[4] See Carsten Stahn, 'Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical', 'Positive' and 'Negative' Complementarity', Chapter 9 in Carsten Stahn and Mohamed M. El Zeidy (Eds), *The International Criminal Court and Complementarity: From Theory to Practice*, (Cambridge: Cambridge University Press, 2011), 233-282 at 250-251.

Herzegovina under the ICTY's primacy model before Rule 11bis.[5] It was only later that substantive reforms were adopted as the State was incentivised to act in order to reclaim jurisdiction through the transfer of cases and this became "a matter of pride and self-respect" for the local judiciary.[6]

However, the perception of the ICTY's ability to recall transferred cases as a "real threat" if conditions were not met, even if no cases were ever recalled, was an essential part of the institutional dynamic that encouraged domestic accountability efforts in the Balkans.[7] While the Appeal Chamber's ruling in *Al-Senussi* is a significant turning point which may catalyse proceedings in other situation countries, even if of limited effect in Libya, it is not clear that the mechanism in Article 19 (10) of the Rome Statute which enables the OTP alone to request an admissibility review in the event of a substantial change of circumstances will operate as a sufficient threat to keep States on the right track in terms of respect for due process. Yet, this may simply reflect the difference between primacy and complementarity.

2. Other Catalytic Effects

As Nouwen[8], Nichols,[9] De Vos,[10] and Wierda[11] found in regard to other ICC situations, complementarity has had other intended and unintended effects in Côte d'Ivoire and Libya beyond investigations and prosecutions. These effects include

[5] Chehtman, 'Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia', supra note 3, at 321.
[6] Chehtman, supra note 3, at 322.
[7] Chehtman, supra note 3, at 322-323.
[8] Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the ICC in Uganda and Sudan*, (Cambridge University Press, 2013).
[9] Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya*, (London: Springer, 2015).
[10] Christian De Vos, 'A Catalyst for Justice? The International Criminal Court in Uganda, Kenya and the Democratic Republic of Congo' (PhD Thesis, Leiden University Repository, 16 March 2016).
[11] Marieke Wierda, "The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries", (PhD Thesis, Leiden University Repository, 9 January 2019).

legislative reform; normative change by empowering civil society to advocate for rule of law reform and accountability; and other systemic reform through the ICC's demonstration effect in fostering the development of a defence culture. Yet, the ICC's engagement was one among many factors which contributed to these outcomes and was not necessarily the primary catalyst.

Legislative reform in Côte d'Ivoire includes the enhancement of constitutional rights, harmonisation of the Penal Code and Criminal Procedure Code with the Rome Statute, modernisation of these codes to conduct complex criminal investigations more effectively, and the adoption of a Law on Witness Protection. In turn, Libya has introduced reforms to its Penal Code and Criminal Procedure Code, including the criminalisation of torture and providing for testimony by video-link. These positive effects indirectly flowed from the ICC's engagement.

Another indirect positive effect in both countries is the empowerment of civil society and other 'norm entrepreneurs' to advocate for rule of law reform and accountability. Victims' groups, local NGOs and other civil society organisations are very active in both countries and have done the most to raise awareness about the ICC. For example, the Ivorian Coalition for the ICC (CI-CPI) published an online magazine "La Haye" and organised a production of "Lady ICC" throughout Côte d'Ivoire, a drama on the Court's work, and distributed it as a film on DVD as part of a sensitisation programme.[12] Further, local civil society groups have used the ICC as a frame of reference, whether in advocating for international or domestic justice. On the other hand, local judges have been incentivised to make use of their own powers and

[12] Human Rights Watch, 'Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire', August 2015, at p.53; and Interview record 35 – interviewee, LIDHO/CI-CPI, 16 October 2018.

to assert their independence from the executive. As one interviewee stated, "they opened their minds to their own competencies, of the local tribunals".[13] In this way, the ICC has impacted the discourse beyond enforcement in proceedings directly linked to international crimes.

Other normative change includes strengthening access to justice and the rights of the defence in Côte d'Ivoire through the ICC's demonstration effect. The televised trial of Gbagbo and Blé Goudé, where their defence counsel, including Ivorian co-counsel, were seen and heard actively advocating on behalf of their clients, set an example.[14] As an Ivorian judge highlighted, many people did not understand the justice process before, but "when people saw the President be judged, it created a boom regarding defending their rights in court…a few years ago there were only a couple of cases at the Supreme Court, but over the last couple of years the number of cases is very high".[15] Given that the Court, at least the OTP, did not have this in mind when engaging in the situation, it is considered an unintended positive impact.

However, negative effects flowing from the ICC's engagement in these situations include further weakening public trust in domestic institutions and witness protection issues. In Côte d'Ivoire, other negative effects include hindering domestic investigations by taking forensic evidence and not sharing the results with local prosecutors, common witnesses not co-operating with domestic investigations and trials, a potential backlash against the Cellule for co-operating with the ICC in the form of a budget reduction, and political reaction by the declaration of an amnesty.

[13] Interview record 20 – interviewee, AFJCI, 27 March 2018.
[14] Interview record 19 – interviewee, National Commission of Human Rights in Côte d'Ivoire (CNDHCI), 26 March 2018.
[15] Interview record 41 – senior judge, Côte d'Ivoire.

Further, the ICC's expressivist function has not been fulfilled as there has been no influence on willingness due to a perception of partiality. Due to the limited scope of this study, it is not possible to conclude if the ICC's engagement had a deterrent effect in either country and perceptions differ, although there are positive indications of this in Côte d'Ivoire, while in Libya it appears to be the opposite.

Considering these findings, the ICC's engagement in conflict affected societies ought to be considered and evaluated in broader terms, taking into account the potential normative, expressive and demonstration effects beyond individual cases.

3. Local Ownership: Time for Qualified Deference in Approaching Admissibility?

As Chapter III demonstrated, the ICC has erroneously extended jurisprudence developed in the context of self-referrals to other situations and has not applied the high threshold for admissibility intended by the drafters of the Rome Statute. The narrow focus on 'incidents' for the sake of comparison has led to the problem of States mimicking the OTP's investigative and prosecutorial strategies, risking impunity rather than filling an accountability gap through burden sharing. Further, the Court applied factors going towards an assessment of the ability and willingness to prosecute in determining the existence of domestic proceedings, finding a state of inactivity as technically construed, contradicting the factual situation in-country. This has confused the local judiciary and affected communities. Moreover, save for Al-Senussi, the Court has weighed domestic processes to the standard envisaged for international proceedings, undermining the ICC's credibility with States and diverging from complementarity.

The question is how to course correct. Proposals include adopting a 'qualified deference' model, according a 'margin of appreciation' to domestic courts in judicial practice, legislative amendment and issuing interpretative guidelines in a code of conduct or revision of the ICC's Rules of Procedure and Evidence (RPE).

Drumbl advocates for a 'qualified deference' model to govern the ICC's relationship with States, albeit instead of complementarity which he argues is "too controlling" in the requirements imposed for local proceedings.[16] Qualified deference would mean applying a rebuttable presumption in favour of local institutions, with procedural flexibility for each society to choose how best to render justice.[17] He suggests the following guidelines for deciding if the presumption should apply:

(i) the State is acting in good faith;

(ii) the local procedural rules are seen as democratically legitimate;

(iii) the characteristics of the violence and political context – is there pervasive insecurity or could proceedings trigger instability?

(iv) avoiding gratuitous or iterated punishment – no double jeopardy but differences in the nature or scope of punishment are permissible;

(v) the effect on the universal substance – crimes must be appropriately recognised; and

(vi) precluding the infliction of great evils – the potential punishment is permissible under international standards.[18]

[16] Mark A Drumbl, *Atrocity, Punishment, and International Law*, (2007, Cambridge: Cambridge University Press), at 187-194.
[17] Drumbl, ibid, at 188.
[18] Drumbl, ibid, at 189.

Drumbl considers the presumption would be reversed for Sudan, where the authorities evinced bad faith in establishing trials controlled by the government while doing nothing to stop the violence; Afghanistan, where customary processes depend on the pronouncements of non-representative religious or military leaders and led to further harm; and Iraq, as pervasive insecurity meant the safety of participants before the Iraqi High Tribunal could not be guaranteed.[19] In contrast, he argues Rwanda's gacaca process would be entitled to qualified deference.[20]

The 'qualified deference' model resembles that formulated by Burke-White where he envisioned the Court as part of a "decentralized, interdependent, self-organizing, and non-hierarchical" community of courts where domestic courts should be accorded a 'margin of appreciation' in establishing accountability for mass crimes.[21] A 'margin of appreciation' governs the relationship between the European Court of Human Rights and States.[22] Complementarity itself closely corresponds to the principle of subsidiarity applicable between the European Court of Justice and State courts as both concepts recognise the need for justice to be rendered as close to the affected community as possible.[23] This is achieved through according flexibility to States in how to implement community norms.

Giving States a 'margin of appreciation' would respond to the need to balance sovereignty and local ownership with the risks that come with the local prosecution of

[19] Drumbl, ibid, at 192-193.
[20] Drumbl, ibid, at 193-194.
[21] William Burke-White, 'A Community of Courts: Towards a System of International Criminal Law Enforcement' (2002) 24(1) Michigan Journal of International Law 1-101, at 98.
[22] Burke-White, ibid, at 98, footnote 505, citing *Handyside v United Kingdom*, 24 Eur. Ct. H.R. (ser.A) at 22 (European Court of Human Rights).
[23] Burke-White, ibid, at 4 and 86-91, referring to the 'co-operative relationship' between the German Federal Constitutional Court and the European Court of Justice (ECJ).

international crimes in terms of the quality and fairness of the proceedings.[24] However, Drumbl argues that subsidiarity would take matters too far.[25] As subsidiarity usually applies to relations between courts in times of stability, he considers that applying this to post-conflict contexts would come with undue risk.[26] He also considers that the 'margin of appreciation' concept has limited value on the basis that there should only be procedural flexibility in how international law is enforced and flexibility should not go to substantive matters regarding international crimes.[27]

Nevertheless, the basic idea behind both the 'margin of appreciation' and 'qualified deference' is that in the event that local proceedings are irredeemably flawed and in violation of agreed standards, then and only then, would the ICC step in. In this regard, the Appeals Chamber in *Al-Senussi* comes close to adopting a concept of 'qualified deference' in finding the case inadmissible due to the existence of domestic proceedings, with the preference for local justice only displaced when due process violations are "so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice."[28] In *Al-Senussi*, the Court returned to the principle of complementarity as envisioned by the Rome Statute's drafters where a high degree of deference is accorded to States but this is not unqualified. As such, it is possible to apply the idea of 'qualified deference'

[24] See Burke-White, ibid, at 15-16.
[25] Drumbl, supra note 17, at 188.
[26] Drumbl, supra note 17, at 188.
[27] Drumbl, supra note 17, at 188.
[28] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, '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'', ICC-01/11-01/11-565, 24 July 2014, at para.230 (hereafter 'Appeals Judgement on Admissibility of the Al-Senussi Case').

within the existing framework and there is no cause to abandon complementarity as the framework governing relations between States and the ICC.

However, it must be considered whether legislative amendment is still necessary to correct inconsistent jurisprudence. It is argued that Article 17 of the Rome Statute would need to be amended to abandon the 'same conduct' test.[29] However, Article 17 does not contain the 'same conduct' requirement. Rather, this falls from the Court linking Article 17 (admissibility) with Article 20 (3) (ne bis in idem).[30] Yet, only Article 17(1)(c), where a person has already been tried domestically, refers to Article 20 (3) on the exceptional circumstances under which a trial for the 'same conduct' may still take place before the ICC. Articles 17 (1)(a) and (b), where national proceedings are ongoing or an investigation was concluded and a non-prosecution decision made, refer to 'case' rather than 'conduct'. Thus, there is scope for simply unlinking the remaining admissibility criteria with ne bis in idem, which must be interpreted strictly to prevent impunity, although this would mean that the test within Article 17 would not be consistent.

The question is also whether the parameters of a 'case' for admissibility should be defined by reference to 'conduct' at all, let alone the 'same conduct'. For example, Heller argues the current test should be replaced with 'radical complementarity' where any case against a suspect already under investigation domestically would be inadmissible if the State's efforts are genuine, regardless of the conduct being

[29] Kevin Jon Heller, 'Radical Complementarity', (2016) 14 (3) Journal of International Criminal Justice 637-665, at 664.
[30] Rod Rastan, 'What is a 'Case' for the Purpose of the Rome Statute?' (2008) 19 Criminal Law Forum 435-448, at 437-439; and Rod Rastan, 'What is 'Substantially the Same Conduct'? Unpacking the ICC's 'First Limb' Complementarity Jurisprudence', (2017) 15 Journal of International Criminal Justice 1-29 at 21-22, arguing this fits with the ordinary meaning of the terms of Article 17 in context.

investigated.[31] This entails a more holistic approach, with a State prosecutor making case selection decisions independently based on the availability, reliability and complexity of the evidence, bringing charges based on what is easiest to prove, gravity and/or the victims' best interests.[32] He previously asserted the Court should look at the comparative sentencing regime, with a case being inadmissible if the national sentence that would be imposed equals or exceeds the average sentence that would apply at the ICC.[33] On both bases, he considers the ICC would be precluded from trying Simone Gbagbo because of her conviction in the state security case where a 20 year sentence was imposed.[34]

However, if a State chooses to investigate or prosecute completely different offending, this is already covered by the Part 9 co-operation regime through consultation and sequencing in Articles 89 (4), 94 and 97 of the Rome Statute.[35] The Court may decide to defer international proceedings until the completion of domestic proceedings in an unrelated matter against the same accused. Alternatively, the OTP may exercise discretion under Article 53 (2)(c) of the Rome Statute if it would not be 'in the interests of justice' to try the same person albeit for different conduct.[36] Further, it is undesirable to amend the provisions on admissibility to block ICC proceedings even if the offending addressed domestically is completely different since it would create a real risk of an accountability deficit.[37] It would also remove States' incentive to institute proceedings in hard cases. This would not be in the

[31] Heller, 'Radical Complementarity', supra note 30, at 664.
[32] Heller, 'Radical Complementarity', supra note 30, at 650-655.
[33] Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 Harvard International Law Journal 86-132, at 109.
[34] Heller, 'Radical Complementarity', supra note 30, at 639-640 and 663-664.
[35] Darryl Robinson, 'Three Theories of Complementarity: Charge, Sentence, or Process?' (2012) 53 Harvard International Law Journal Online 165-182, at 178-179.
[36] Robinson, ibid.
[37] Robinson, ibid, at 179; and Rastan, 'What is 'Substantially the Same Conduct'? Unpacking the ICC's 'First Limb' Complementarity Jurisprudence', supra note 31, at 23-25.

interests of victims or building the rule of law domestically. While consultation and sequencing is imperfect - not least because Article 89 (4) requires a State to agree to surrender the individual to the ICC before consultation may commence - amending the ICC's RPE to add forward-thinking interpretative guidelines is more realistic than legislative change.[38]

Further, a sentence-based approach could not be applied to ongoing investigations or trials as it would introduce uncertainty.[39] It would also be redundant in the event the domestic proceedings result in an acquittal and may encourage States to either harmonise their sentencing practices in line with the ICC or sentence more harshly.[40] No sentence could be graver than the death penalty.

As discussed in Chapter III, conduct is the best comparator for admissibility. The problem is in the degree of identity required by the Court and the creation of an additional hurdle requiring a State to demonstrate 'concrete and progressive investigation steps' as part of the first admissibility limb.[41] Accordingly, rather than legislative amendment, the solution lies in interpreting the admissibility provisions in accordance with their object and purpose and the broader legislative policy behind complementarity.

Specifically, it is considered that the course of conduct analysis by the Pre-Trial Chamber in *Al-Senussi* in applying the 'substantially the same conduct' test is

[38] As proposed by Robinson, supra note 36, at 181-182.
[39] Robinson, supra note 36, at 171-172.
[40] Robinson, supra note 36, at 172.
[41] E.g. Appeals Judgement on Côte d'Ivoire's Admissibility Challenge, supra note 24, at paras. 59, 61-62 (determining a situation of inactivity based on the Court's view on the pace and effectiveness of the domestic investigation of Simone Gbagbo for crimes against humanity).

compatible with complementarity.[42] Further, although not all of the incidents examined by the ICC were reflected in Libya's investigation, it was sufficient for inadmissibility that Libya's case covered "those events that are described in the Article 58 Decision as particularly violent or that appear to be significantly representative".[43] This approach was favoured by Judge Sang-Hyun Song who regarded the fact the Pre-Trial Chamber found "all or some of the 'incidents' or 'events" matched up did not alter its original approach which he considered to be correct, that 'incidents' are not an essential comparator.[44] In my view, the Pre-Trial Chamber and not the Appeals Chamber got the first limb of admissibility right and the change ought to be corrected.

Next, Robinson advocates for a process-based approach to the second limb of assessing admissibility where the genuineness of the process is determinative and the domestic charges selected and any sentence rendered are useful indicators but no more than that since proceedings ending in acquittal may still be genuine.[45] This is consistent with Article 17(1)(a) and (b) of the Rome Statute which render a case inadmissible where domestic proceedings exist unless the State was unable or unwilling "genuinely to carry out the investigation or prosecution" or "genuinely to

[42] ICC, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senus*si, Pre-Trial Chamber I, 'Decision on the admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-466-Red, 11 October 2013, at para.70 (hereafter 'PTC Decision on admissibility of the Al-Senussi case').
[43] PTC Decision on admissibility of the Al-Senussi case, ibid, at para.165.
[44] ICC, Appeals Chamber, Situation in Libya, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senus*si, 'Separate Opinion of Judge Sang-Hyun Song to the 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 Saif Al-Islam Gaddafi'', ICC-01/11-01/11-565-Anx 1, 24 July 2014, at para.2 (hereafter 'Separate Opinion of Judge Sang-Hyun Song to Appeals Judgment on Admissibility of the Al-Senussi Case').
[45] Robinson, supra note 36, at 173-175.

prosecute".[46] However, this does not solve the problem that belies the Court's jurisprudence, the unduly high threshold being applied when it assesses genuineness.

The best solution for course correction regarding both the first and second limbs of admissibility would be for further guidance to be set through an amendment to the ICC's RPE by the Assembly of States Parties (ASP). This procedure is less cumbersome than amending the Rome Statute. Alternatively, guidance could be issued in an internal code of practice. At the outset, Burke-White articulated the need for guidelines to manage the relationship between local and international courts in the Rome Statute system.[47] He further recommended a code of conduct, albeit he envisioned that this would be to guide the domestic enforcement of international criminal law for consistency.[48] The Court's practice shows such guidelines would be valuable and could give practical effect to qualified deference.

4. Managing Unwillingness

Côte d'Ivoire and Libya are case studies in managing co-operation where the context shifts from inability to unwillingness. This is the most challenging context for implementing positive complementarity but where there is the potential for the ICC to achieve its greatest impact.[49] Yet, the ICC has not had the impact expected. The Court's practice has developed based on an institutional imperative to build its docket

[46] Articles 17 (1)(a) and (b), Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, in force on 1 July 2002, United Nations Treaty Series Vol. 2187, No. 38544 (emphasis added).
[47] Burke-White, 'A Community of Courts: Towards a System of International Criminal Law Enforcement', supra note 22, at 98.
[48] Burke-White, supra note 22, at 98.
[49] Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008), at 346.

and secure co-operation to go beyond one-sided justice.[50] The OTP should do more to encourage States to own accountability efforts.

From examining the Kenya situation, Nichols concluded that a positive complementarity strategy cannot succeed where the alleged perpetrators occupy power and have a vested interest in hampering domestic prosecutions.[51] He opines that the ICC should exercise its own jurisdiction in such cases rather than engage with the hope of fostering an in-country response.[52] However, the Kenyan context was unique as the power-sharing agreement between the coalition partners meant there was no complete transition. As such, civil society groups were convinced that despite contradictory rhetoric, the government was not open to justice sector reform towards meaningful accountability domestically.[53] As Bjork and Goerbertus found, the lack of a transition meant that the 'window of opportunity' for coming to terms with the past never materialised and those on the ground did not believe the authorities were actually susceptible to pressure to act in response to the ICC's 'stick'.[54] As other studies have shown, the contribution of local NGOs and civil society is instrumental for securing normative change.[55] A context-specific approach is required.

It is considered that the qualified deference approach to admissibility should apply to both contexts of inability and unwillingness. As regards Côte d'Ivoire, this research

[50] Padraig McAuliffe, 'Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11is Inapplicable to the ICC's Complementarity Regime', (2014) 11 Int'l Org. L. Rev 314-427.
[51] Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya*, (Springer, 2015) at 134-139, 151, 173-174 and 253.
[52] Nichols, ibid, at 173-174 and 253.
[53] Christine Bjork and Juanita Goebertus, Note from the Field, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya', (2011) 14 Yale Human Rights and Development Law Journal 205-229, at 223-224.
[54] Bjork and Goebertus, ibid, at 222.
[55] E.g. Nouwen, Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the ICC in Uganda and Sudan*, (Cambridge University Press, 2013), at 141and 236-237.

has shown that the OTP's engagement can make a difference on the State's willingness to undertake prosecutions even concerning government allies. The admissibility process and communications by the OTP on the prospect of the ICC investigating both sides incentivised domestic action. While in Kenya, initiating a formal investigation removed the incentive as the authorities saw prosecutions before the ICC as inevitable,[56] in other contexts Dancy and Montal found the ICC had its greatest impact in triggering local prosecutions after the initiation of a formal investigation.[57] In this regard, the OTP's delay in commencing investigations in CIV-II for want of resources meant little operational activity was catalysed concerning the pro-Ouattara until 2015.

The problem is the lack of consistent follow-up and lengthy delays concerning the CIV-II investigation and the *Gbagbo and Blé Goudé* trial duration and outcome means that ICC prosecution of the pro-Ouattara is no longer seen as an immediate and credible threat. As Nichols found in regard to Kenya, international prosecutions must be perceived as both likely and imminent to influence domestic politics.[58] This theory equally bears out in Côte d'Ivoire.

5. Accommodating Situational Change

It takes time to implement judicial reform and States emerging from conflict, or other transitional events, move at a different pace. The direction is usually not linear.[59]

[56] Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya*, (Springer, 2015) at 146-151.
[57] Geoff Dancy and Florencia Montal, 'Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions' (2017) 111 (3) American Journal of International Law 689-723, at 696-697 and 716.
[58] Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya*, (Springer, 2015) at 146-151.
[59] Harvey M Weinstein, Laurel E Fletcher, Patrick Vinck and Phuong N Pham, "Stay the Hand of Justice: Whose Priorities Take Priority?" Chapter 2 in Rosalind Shaw and Lars Waldorf (Eds),

Côte d'Ivoire and Libya are prime examples of this. The OTP has increased its ability to assess and respond to dynamic political and legal change by recruiting Situation Specific Investigative Assistants (SSIAs) and country experts, and expanding its field presence by deploying satellite investigative teams for longer periods.[60] However, these practices are still reserved to a few situations. It is recommended that they be adopted more widely.

Further, as discussed in Chapter III, the existing statutory framework already provides a means for accommodating situational change in the provisions for deferral, monitoring and review. However, there is a need for it to be used more effectively and for a 'big picture' approach when States request more time to reform.[61]

First, Article 53 (4) of the Rome Statute provides the Prosecutor with general authority to reconsider a decision to initiate proceedings based on new facts. This includes information on domestic proceedings which affects admissibility and/or the 'interests of justice' assessment under Article 53 (1)(c). This provides a route to respond to change, for example, if a domestic investigation is catalysed or if due to the operation of an alternative justice mechanism, it is no longer 'in the interests of justice' to proceed internationally.

Localizing Transitional Justice: Interventions and Priorities After Mass Violence, (2010, Stanford: Stanford University Press), 27-48 at 36.

[60] See ICC OTP, Response of the ICC Office of the Prosecutor to an Outcome Report and Recommendations from Open Society Justice Initiative (OSJI) and Amsterdam Law School (University of Amsterdam) based on a workshop held on 25-26 March 2020 on 'Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms and Practices', 8 May 2020, at pp. 3, 9-10.

[61] See McAuliffe, 'Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11is Inapplicable to the ICC's Complementarity Regime', supra note 51, at 415 (noting that it took years for Rwanda, Serbia, Bosnia and Herzegovina and Croatia to undertake the necessary reforms to meet the requirements of Rule 11bis and considering the ICC's admissibility framework under Articles 15, 17, 17 and 18 ill-suited for accommodating the necessary 'big picture' approach).

As in Kenya, the OTP may rely on its general competence to ensure effective investigations and prosecutions under Article 54(1)(b) of the Rome Statute to agree benchmarks for domestic proceedings to encourage progress. This is likely to be most useful during a preliminary examination.[62] If these benchmarks are met, the Prosecutor may rely on Articles 18 and 19 (11) of the Rome Statute to defer an investigation to domestic courts. A review mechanism in Article 18 (3) of the Rome Statute further supports the effectiveness of the system in accounting for "a significant change of circumstances based on the State's unwillingness or inability" and requiring periodic reporting.[63] Further, Article 19 (11) provides that the Prosecutor may still decide to defer an investigation later and require a State to provide ongoing information on the deferred proceedings. This would give States an opportunity to demonstrate willingness and capacity.

The existing monitoring mechanisms could also be used more effectively in conjunction with the admissibility framework to secure compliance with due process standards. There is scope for applying the 'qualified deference' concept to admissibility determinations to better handle due process concerns.[64] Stahn suggests it could be applied in three ways involving monitoring and review to accommodate situational change:

(i) Giving States a 'window of opportunity' after they lodge an admissibility challenge to continue domestic proceedings and demonstrate that the

[62] McAuliffe, ibid, at 391, citing OTP, Agreed minutes of the meeting between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government, The Hague 3 July 2009.
[63] Article 18 (3) Rome Statute, supra note 47.
[64] Carsten Stahn, 'Admissibility Challenges Before the ICC: From Quasi-Primacy to Qualified Deference', Chapter 11 in Carsten Stahn (Ed), *The Law and Practice of the International Criminal Court* (2015, Oxford: Oxford University Press), 228-259, at 245-255 and 258.

standards expected are met, before the Court rules on the motion (with ICC and domestic investigations running in parallel);

(ii) Defer to the domestic proceedings but with ongoing judicial monitoring; or

(iii) Making conditional admissibility decisions, with deferral conditional on the monitoring and supervision of domestic proceedings before a final ruling.[65]

Subsequent to the *Al-Senussi* inadmissibility finding, the Court ruled that the ICC investigation was closed.[66] This does not necessarily follow from an Article 19 decision. In the absence of a provision in the Rome Statute regulating the matter, there was nothing to stop the Court from instead suspending the international investigation pending the conclusion of the domestic proceedings.[67] This might have enabled greater judicial oversight in case the domestic trial failed to run its course due to a change of circumstances.

Further, it was within the Court's discretion to make the determination of inadmissibility conditional on ongoing monitoring.[68] As Libya argued, the Court could monitor the proceedings on an ongoing basis and require both Libya and the OTP to report on progress, with the case rendered admissible before the ICC if the national proceedings were not genuine or did not comply with basic due process.[69] This would have been within the Court's inherent authority.[70] Yet, the Court left the matter within the OTP's discretion to request a new admissibility review under

[65] Stahn, ibid, at 254.
[66] ICC, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-567, Pre-Trial Chamber I, Decision following the declaration of inadmissibility of the case of Abdullah Al-Senussi before the Court, 7 August 2014.
[67] See Stahn, supra note 65, at 255.
[68] Libya Admissibility Challenge concerning the Al-Senussi case, supra note 11, at para 40.
[69] Ibid, paras 40 and 205.
[70] Stahn, supra note 65, at 256-257.

Article 19 (10) of the Rome Statute without imposing any reporting requirements on Libya.

Nevertheless, the provisions for ex-post review and monitoring in the Rome Statute do not go as far as Rule 11bis (D) and (F) of the Rules of Procedure and Evidence of the ad hoc tribunals.[71] As such, there remains scope for strengthening the Court's monitoring structures, though any reinforcement would necessitate legislative amendment and further consideration as to how to reconcile additional safeguards with complementarity.

6. Approaching Co-operation

There are multiple aspects to the approach to co-operation in Côte d'Ivoire and Libya from which broader lessons can be drawn. First, there is the issue of case selection and prioritisation, particularly the use of sequencing to address the need for State co-operation. Next, there is the need to strengthen co-operation between the OTP and the domestic prosecutors to bring about the intended catalytic effects on the rule of law, especially reverse co-operation in sharing evidence to benefit domestic investigations. Thirdly, from a communications perspective, there is an issue as to the choice of partners for co-operation and the manner of that engagement. Finally, communication with affected communities may be strengthened by increasing field presence.

[71] Stahn, supra note 65, at 250-251. On referring a case to domestic courts, Rule 11 *bis*D conferred authority on the Referral Bench to order the continuation of protective measures for victims and witnesses and enabled the Prosecutor to send observers to monitor the national proceedings on her behalf, while Rule 11*bis* F gave the Referral Bench the right to revoke the referral order at any time before the conclusion of the domestic proceedings: Rule 11*bis*, ICTY RPE and ICTR RPE.

6.1 Case selection and sequencing

While committed to exercising its mandate independently and impartially and making apolitical decisions on case selection and prioritisation, the OTP has faced significant challenges given its need for State co-operation. This issue is at the heart of its engagement in Côte d'Ivoire and Libya where it faces claims about a pattern of politicisation due to the absence of prosecutions against the pro-Ouattara or revolutionaries, respectively.[72] Generally, the OTP's lack of ability to use UN Charter Chapter VII enforcement powers to overcome evidence collection difficulties like the ICTY and ICTR has meant the prioritisation of co-operative relationships over more critical engagement and attention to abuses by both sides of a conflict.[73]

While co-operation is not part of the OTP's calculus on selecting cases to open under its Policy on Case Selection and Prioritisation, operational viability determines which cases are prioritised and the approach pursued.[74] This includes assessing the likelihood of co-operation; the availability of evidence and risk of its degradation; the security situation and possibility to protect persons from risks that might arise from their interaction with the OTP; and the potential to secure the suspect's appearance before the Court.[75] The OTP has expressly referred to a sequential approach in Côte d'Ivoire.[76] In contrast, in Libya the OTP has apparently not followed a sequential approach per se but selected and prioritised cases based on an assessment of where it

[72] Alana Tiemessen, 'The International Criminal Court and the Politics of Prosecutions', (2014) 18 (4-5) The International Journal of Human Rights 444-461, at 453-454 and 456.
[73] McAuliffe, 'Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11is Inapplicable to the ICC's Complementarity Regime', supra note 51, at 392-394 and 396-398.
[74] OTP Policy on Case Selection and Prioritisation, 2016, paras. 50 (e) and 51. Note also OTP Policy on Preliminary Examinations, November 2013, para.70.
[75] OTP Policy on Case Selection and Prioritisation, 2016, para.51.
[76] Interview record 5 – Head of Jurisdiction, Complementarity and Co-operation Division (JCCD), ICC Office of the Prosecutor, 30 November 2017.

could achieve the most impact.[77] Despite an inability to rely on co-operation from the LNA to access crimes sites around Benghazi; focusing on gathering evidence from different sources, especially online and communications data and financial tracing means investigations concerning Al-Werfalli are progressing.[78] The OTP has pursued and unsealed warrants against him based not only on the prospect of securing his arrest but an assessment of the potential deterrent impact generally.[79]

Other cases should also be prioritised if this reasoning is applied more broadly and the OTP expands its use of alternative investigative techniques to reduce its reliance on State co-operation. However, rather than deterrence or retribution, refocusing on the potential to have a greater expressive impact through promoting global norms may enhance the Court's legitimacy.[80] As De Guzman argues, the Court should develop its underlying goals and priorities to better reflect the values of its local constitutive communities as well as international.[81] These goals and priorities should then inform decisions on situation and case selection.[82] This may result in more balanced justice as there would be less risk of one-sided prosecutions.[83]

6.2 Reverse co-operation

While Article 93 (10) of the Rome Statute first necessitates a request for co-operation being made for assistance, even when States do seek the OTP's assistance, a response

[77] Interview record 6 – OTP Official, 4 December 2017.
[78] See Reponse of the ICC Office of the Prosecutor to an Outcome Report and Recommendations from OSJI and Amsterdam Law School based on a workshop held on 25-26 March 2020 on 'Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms and Practices', supra note 61, at pp.12-13.
[79] Interview record 5 – Head of Jurisdiction, Complementarity and Co-operation Division (JCCD), ICC Office of the Prosecutor, 30 November 2017.
[80] See Margaret de Guzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", (2012) 33 (2) Michigan Journal of International Law 265-320.
[81] De Guzman, ibid, at 269 and 299-320.
[82] De Guzman, ibid, at 281-289.
[83] See De Guzman, ibid, at 272.

is not always forthcoming. Côte d'Ivoire's experience has parallels with that of the DRC, where military prosecutors sent requests for information to the OTP and never received a response.[84]

Newton has proposed amending Article 93 (10) of the Rome Statute to make it mandatory for the ICC to respond to a State's request for co-operation by replacing 'may' with 'shall', putting reverse co-operation on an equal basis to State co-operation with the Court under Article 87.[85] A reciprocal obligation would reinforce the values underlying positive complementarity and confirm that the relationship between States and the ICC is horizontal, far removed from the vertical arrangement between Rwanda and the former Yugoslavia and the ad hoc tribunals under primacy. Yet, prosecutorial discretion is important and the risk of such an obligation being abused by States in bad faith is too high. There is good reason for reverse co-operation being considered on a case-by-case basis with assistance based on the degree of trust between counterparts.[86] For example, in contrast to Kenya, the OTP has provided Libyan counterparts with assistance at an operational level, supporting domestic investigations concerning human trafficking and the ill-treatment of migrants.[87]

The problem generally is the underuse of the existing provision for reverse co-operation. While States are increasingly relying on Article 93 (10), there is a

[84] Open Society Justice Initiative, 'Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya' (New York: OSJI, 2011), at 26, citing an interview with an official in the military justice system in the DRC.
[85] Michael A Newton, 'The quest for constructive complementarity', Chapter 11 in Stahn and El Zeidy (Eds), *The International Criminal Court and Complementarity: From Theory to Practice*, supra note 5, 304-360, at 333-334.
[86] Interview record 4 – OTP Official, 30 November 2017 (noting that Kenya's request for assistance in the context of its admissibility challenge was considered disingenuous).
[87] Interview record 6 – OTP Official, 4 December 2017.

significant need for the OTP to strengthen its responsiveness, as recognised in its Strategic Plan for 2019-2021.[88] The OTP has already identified knowledge sharing, preserving evidence, and sharing information as priorities and committed to responding to all requests within set timeframes.[89] However, two key challenges are foreseeable. First, it is doubtful that the Jurisdiction, Complementarity and Co-operation Division (JCCD) will be able to respond as diligently as intended without a real increase in staffing levels. Secondly, it is recommended that situation-specific practical guidelines be established over evidence sharing, informed by the contextual understanding and experience of the JCCD and Integrated Teams acquired over time. Without such guidelines to give concrete effect to the overarching framework of Article 93 (10), there is unlikely to be a substantive change in responsiveness which depends on resolving issues over ability and willingness, information security, witness protection and the integrity of concurrent proceedings.

Further, even where it is used, sometimes Article 93(10) is read too restrictively as not providing a basis for general technical assistance or training, for example, on case and evidence management to enable evidence sought to be used effectively in local proceedings.[90] While the Registry has engaged in outreach, public information and capacity-building projects to develop local witness protection programmes and legislation implementing the Rome Statute, as McAuliffe identifies, "these disparate activities are unlikely to coalesce into concerted action to ensure the state can undertake credible, competent and fair trials like those that flowed from Rule

[88] OTP Strategic Plan 2019-2021, dated 17 July 2019, at pp.10 and 29.
[89] OTP Strategic Plan 2019-2021, at pp.29-31 and 38 (setting targets to send an initial yes/no response to all requests within three months and a substantive response to 80% of requests within six months).
[90] McAuliffe, 'Bad Analogy: Why the Divergent Institutional Imperatives of the ad hoc Tribunals and the ICC Make the Lessons of Rule 11is Inapplicable to the ICC's Complementarity Regime', supra note 51, at 419.

11bis".[91] While the JCCD has organised trainings and conferences infrequently, resource constraints necessitate outsourcing capacity-building to States and other international, intergovernmental, regional or national organisations. For example, in Libya, training and support for legislative and policy reform by EUBAM, UNSMIL, USIP and the ICTJ has contributed to police and judicial capacity. Nevertheless, there needs to be greater engagement by the OTP specifically in concrete matters to achieve the desired catalytic effects.

The OTP has focused on catalysing local prosecutions but not directly enabling them. For example, if the ICC was able to assist with the establishment of witness protection at the domestic level, it would also facilitate the safe sharing of the statements of those witnesses, thereby enabling local prosecutions. States Parties should fund such activities if they are serious about complementarity having a positive impact on the rule of law.

6.3 Communication: co-operation partners and manner of engagement

Aside from case selection matters, the OTP's choice of partner is also problematic due to the perception of partiality created from engaging in media opportunities with the political elite – President Ouattara in Côte d'Ivoire and Prime Minister al-Serraj in Libya. It is also possible to see an analogy with its approach of predominantly engaging with the executive in Uganda and the DRC, with similar repercussions on local perceptions.[92] While the Rome Statute requires communications to initially be addressed to the executive as they are to be "transmitted through the diplomatic

[91] McAuliffe, ibid, at 420.
[92] Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press, 2018), at 64, 80 and 174.

channel", this does not prevent the OTP engaging in direct dialogue with judicial counterparts thereafter.[93]

Maintaining a good working relationship with national co-operation focal points is instrumental for this.[94] At the same time investigation teams need to have the necessary authority and support to develop relationships and react to developments quickly.[95] As such, OTP reforms embedding a JCCD International Co-operation Advisor in Integrated Teams led by a Senior Trial Lawyer from the Prosecution Division for each situation and delegating more authority to these Integrated Teams are positive developments that are already helping to facilitate these relationships.[96]

In contrast to the Kenya situation where it was difficult to engage beyond the executive level as no prosecutors in Nairobi were actually handling the cases;[97] in Côte d'Ivoire and Libya, there are ongoing domestic investigations. The OTP Integrated Teams have established working relationships with their direct counterparts in both countries. However, there is scope to deepen these relationships in Côte d'Ivoire through a two-way exchange of information and evidence, assistance with witness protection and forensic capability, and ensuring the OTP provides more

[93] Article 87 Rome Statute. See William W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008) 19 Criminal Law Forum 59-85, at 72.
[94] The author met with the co-operation focal point for Côte d'Ivoire to the ICC in Abidjan in October 2018. While she was unable to meet the co-operation focal point for Libya, it is understood that there is a focal point in all ICC situations: Interview record 5 – Head of Jurisdiction, Complementarity and Co-operation Division (JCCD), ICC Office of the Prosecutor, 30 November 2017.
[95] See ICC OTP Kenya Cases: Review and Recommendations, Executive Summary of the Report of the External Independent Experts, Annex 1 to Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation, 26 November 2019 (finding that micro management by the first Prosecutor, top-heavy decision-making through the OTP Executive Committee ('Ex-Com') and the previous structure for JCCD involvement contributed to the problems in Kenya) . The full report remains confidential.
[96] See ICC OTP, Full Statement of the Prosecutor, Fatou Bensouda, on external expert review and lessons drawn from the Kenya situation, 26 November 2019 at pp. 4, 7 and 11.
[97] Interview record 4 – OTP Official, 30 November 2017.

support to its local counterparts by utilising its diplomatic tools and international networks to bolster political will.

In situations like Libya where the State does not have exclusive control in all areas, the OTP faces a greater problem concerning co-operation partners. Positive practices include receiving a delegation of judges and prosecutors from all areas of Libya and engaging with representatives of the House of Representatives as well as the recognised Government.[98] However, it is unable to formally engage with non-State entities. Since most international organisations in Libya, including UNSMIL and EUBAM, have the same difficulty, it is impossible to rely on such partners to exert influence. It is widely known that Egypt, the United Arab Emirates and France do engage with the LNA, all of whom are legally bound in one way or another to co-operate. However, the OTP is largely reliant on the ASP to secure compliance.

Scheffer has proposed that a Select Committee of ICC State Party Representatives be set-up through the ASP to communicate directly with non-co-operating States Parties, imminent breakaway States Parties and non-party States to improve enforcement.[99] This recommendation has merit as it would provide a degree of separation between the Prosecutor and politics, reinforcing the Court's neutrality and independence. It would also provide necessary support to the OTP to assist it to achieve its objectives, including in regard to positive complementarity, by reinforcing messaging over the need for co-operation and political will.

[98] Interview record 6 – OTP Official, 4 December 2017.

[99] David Scheffer, 'Create a Select Committee of ICC State Party Representatives', ICC Forum (28 June 2018) under 'In the Rome Statute's Third Decade, What Key Reforms Could Make the International Criminal Justice Project Stronger, More Efficient, and More Effective'; and expanded on in David Scheffer, 'Improving Communication with States', Chapter 33 in Richard E. Steinberg (Ed), The International Criminal Court: Contemporary Challenges and Reform Proposals, 367-370 (2020, Leiden; Koninklijke Brill NV).

Nevertheless, the OTP could still use existing communication tools and channels to greater persuasive effect. The OTP's Strategic Plan for 2019-2021 makes communication a key priority.[100] This includes a plan to hold meetings with States Parties twice a year to update them on progress, publishing an annual report measuring the OTP's achievements against performance indicators and collaborating in outreach with the Registry.[101] The OTP already provides regular updates to all States on progress in the Libya situation in the Prosecutor's Statement to the Security Council. It has used the latter effectively, together with press statements, to regularly remind all parties in Libya that the Court is watching, with a view to having a deterrent impact. However, in Côte d'Ivoire, communications are limited to contributing to the annual report on the Court's activities and ad hoc press statements or appearances. Very little is publicly known as to what is happening in CIV-II. Many international, regional and national organisations are not even aware there is a second investigation. As such, there is scope to increase transparency and persuasive effect by engaging in more public forums and with the international and Ivorian media, while still safeguarding investigative confidentiality.

It is essential that the OTP becomes more proactive rather than reactive, to mitigate the effects of misinformation and targeted media campaigns by those with an interest in undermining the Court's credibility. Moreover, it may increase its catalytic impact by focusing on core messaging around equal accountability before the law to add expressive value and influence normative change.

[100] OTP Strategic Plan 2019-2021, at pp.6 and 28.
[101] OTP Strategic Plan 2019-2021, at p.28.

6.4 Communication with affected communities and civil society

To some extent, the results from Côte d'Ivoire reflect the difficulty of sustaining effective engagement with affected communities through the lifespan of complex cases. Outreach was slow to get off the ground due to resource constraints as, despite the ICC and Ivorian Government concluding a Memorandum of Understanding in February 2012, the opening of the Abidjan field office was delayed to September 2013 while equipment was moved from operations in Chad.[102] The first Registry outreach officer was only in post a year later from October 2014, three years after the opening of an investigation, as the post was redeployed from the CAR.[103] Nevertheless, a 2015 study of victim participants showed victims in Côte d'Ivoire had a higher degree of understanding and support for the Court than respondents from Kenya, Uganda and the DRC.[104] The difficulty is in managing expectations and ensuring clear messaging throughout the Court's engagement in the situation as the more time that passes, the greater the risk of disillusionment.

The Registry has been relatively active in Côte d'Ivoire, including running an outreach campaign throughout 10 regions of the country to coincide with the 20th anniversary of the Rome Statute, involving local intermediaries, focal points, radio and print media in 2018;[105] and organising awareness-raising sessions with 280 representatives of civil society organisations, NGOs and media together with the

[102] Human Rights Watch, 'Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire', 2015, at 20.
[103] Ibid, at 46.
[104] University of California Berkeley School of Law, Human Rights Center, 'The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court – Uganda, Democratic Republic of Congo, Kenya and Côte d'Ivoire, 2015 at 60-69.
[105] ICC-ASP/17/9, Report on Activities of the International Criminal Court (2017-2018), 12 November 2018, for the 17th Session of the ASP, at paras 29-33.

National Council for Human Rights (formerly CNDHCI) in 2019.[106] However, the Registry has a separate mandate and is unable to comment on OTP decisions, especially the rationale behind case selection and investigative strategy.[107] The results on the Court's impact in both Côte d'Ivoire and Libya[108] show there is still a gap to be filled in this regard.

Where the OTP has directly engaged with victims' groups and civil society to explain the use of sequencing, this was well-received and serves as a positive example in regard to its impact on local perceptions of independence and impartiality. For example, a civil society interviewee reported a two-way conversation with OTP representatives where they explained that the decision to adopt a sequencing strategy followed from lessons learned in Kenya where going after the President and Vice-President simultaneously meant the Kenyan authorities stopped co-operating.[109] Yet, such efforts to engage in dialogue with civil society organisations have been too sporadic.

Further, the OTP responded timely to the dissemination of inaccurate reports on social media in Côte d'Ivoire over the confirmation of charges and provisional detention of Laurent Gbagbo. Yet, since then an ever wider space has been left for a rhetoric of selective justice and Western imperialism propagated by some media outlets to grow. In particular, communications should focus on sensitising affected

[106] ICC-ASP/18/9, Report on Activities of the International Criminal Court (2018-2019), 21 October 2019, for the 18th Session of the ASP, at paras 38-39.
[107] See Matias Hellman, 'Challenges and Limitations of Outreach: From the ICTY to the ICC', Chapter 10 in Christian De Vos, Sara Kendall and Carsten Stahn (Eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (2015, Cambridge: Cambridge University Press), 251-271,at 262.
[108] Interview record 11 –interviewee, Lawyers for Justice in Libya, 16 March 2018 (noting "they don't reach out to victims – they are woefully underfunded…the issue is that victims' outreach is done by the Registry, not by the OTP".)
[109] Interview record 21 – interviewee, Convention Sociéte Civile de Côte d'Ivoire, 27 March 2018.

communities on the reasons for the disparity in investigation times between CIV I and II as the OTP's current strategy is to be trial ready at the time of requesting arrest warrants or no later than the confirmation of charges hearing.[110]

However, it is difficult for the OTP to do more with less, with the gap between the OTP's basic size and the approved budget increasing to 14 million Euro in 2019.[111] One solution, as the OTP has already recognised, is increasing joint outreach activities.[112] For example, back in March 2017, the OTP engaged in joint outreach with the Registry in sensitising diplomats, Ivorian civil society organisations and media representatives on the Court's work.[113] Another option is co-developing localised outreach with local NGOs or institutions such as the National Council for Human Rights - like the Registry – likely to be the most effective given they know the local context and culture and could facilitate access to a wider audience.

Further, there is a clear need to separate offices for outreach and investigative activities. This would mean the Abidjan field office could be more open, facilitating a two-way information exchange with local victims' groups and wider civil society. It would be best for the OTP to have other bases in-country to conduct witness interviews and other confidential operational activities, including a forward operating

[110] ICC OTP, Report on Implementation of the OTP Strategic Plan 2016-2018, 23 August 2019, p.16 at para 23, noting that pre-2012 the average duration between the opening of an investigation and seeking an arrest warrant was 12.3 months whereas post-2012 it is over 42.5 months.
[111] ICC-ASP/18/2/Rev.1, Final Audit Report on the Budget Process of the International Criminal Court, 7 August 2019 at p.10-11; and ICC-ASP/14/21, Report of the Court on the Basic Size of the Office of the Prosecutor, 17 September 2015.
[112] Response of the ICC Office of the Prosecutor to an Outcome Report and Recommendations from OSJI and Amsterdam Law School on 'Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms and Practices', supra note 61, at p.16 (citing joint OTP-Registry outreach in Côte d'Ivoire as a positive example and highlighting that a joint approach is increasingly part of the OTP's approach to communication with affected communities)
[113] ICC-ASP/16/9, Report on Activities of the International Criminal Court (2016-2017), 2 November 2017, at para.29.

base in the West of Côte d'Ivoire to investigate CIV-II most effectively. Moreover, strengthening field presence by moving away from the general approach of sending rotating pairs of 8 investigators on mission for two weeks at a time in five week cycles[114] to the use of in-country satellite investigation teams[115] enhances cultural awareness and helps in developing trust with victims and witnesses. While the OTP has deployed investigators to the field in Côte d'Ivoire for longer;[116] this research shows that maintaining Abidjan as the core base has limited the impact given that most crimes in which the pro-Ouattara are implicated took place in the West.

In turn, Libya shows the challenges of engaging from afar when the security environment restricts in-country activity, with 2018 being the first time OTP investigators were able to enter Libya in five years.[117] While the OTP has made efforts to engage directly, the difficulty of accessing affected communities carries the risk of over-reliance on intermediaries[118] and placing undue weight on the findings of NGOs or other 'first responders'.[119] First responders often have better access to both witnesses and physical evidence and established community presence which encourages survivors to come forward, especially in sexual and gender-based violence cases.[120] However, interviewees highlighted the OTP's tendency to engage

[114] ICC-ASP/14/21, Report of the Court on the Basic Size of the OTP, supra note 112, p.45, at para.28.
[115] Response of the ICC Office of the Prosecutor to an Outcome Report and Recommendations from OSJI and Amsterdam Law School on 'Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms and Practices', supra note 61, at p.10.
[116] See ICC OTP Strategic Pan 2016-2018, dated 16 November 2015, p.44 at para.20.
[117] Report on Activities of the International Criminal Court (2017-2018), supra note 106, at para.65.
[118] Note ICC Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with intermediaries, March 2014.
[119] See generally Rafael Braga da Silva, 'Sherlock at the ICC? Regularising Third-Party Investigations of International Crimes in the Rome Statute Legal Framework', (2020) 18 (1) Journal of International Criminal Justice 59-86; and Susana SáCouto, 'Improving NGO and IGO Capacity to Gather Evidence', Chapter 3 in Richard H. Steinbrg (Ed), *The International Criminal Court: Contemporary Challenges and Reform Proposals*, (Leiden: Koninklijke Brill NV, 2020), 22-36.
[120] Note ICC OTP Policy Paper on Sexual and Gender-Based Crimes, June 2014, at para 107; and Stephanie Barbour, 'Supporting Accountability for Sexual Violence in the Syria and Iraq Conflicts:

more with NGOs in major hubs like London than Libyan grass-roots organisations on the ground.[121]

In both Côte d'Ivoire and Libya, civil society groups expressed frustration that the relationship with the OTP is one-way, having received little to no news on what the OTP is doing with any information they shared or not having the opportunity to engage in a real dialogue.[122] However, where a result is seen, the response is positive, with NGOs that submitted communications on Al-Werfalli pleased with the outcome.[123] While every context is different, the widespread use of social media in Libya has not only provided new investigation opportunities but challenged the OTP to innovate to communicate more effectively with local stakeholders.[124] However, there is scope to go further, including a monthly two-way exchange with civil society on Facebook or other interactive social media platforms.[125] Until recently, relying on the intranet to communicate with stakeholders in Côte d'Ivoire would have resulted in abject failure based on the lower access rates and cultural context which necessitates face-to-face communication. However, the health pandemic has seen more Ivorians embracing virtual technology.

Innovations, Good Practices, and Lessons Learned through Private Criminal Investigations' (2020) 18 (2) Journal of International Criminal Justice 397-423.

[121] Interview record 34 – Libyan activist, 13 October 2018.

[122] Interview record 11 – interviewee, Lawyers for Justice in Libya, 16 March 2018; Interview record 36 – interviewee, Réseau Action Justice et Paix (RAJP), 16 October 2018.

[123] E.g. Interview record 30 – interviewee, DAAM Center, 1 October 2018 (noting that the DAAM Center, Cairo Institute for Human Rights Studies and LFJL submitted files to the OTP which they saw result in arrest warrants being issued against Al-Werfalli).

[124] Response of the ICC Office of the Prosecutor to an Outcome Report and Recommendations from OSJI and Amsterdam Law School on 'Improving the Operations of the ICC Office of the Prosecutor: Reappraisal of Structures, Norms and Practices', supra note 61, at p.13.

[125] Interview record 11- interviewee, Lawyers for Justice in Libya, 16 March 2018.

7. Conclusion

This Chapter has shown that while the ICC's results are mixed in terms of catalysing genuine investigations and prosecutions at the domestic level, it has had an indirect positive impact on legislative reform, empowering civil society and other normative change. There have also been genuine improvements by the OTP in engagement, irrespective of the method by which the situation came before the ICC. However, the Court's intervention has also triggered unintended negative effects. These empirical findings show that the ICC's engagement in conflict affected societies should be considered and measured more broadly in terms of its potential normative, expressive and demonstration effects.

Although Côte d'Ivoire and Libya are unique contexts, general reform suggestions from lessons learned in these situations include adopting a qualified deference model to guide admissibility assessments, proactive use of reverse co-operation and rethinking communicative frames to make Court practices more persuasive and improve engagement with affected communities.

Chapter VIII concludes by drawing together the findings on the key themes examined in this thesis - the ICC's place in relation to national transitional justice processes, action at the domestic level catalysed by the ICC's engagement and the impact on the rule of law, multi-level dialogue going forward, and lessons learned for ICC reform.

VIII. CONCLUSION

1. The ICC's Place in Relation to National Transitional Justice Processes

The ICC was not designed to be a world human rights court and was not accorded primacy by the drafters of the Rome Statute. It is a court of last resort. The primary responsibility to provide redress is with the State, whether this be a State Party, as in the case of Côte d'Ivoire, or a State referred by the UN Security Council, like Libya. Complementarity effectively means the ICC must extend a margin of appreciation to domestic justice efforts, even if this is qualified by elementary standards of due process. In this regard, the Court of Appeal in *Al-Senussi* correctly determined his case was inadmissible before the ICC as Libya was already investigating him for the 'same conduct' at the domestic level and the high threshold applicable to determining these proceedings were not genuine was not met. Moreover, the high threshold for exercising jurisdiction applies even in the most difficult cases involving 'own side' investigations; namely, cases concerning crimes allegedly committed by the victors while overthrowing incumbents accused of gross human rights abuses. Ultimately, local ownership has a greater impact on the rule of law.

The ICC provides a means to fight impunity where States are unable or unwilling to investigate and prosecute in a genuine manner. It offers the hope of justice for victims who would otherwise go without redress, having been abandoned by their State in a breach of the social contract and international obligations. The inappropriate use of resources at the OTP's disposal through its engagement in investigations where concurrent proceedings are genuinely being conducted domestically has a direct impact on its ability to effectively investigate other matters and conclude fair and

efficient trials without delay. In turn, the ICC offers enormous potential beyond a limited number of prosecutions in The Hague as it may foster justice and accountability at the level closest to the affected communities through positive complementarity. Yet, the analysis here demonstrates that the ICC may have acted in cases it should have deferred earlier to the national judiciary and instead supported domestic investigations and prosecutions through reverse co-operation. Further, it shows there is a need for better synchronisation between the ICC and domestic mechanisms.

An ongoing issue is how to implement the concept of positive complementarity in practice. It is considered that more could be done by the OTP to catalyse equal access to justice and accountability at the domestic level. Contrary to the emerging view that capacity-building is best left to the wider human rights community and international, regional and local organisations and civil society, it is considered that this is still part of the OTP's mandate. The OTP has an instrumental role to play in identifying gaps or otherwise contributing to dialogue with stakeholders on the ground and partners in the international community in tackling issues impeding the fight against impunity in the specific local context. Yet, the analysis here shows that, to date, any 'justice cascade' effect from the ICC's engagement in Côte d'Ivoire and Libya is minimal as the focus has been on proceedings at the international level.

Better co-operation between the OTP and domestic prosecutors, especially regarding case selection and decision-making on the scope of the charges, would ensure that investigations and prosecutions capture the extent and different patterns of criminality and lead to perpetrators at different levels of responsibility being held to account. As

shown by the analysis in Chapter III, the ICC's approach to admissibility has given rise to a narrowing of domestic proceedings in an effort to mirror the cases under investigation by the OTP. This means that some victim communities may be left without redress unnecessarily due to case selection.

Chapter IV discussed the ways in which the ICC could implement positive complementarity by providing reverse co-operation to assist States in investigations and trials being conducted at the domestic level. Further, it showed it is possible to build national capacity even in the course of ICC proceedings through on-site investigations and in situ proceedings among other mechanisms. These tools are still underused. Multi-level dialogue and synergies between the international and domestic levels to give substance to the principle of complementarity could also include assistance with legislative reform, especially the introduction or improvement of mechanisms for legal co-operation to enable mutual assistance in concrete cases, ensuring the protection of victims and witneses and building respect for the rights of the accused and due process guarantees.

2. Catalysing Action at the National Level

Chapters V and VI show that the ICC has catalysed action in Côte d'Ivoire and Libya but that the results have been limited in terms of establishing or consolidating the rule of law at the local level. In both instances, the process has not been linear but full of highs and lows, showing the importance of a context-specific approach and responsiveness to situational change.

Positive national level responses include investigations and prosecutions; legislative reform; normative change in empowering victims and national civil society organisations to advocate for greater access to justice; and fostering the development of a stronger defence culture through the ICC's demonstration effect. These effects were analysed in detail in Chapter VII. However, in all these areas, the ICC's engagement was just one among many different factors which prompted or otherwise contributed to the reforms and it is not possible to precisely quantify its impact.

As discussed in Chapter VII, the ICC's engagement has also given rise to unintended negative effects, especially the further weakening of public trust in domestic judicial institutions. In many respects this is due to the Court's dismissal of admissibility challenges raised by Côte d'Ivoire and Libya (in regard to Saif Gaddafi) and the critique of the domestic judicial systems by Chambers in the course of this litigation. The ICC's assertion and retention of jurisdiction was seen by many as confirmation of the inadequacy of their national courts, reaffirming their belief that they would never be able to access justice nationally and as such, the ICC is their only hope. This has overshadowed the remarkable progress that has been made in justice sector reform in both countries in the face of herculean obstacles.

Other unintended negative effects have arisen in Côte d'Ivoire from the OTP's approach of competing with their national counterparts rather than engaging in a deeper co-operative relationship to support domestic investigations, for example, through the reciprocal exchange of evidence. Yet, at the same time, the Cellule has experienced a backlash as its work in investigating and prosecuting post-election violence cases is still closely associated with the ICC. This backlash was in the form

of budget cuts and finally, the adoption of a wide-ranging amnesty which has effectively terminated most of its significant cases before the accused could be brought to court for trial. Were it not for the amnesty and surrounding developments showing increased interference with judicial independence, the conclusion reached from this research might have been different.

At the opening of the ICC investigation into each situation, the issue was a lack of capacity – domestic authorities were considered 'unable' to effectively investigate or prosecute based largely on the unavailability of the respective justice system under Article 17 (3) of the Rome Statute. However, today, the key problem in both countries is the issue of independence and impartiality in terms of 'unwillingness' pursuant to Article 17 (2) of the Rome Statute given political interference or omission in starving the established justice mechanisms of the necessary resources to proceed effectively and/or the prevailing security environment. Amnesty or pardon post-charge may bring the issue under the limb of 'unable' due to the 'unavailability' of the national judicial system to victims seeking access to justice, but if the system is only unavailable due to political decisions which make it unavailable, for example, the amnesty in the case of Côte d'Ivoire, the larger issue is clearly one of 'will' under Article 17 (2)(a) of the Rome Statute.

It is considered that the OTP could do more to encourage unwilling States to undertake genuine proceedings domestically while following a strategy of positive complementarity. Libya has presented unique challenges, not least due to pervasive insecurity and the existence of non-State entities exercising control over part of the territory. However, one of the contributing factors to the ICC's limited impact on the

rule of law is the same as that applicable in Côte d'Ivoire – the Court's weak expressivist effect from the OTP's selection and prioritisation of cases and/or use of sequencing which has been perceived locally as political and unbalanced. As the OTP's approach is mirrored on the domestic level, this has resulted in an overwhelming impression of victor's justice among affected communities. The new governments have had little incentive to allow prosecutions against their allies for crimes committed during the political transition (the post-election crisis in Côte d'Ivoire of 2010-11 or Libya's Revolution of 2011). Moreover, in Côte d'Ivoire, those who followed the *Gbagbo and Blé Goudé* proceedings now doubt the relative quality of the ICC's procedures. The ICC's diminishing influence has arguably meant that those in power no longer feel compelled to allow domestic processes which showed so much promise to continue.

Nevertheless, there is a real sense that it is not the end of the story but a critical junction, with Côte d'Ivoire heading into presidential elections in October 2020. In turn, a ceasefire was declared in Libya with a view to parliamentary and presidential elections being held in March 2021, though there is no certainty it will hold.[1] The OTP is between a rock and a hard place in evaluating its options between exercising restraint and intervening further in these situations, but the work is not finished. As the OTP has declared both the CIV-II and Libya investigations priorities for 2020 and 2021, further international action is likely.[2] If the CIV-II investigation results in public warrants being issued against the pro-Ouattara post-election then, subject to

[1] The Guardian, Associated Press in Cairo, 'UN-supported Libya government and rival authority call ceasefire', 21 August 2020, at: https://www.theguardian.com/world/2020/aug/21/rival-libya-parliament-backs-un-supported-government-ceasefire (last accessed 24 August 2020).

[2] ICC, 'Proposed Programme Budget for 2020 of the International Criminal Court', ICC-ASP/18/10, 25 July 2019, at para.21 (referring to a decision by the OTP's Executive Committee); and ICC, 'Proposed Programme Budget for 2021 of the International Criminal Court', ICC-ASP/19/10/AV, 7 August 2020, at para.23.

the election results, this still has the potential to reincentivise domestic proceedings in Côte d'Ivoire. Further Libyan proceedings appear more remote, but cannot be ruled out. Accordingly, the relationship between the ICC and the domestic authorities and the Court's approach to complementarity is still a live issue.

3. Multi-Level Dialogue with Ivorian and Libyan Counterparts Going Forward

For a greater impact on the rule of law going forward, there is a need to enhance co-operation between the OTP and domestic prosecutors. The Libyan situation is a positive example where the OTP is co-operating with local counterparts in a more joined-up approach remnant of complementarity as partnership. The emphasis on a division of labour in regard to organised immigration crime shows a greater respect for national sovereignty and an understanding that normative change requires local buy-in. While the impact on the rule of law in Libya has been limited, this is due more to external factors outside the Court's control preventing both effective local ownership and international proceedings, than actions the OTP may or may not have taken.

Nevertheless, it is considered that the deterrent and catalytic value would be greater if the ICC was seen as closer to the ground, with the best way of doing this in the current security climate being to open an office in neighbouring Tunisia. In turn, more extensive outreach by the Field Office in Abidjan and enhanced co-operation with the Cellule and victims' associations would increase the likelihood of the ICC having a positive outcome on the rule of law in Côte d'Ivoire in the long-term. Further, in the event further investigations proceed to the prosecution phase and it is determined that trials must be conducted by the ICC in the circumstances then

applicable, in situ proceedings would still be beneficial for national capacity-building and may have a lasting positive impact on the affected communities in the situation countries.

4. Lessons for Reform of the ICC

As discussed in Chapter VII, while Côte d'Ivoire and Libya are unique contexts, some lessons learned from examining the ICC's engagement in these situations are capable of wider application. Proposals for ICC reform following from this research include the adoption of a qualified deference model and amendment of the ICC's Rules of Procedure and Evidence to introduce operational guidelines on how to assess admissibility. Further, the proactive use of reverse co-operation is encouraged, with the OTP being more responsive to State requests for assistance, particularly in the sharing of evidence for use in domestic investigations and prosecutions and technical assistance over witness protection. Finally, it is necessary to rethink communicative frames to make Court practices more persuasive and improve engagement with affected communities and civil society. This entails refocusing communications on core messaging around equal justice and accountability to end impunity for international crimes, greater field presence and making innovative use of technology to reach out to affected communities and engage in a genuine two-way exchange with civil society.

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