

Conflicts of Legitimacy

A 'legitimate' International Criminal Court for post-Gaddafi Libya

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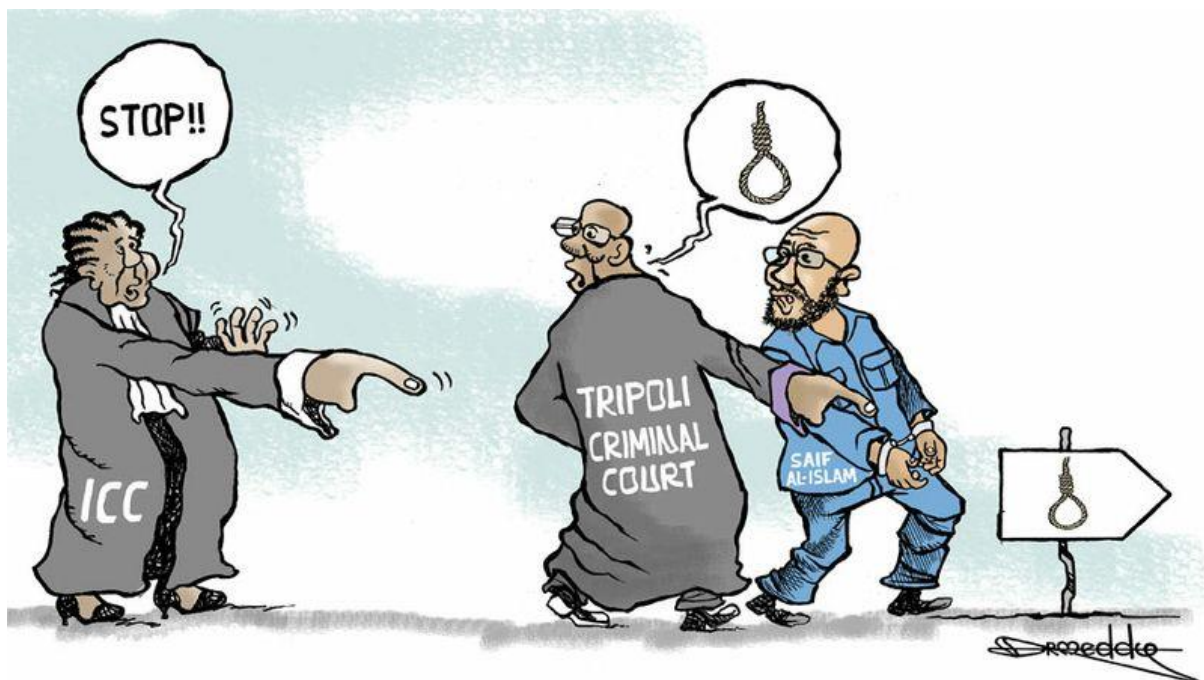
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“Order Libya to Surrender Gaddafi to the ICC” (Dr Meddy, Cartoon Movement, 25 August 2015)

Abbreviations

CSO	Civil Society Organization
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
IS, ISIS	Islamic State of Iraq and Syria; Islamic State of Iraq and the Levant; Daesh
LFJL	Lawyers for Justice in Libya
NGO	Non-Governmental Organization
NTC	Libyan National Transitional Council
OPCD	ICC Office of Public Counsel for the Defence
OTP	ICC Office of the Prosecutor
PIDS	ICC Public Information and Documentation Section
P-TC	Pre-Trial Chamber
Rome Statute	Rome Statute of the International Criminal Court 1998
<i>Thuwar</i>	Libyan revolutionaries or rebels ¹
UDHR	Universal Declaration of Human Rights
UNSC	United Nations Security Council
UN Charter	Charter of the United Nations 1945

¹ Friedman (2011)

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1. Introduction

Broadly defined, the concept of legitimacy operates as a “justification for the exercise of authority”². Without more, it is an idea relevant in almost all stages of conflict – fuelling the discourses which initiate and escalate violence, whilst also encapsulating one of the very things post-conflict resolution efforts seek to restore. Accordingly, exploration of legitimacy requires a context-specific approach. For the purposes of the present research, the chosen focus is the International Criminal Court’s jurisdiction to investigate and make corresponding rulings in conflict regions, following alleged violations of international criminal law. Specifically, those arising from the collapse of the Gaddafi regime in Libya since 2011.

From its inception in 2002, the International Criminal Court has represented an increasingly dominant “new order”³ in response to violence conflict⁴. The new order emphasises justice, accountability and an end to cultures of impunity for the gravest crimes, capable of afflicting entire communities by their commission. At least at an abstract level, Brants, Brants and Gould suspect that “few, if any, would question the legitimacy that derives” from such objectives⁵. However, as noted by the same authors, the discourse surrounding the Court has “proliferated” its functions into the sphere of peace and security, to include conflict resolution and deterrence, amongst other aims⁶. As proposed by the ICC itself, the Court’s pursuit of international justice “can contribute to long-term peace, stability and equitable development in post-conflict societies”⁷. As the Court enters these “unchartered waters”⁸, more expansive aims demand that “the ICC communicates to different audiences”⁹, with different expectations – which in turn leaves the institution’s legitimacy contestable.

Against this backdrop, contemporary discussion of the practice of the Court in The Hague depicts its legitimacy as “far from self-evident”¹⁰ – more often characterised as in a state of “crisis”¹¹. The problem posed for the Court derives from the fact that the demands of a

² Danner (2003:511)

³ Nnabuike Malu (Dec 2015)

⁴ JURIST (n.d.)

⁵ Brants, Brants and Gould (2013:143)

⁶ *Ibid.*

⁷ ICC > About (n.d.) See too Darehshori and Evenson (2010:22); Nouwen (2012:186); and Lanz (2007:27).

⁸ Sumita (2007:3)

⁹ Brants, Brants and Gould (2013:146)

¹⁰ Takemura (2012:3)

¹¹ Hornsby (2015) and Kersten (Feb 2015)

‘legitimate’ ICC are “as ambitious as they are contradictory”¹². This “ubiquity” is captured by Vasiliev:

“The concept resides in the realms of political, social, and legal theory as much as in the marshy terrains of morality and political expediency.”¹³

As further developed by Hansen, “the ICC is often ‘trapped’ in between the demands of legalism and the demands arising out of the broader political and social context in which it operates”¹⁴. From such complexity, some have concluded that legitimacy is an impossibility for the ICC. The concept is “best understood as a Kantian antinomy – an unanswerable question that borders on the metaphysical”¹⁵. However, for a Court with an ever-expanding case load, adjudicating on issues which can both disturb the sovereignty of situation area States and attach serious potential consequences for individuals implicated in them, this conclusion cannot be satisfactory. From this premise, this thesis seeks to challenge such assertions, demonstrating – through application of a theoretical framework of legitimacy to the empirical setting of post-Gaddafi Libya – that a combination of criteria can be used to more transparently illustrate ICC legitimacy (or lack of).

A deductive approach has been taken to research. Libya provides the empirical complication to *test* and *observe* a theoretically-informed understanding of legitimacy, ultimately leading to a more realistic understanding of how the concept varies in practice. The situation in Libya was brought before the ICC in early 2011, following revolutionary uprisings against 42 years of the Gaddafi regime. Following events inspired by the wider context of the Arab Spring, Libya has faced two civil wars: the first resulting in the eventual overthrow of the regime and killing of Muammar Gaddafi; and the second ongoing conflict between two rival governments stemming from the aftermath of violence¹⁶. Though Libya is not party to the ICC’s founding Rome Statute, the situation was referred on 26th February 2011 by unanimous UN Security Council Resolution 1970, acting under Article 41, Chapter VII of the UN Charter.

¹² Alvarez (2004:321) in Brants, Brants and Gould (2013:143)

¹³ Vasiliev (2015:2)

¹⁴ Hansen (2014:1-2)

¹⁵ Kiyani (2015:Abstract)

¹⁶ BBC (April 2016)

In the five years following the referral, the ICC has been subjected to significant criticism regarding its Libyan interventions – dubbed the Court’s “latest failure”¹⁷, and characterised by “ongoing mistrust and rancour amongst actors with competing and conflicting interests”¹⁸. Critiques have often been couched in the language of legitimacy, as evidenced by assertions that “post-Gaddafi Libya has been a battleground for legitimacy and effect”¹⁹. However, while the issues underpinning legitimacy have been analysed in depth across several earlier ICC situation areas – notably Uganda²⁰ and Sudan²¹ - less theoretically-grounded analysis of the concept appears to have been undertaken in Libya²².

Aside offering a less-explored research focus, the early and expeditious referral of the Libyan hostilities to the Court also introduced new dynamics into the ICC’s interventions. As recognised by Stahn, the ICC’s role in Libya differed from its conventional “ex post facto mechanism”²³. In Libya, the Court became, at least for some actors, “partially an instrument to constrain ongoing violence and secure accountability in the context of hostilities”²⁴. On the one hand, the possibility to play a preventative role offered potential legitimising weight for the ICC. However, on the other, early interventions by the Court had the potential to “affect the course of the conflict”, shaping perceptions or even *legitimising* claims of rival parties²⁵. The legitimacy of the Court’s intervention in post-Gaddafi Libya is accordingly not only meaningful for reflections on the proper role of the institution, but also on the unfolding direction of the conflict itself. Research seeking greater transparency in the ICC’s claims of legitimacy can therefore also facilitate better understanding of the far-reaching potential empirical consequences of such.

1.1. Research Design and Method

Through an extensive review of the existing socio-legal literature on ideas of legitimacy in the context of international criminal justice, Chapter 2 seeks to answer several preliminary questions. First, what the different ‘factors’ of legitimacy actually are. Three constitutive

¹⁷ McDermott (August 2015)

¹⁸ Kersten (2012b:2)

¹⁹ Kersten (2012b:35)

²⁰ See Nouwen (2013); Nouwen and Werner (2010) and Brants, Brants and Gould (2013).

²¹ See Nouwen (2013) and Nouwen and Werner (2010)

²² With some notable exceptions, e.g. Kersten (2014a)

²³ Stahn (2012:2)

²⁴ *Ibid.*

²⁵ Sumita (2007:4)

understandings of the concept are identified – labelled ‘procedural’, ‘normative’ and ‘sociological’. Second, how to measure these factors; then third, on a theoretical level, how do the different components of legitimacy relate to one another? From these preliminary focuses, a theoretical framework of legitimacy is suggested, by which ICC interventions can be explored and evaluated.

As introduced above, the relevant ICC interventions here are those into post-Gaddafi Libya, since 2011. Emerging dynamics from within the ongoing hostilities – notably security risks – as well as other financial and linguistic limitations, have impacted the scope of the present research. The initial intention was to explore each of the three factors of legitimacy. However, as explained in the subsequent chapter, a proper measure of the sociological account cannot, on the present definition, be achieved without access to the Libyan communities who have been affected by violations of international criminal law. Therefore, while this thesis continues to propose the sociological lens as a crucial element of a complete picture of ICC legitimacy in a given situation, it has not been possible for this (and it is suspected for most) research to explore this aspect within Libya at the present time. Two reflections result from this. First, my research puzzle became qualified to focus on the accessible measures of ‘legitimacy’:

‘How have *procedural* and *normative* factors constructed and deconstructed the legitimacy of the International Criminal Court, in its investigation and prosecution of international crimes in Libya, following the revolutionary uprisings against the Gaddafi regime, beginning February 2011 until present?’

Second, once the stability for access can be guaranteed, this thesis calls for the groundwork within Libyan communities necessary to complete the picture of legitimacy set out below.

The research puzzle is answered through two case studies, explored across two chapters. First, the two cases the ICC has considered from the Libyan situation, against Saif Gaddafi and Abdullah Al-Senussi (set out in Chapter 3); second, the ongoing violence in Libya (Chapter 4). The purpose of distinguishing different ICC interventions in Libya is to produce more focused measures of legitimacy. After introduction of each case within their corresponding chapters, two sub-questions are asked in turn. The first corresponds to the theoretically-informed measure of procedural legitimacy – i.e. ICC compliance with the provisions of the Rome Statute. The second incorporates the normative measure, based on the Court’s adherence to

international human rights standards and norms of international criminal law, specifically here, due process rights and a norm against impunity. Division of discussion between cases was preferred to separation of the two theoretical components on the grounds that this facilitated more fluid reference to and comparison of the often overlapping procedural and normative indicators.

Adopting a qualitative methodology, a mixed selection of sources was relied upon for collection of data to answer my sub-questions. The primary focus was pre-existing documentary data. This was always necessary to the extent that determining certain obligations of the ICC required examination of a number of authoritative texts – such as the Court’s founding Rome Statute, or UN Security Council Resolution 1970 on the Libyan situation. Beyond these ‘core texts’, wider documentary analysis – including public statements and reports, case law of international criminal tribunals and academic publications – accounted for most of the data collected due to both the wealth and accessibility of such information. These documents were sourced through a non-probability sample, according to relevance to the two cases set out above. In an attempt to reduce any bias in selection, relevance was determined on the basis of chains of citations produced by searches of several ‘key phrases’ on established search engines (e.g. Google Scholar, LexisNexis). For example, searching the phrase “ICC Libya impartiality” on Google Scholar led me to the doctoral thesis of Mark Kersten²⁶, references in which in turn led me to the work of the Libyan Working Group²⁷.

In addition to documents, data was also generated through a small (again non-probability) sample of in-depth interviews. The intention here was to ask more specifically about the indicators of legitimacy, hopefully providing more focused reflections than those inferred from the literature. It emerged at an early stage that the detail and often legalistic nature of the data I sought could only be offered by a very specific sample of interviewees – e.g. ICC staff would likely require some professional proximity to the Court’s work in Libya. Potential interviewees were sourced both through reliance on a snowball method from several initial contacts at the Court; and by contacting individuals identified from the relevant literature directly through email and professional networking site LinkedIn. In line with initial intentions of also exploring sociological elements of legitimacy, consistent (though ultimately unsuccessful) attempts were

²⁶ Kersten (2014a)

²⁷ Ferstman, Heller, Taylor and Wilmshurst (2014)

also made to contact NGOs and civil society organisations mandated to work within Libyan communities²⁸.

Eventually, contact was secured with a selection of insightful individuals. This included former defence counsel for Saif Gaddafi; ICC staff who had been detained in Libya; Executive Director of the International Bar Association and Assistant Counsel to the ICC, Mark Ellis, who recently wrote on trials in Libya; and academics and frequent bloggers Mark Kersten and Kevin Jon Heller. A notable absence, despite some initial contact with several individuals, is the lack of voices from within the ICC's Office of the Prosecutor. As developed later, as Libyan interventions have, since 2011, been confined to the pre-trial stages, the Office bore the brunt of the majority of critiques levelled at the Court. OTP insights would therefore have been a valuable addition. However, for reasons set out below, how far contributions from within the Office could or would have differed from the views set out in accessible public statements of the ICC Prosecutor is questionable anyway.

As I anticipated, being conveniently located to The Hague, and thus the Court's premises, facilitated the possibility of interviews with several participants. Interviews were semi-structured, following a list of topics pertaining to the measures of legitimacy – e.g. for procedural legitimacy, various relevant Rome Statute provisions²⁹. Alternatives were required for other interviewees (based in London and the US), which included conducting interviews over Skype, telephone conversations and sending participants a list of written, open-ended questions to offer their thoughts on. Of the alternatives, the former was the clearly preferred option, as it allowed me to capture many of the same dynamics (tone, expression) as an interview in person – though not overlooking the limitations of some connection issues. Many issues were faced with written lists of questions, most obviously simply receiving no reply once contact was established and questions were sent. This made data collection an uncertain and time-consuming process³⁰.

After relevant literature was collected, consent obtained from interviewees, and interview recordings transcribed, a thematic analysis was carried out across the data. Broad themes

²⁸ Including Lawyers for Justice in Libya; the Libyan Lawyers Association; and No Peace Without Justice.

²⁹ See Chapter 2.1.

³⁰ The issues with responses to written questions are largely understandable from working professionals, and deeply saddening in the case of former defence counsel for Gaddafi who passed away in April 2016.

corresponding to the theoretical indicators of legitimacy were recorded – e.g. the relevant Rome Statute provisions and specific international human rights standards. Specifically, for textual data, patterns across varying dates of publication were also noted, with hindsight appearing to alter reflections on the Court’s interventions. All data was then re-examined in detail through the lens of each theme, broadly in line with the “axial coding” stage of strict ‘grounded theory’³¹. This allowed more specific themes to be developed; and for both types of data to be combined, then divided and ordered according to a final list of themes. From this framework of data, presented in Chapters 4 and 5, conclusions on the legitimacy of the ICC in post-Gaddafi Libya could ultimately be drawn.

³¹ Curtis and Curtis (2012:45)

2. The Analytical Concept of Legitimacy

‘Legitimacy’ features as a “catchword in the everyday language surrounding international criminal justice”³². Yet Vasiliev qualifies that this pervasiveness by no means implies “that anything close to a unique theory of international legitimacy has emerged”³³. Two alternative explanations of legitimacy tend to be distinguished within this context. The first is widely referred to as empirical or “sociological legitimacy”³⁴, which draws from the work of Max Weber and recognizes legitimacy as synonymous with socially-*perceived* legitimacy³⁵. The other is labelled both “procedural legitimacy” and “normative legitimacy”. Though the two terms are used interchangeably – “procedural legitimacy *aka* normative legitimacy”³⁶ – it will be argued that conflating both stances overlooks important theoretical distinctions. Drawing on this, my research proposes that the legitimacy of the ICC can be explored through three – procedural, normative and sociological – multidisciplinary as well as ontologically and epistemologically varying lenses and, crucially, their interrelation and implications on one another. However, before attempting any such exploration, each of the components, their theoretical assumptions and empirical significance first require further definition.

2.1. Procedural legitimacy

According to Takemura³⁷, current debate surrounding the legitimacy of the Court (as well as international criminal law more widely) has been “dominated by the procedural aspects of the ICC”. Interpreted strictly, procedural legitimacy embodies Weber’s idea of rational(-legal) authority³⁸, i.e. whether an institution, rule or decision is legitimate depends solely on whether it is made in via the “prescribed routines”³⁹ for legitimacy. Content and substantive consequences (or lack of) are irrelevant to the “technical imperative” of legitimacy⁴⁰. Jumping through the correct procedural ‘hoops’ trumps securing convictions⁴¹. Procedural legitimacy

³² Vasiliev (2015:2)

³³ Vasiliev (2015:3)

³⁴ *Ibid.*

³⁵ Weber (1978:78) as summarized in Hurd (2007a:31)

³⁶ Takemura (2012:5)

³⁷ Takemura (2012:8)

³⁸ Weber (1978:334)

³⁹ Nonet & Selznick (2001:65)

⁴⁰ Glasius (2012:58)

⁴¹ Takemura (2012:8)

therefore closely corresponds to ideas of legality. Epistemologically, the procedural approach does not seek to understand by asking *why*, but rather only to *explain* what and how decisions are made. In terms of ontology, if legitimacy is determined by procedures and systems of rules, there is no scope for individuals to initiate variation or changes to legitimacy without altering the formal *structures*.

With regards to the ICC then, decisions will be procedurally legitimate where they adhere to the procedural requirements laid down for the Court in the Rome Statute⁴². As set out in detail below, in the Libyan context, this concerns only pre-trial procedural requirements, consisting of several jurisdictional prerequisites. First, the requirement that situations are brought before the Court in accordance with one of the prescribed routes laid down in Article 13 (notably referral by a State Party or the UN Security Council). Second, that the facts alleged concern one or more of the crimes falling within the ICC's mandate – notably war crimes, genocide and crimes against humanity – as set out in Article 5. Finally, that cases are admissible before the Court only as a 'last resort' where the case is not investigated by the implicated State; or where the case is being investigated, but the relevant State is either *unwilling* or genuinely *unable* to effectively address the crimes (Article 17). Article 17 reflects the ICC's subsidiary jurisdiction, more widely referred to as the principle of complementarity.

As a final note here, and one relevant to later discussion, it is recognised that while procedural standards are ordinarily fixed, and thus indisputable, the principle of complementarity has further been "conceptualized"⁴³ beyond this technical admissibility test. Complementarity now also captures a "big idea" (promoted by NGOs, academics, politicians and civil society organizations, as well as lawyers)⁴⁴ of a "proactive policy of cooperation aimed at promoting national proceedings"⁴⁵. The Court's own Prosecutorial Strategy defines this phenomenon as 'positive complementarity'⁴⁶. Nouwen highlights how under this "big idea", "agendas beyond the Rome Statute... have advocated 'benchmarks'" that go beyond the requirements of Article 17⁴⁷. Accordingly, while complementarity leads this "double life"⁴⁸, the ICC's legitimacy remains open to challenge, to the extent that the procedural admissibility hurdle demands a

⁴² UN General Assembly (1998) *Rome Statute of the International Criminal Court*

⁴³ Nouwen (2013:11)

⁴⁴ *Ibid.*

⁴⁵ OTP 'Prosecutorial Strategy 2009-2012' (February 2010)

⁴⁶ *Ibid.*

⁴⁷ Nouwen (2013:11)

⁴⁸ Nouwen (2013:14)

different standard than the positive interpretation. This dynamic has played out in the ICC's Libyan interventions, and will be addressed in detail in Chapter 3.

2.2. Normative legitimacy

A second understanding of legitimacy, and one incorporated by several authors⁴⁹ into wider conceptions of procedural legitimacy, is *normative* legitimacy. Here the focus is not procedural technicalities, but rather a “moral search”⁵⁰. For some authors, looking beyond procedural standards constitutes a “breaking of the mold”⁵¹. Yet, it is right that moral considerations are made in determining the legitimacy of the Court. In addition to ensuring accountability, ICC interventions advance “particular values” and keep “states within a particular normative community”⁵². International criminal law delineates moral thresholds, and thus judgements of morality are inherent in Court's work. Accordingly, for Clark, normative legitimacy – enabling the work of the Court to be “morally valued even when [it] issue[s] contentious verdicts”⁵³ – is “the ultimate form of legitimacy”⁵⁴ the institution can aspire to.

On the normative understanding, an institution's legitimacy is derived from the “special, nonderogable character of the norms”⁵⁵ that it seeks to uphold through both its discourse and actions. Naturally, the next question is *what* are these norms, or at least upon what are they based? At its core, the International *Criminal* Court “adheres to fundamental principles of criminal law”⁵⁶. Robinson explains that the “solid pillar” here is the principle of legality – requiring determinable definitions and application of the law to those who break it⁵⁷. As already mentioned above, the demands of legality are largely synonymous with procedural legitimacy. However, Robinson contends that the “normative content” of the ICC also includes broader ideas, more consistent with wider liberal principles “based in respect for human dignity”⁵⁸. For Robinson, the most concrete articulation of these broad, liberal principles is the advancement of a human rights agenda, through international human rights law⁵⁹. Such views fall in line

⁴⁹ Takemura (2012)

⁵⁰ Glasius (2012:58)

⁵¹ Glasius (2013:65).

⁵² Grossman (2013:75)

⁵³ Clark (2015:763)

⁵⁴ *Ibid.*

⁵⁵ Pavel (2014:42)

⁵⁶ Robinson (2010:926)

⁵⁷ *Ibid.*

⁵⁸ Robinson (2010:925, 962)

⁵⁹ Robinson (2010:933)

with the arguments of Allen Buchanan, a prominent advocate of the normative understanding, that legitimacy should be defined “in terms of some threshold approximation to full or perfect justice”⁶⁰, and that nowadays, this threshold is compliance with “basic human rights”⁶¹.

It seems almost common sensical to assert that the Court should be human rights compliant. However, the proposition is problematic. International criminal law is distinct from international human rights law. As emphasized in the International Law Programme 2014 Meeting Summary, “one significant reason why states were finally able to conclude the Rome Statute was the agreement that the ICC would not be a human rights court”⁶². Moreover, international human rights treaties (e.g. the International Covenant on Civil and Political Rights) do not bind international institutions, as such bodies “are not parties to those treaties and normally cannot even accede to that status”⁶³.

On what grounds then can human rights norms ground the ICC as normatively legitimate? Though the same conclusion is reached, different authors offer alternative explanations. On the one hand, Zappala advances the position that international courts have become bound by human rights norms through the pursuit of “political or moral, as opposed to legal” imperatives⁶⁴. Discussing specifically due process human rights standards:

“[T]he starting point adopted... is that this is more a *policy* issue than a legal question. And the policy choice has been made in favour of an extension to international criminal proceedings of international human rights provisions on due process.”⁶⁵

On the other hand, and it is submitted more convincingly, Gradoni instead understands wider human rights standards as nonetheless part of the Court’s legal obligations⁶⁶. In the first place, Article 21(3) of the Statute includes an open-ended clause, which explicitly stipulates that “the application and interpretation of the law [by the Court] ...must be consistent with internationally recognized human rights”⁶⁷. Moreover, the international community “has recognised the existence of *jus cogens* or peremptory norms that supersede all other legal obligations”, including those of the Court under the Rome Statute⁶⁸. It is largely

⁶⁰ Buchanan (2003:432)

⁶¹ *Ibid.*

⁶² Ferstman, Heller, Taylor and Wilmschurst (2014:7-8)

⁶³ Gradoni (2006:850)

⁶⁴ Gradoni (2006:849)

⁶⁵ Zappala (2003:7)

⁶⁶ Gradoni (2006)

⁶⁷ Gradoni (2006:853) and Grossman (2013:98)

⁶⁸ Rome Statute, Article 21(1)(b)

uncontroversial that the content of several central human rights is included within these general principles⁶⁹ – though the specific limits of such are far from settled. Bringing together both of Gradoni’s arguments, in a Separate Opinion in the *Lubanga* case, Judge Pikis interpreted Article 21(3) to include “those human rights acknowledged by customary international law and international treaties and conventions”⁷⁰. Buchanan’s advancement of human rights compliance as a threshold for the International Criminal Court’s normative legitimacy is therefore possible on the basis of such arguments⁷¹.

Yet the ‘human rights agenda’ and ‘basic human rights’ are not without issue for the Court. In the first place, its leaves normative legitimacy potentially sociologically problematic in states where the liberal human rights ideology is less established. At least in theory, norms derive from dominant social understandings of morality. However, Vasiliev highlights how international courts “have never seriously engaged in a comprehensive comparative research involving all national jurisdictions”⁷² for the purposes of identifying their guiding norms. They have instead “operated on the level of the ‘major legal systems of the world’”⁷³, fixing these standards in international instruments. Yet as noted by Glasius, the human rights which overlap with the scope of serious international crimes are likely to be more defensible and universal than “the wider human rights agenda”⁷⁴.

Secondly, human rights remain a vague and unworkable measure by which to evaluate the Court’s legitimacy. Further specificity is required regarding the rights with which the ICC must adhere. At the heart of rights protection is the accused’s rights to a fair trial and due process. Both terms warrant further definition. Due process here refers to the “rules applicable to the administration of justice”, which act as “safeguards for the protection of individual rights”⁷⁵. Central to due process is the requirement of a fair trial. As simply set out in Article 14(1) of the International Covenant on Civil and Political Rights, “everyone shall be entitled to a fair and public hearing”. The procedural nature of this right means that overlap with the scope of procedural legitimacy remains inherent.

⁶⁹ *Ibid.*

⁷⁰ Separate Opinion of Judge Georgios M. Pikis in *Lubanga*, ICC-01/04-01/06-424, para. 3

⁷¹ A distinct issue, discussed later, relates to how far human rights compliance permeates all aspects of the Court’s activities, including the requirements of states for admissibility challenges under Article 17. *C.f.* Ferstman, Heller, Taylor and Wilmschurst (2014:8) and Nouwen (2013:67-69)

⁷² Vasiliev (2009:63)

⁷³ *Ibid.*

⁷⁴ Glasius (2012:56)

⁷⁵ Icelandic Human Rights Centre (n.d.)

Jurisprudence from another international criminal law institution, the Tribunal for the former Yugoslavia, has highlighted the “fundamental nature”⁷⁶ of the right to a fair trial. In the *Tadić* case, the ICTY described the right as “an imperative norm of international law to which the Tribunal must adhere”⁷⁷. Moreover, the Rome Statute itself makes specific reference to these standards. Article 67 of the Rome Statute echoes Article 14 ICCPR and sets out “minimum guarantees” for the accused to a “fair hearing conducted impartially”⁷⁸. Furthermore, when the admissibility of individual cases is challenged before the ICC – as relevant to the discussion of Libya in Chapter 3 – the Court shall “have regard to principles of due process recognized by international law”⁷⁹.

The right to a fair trial is in itself comprised of a variety of more specific guarantees. A recent report on fair trials in the Libyan context by Mark Ellis catalogues the rights constitutive of a fair trial⁸⁰. Included are the rights to be present at trial; to be represented by counsel; and to an independent and impartial tribunal⁸¹. Many of these constitutive rights have yet to be triggered in the Libyan cases, which remain in their pre-trial stages. However, one guarantee relevant even during investigation and other preliminary processes is the right to an independent and impartial Court. Independence and impartiality are often treated as one in the same, but as Bangamwabo explains, the two thresholds are distinct. Independence requires a Court to generally be “free from an ‘inappropriate influence’”⁸². Impartiality, on the other hand, is case-specific, and requires a Court not to be biased in favour of one party in the relevant proceedings or another⁸³.

There is no shortage of recognition afforded by the Court to the importance of the principles of independence and impartiality. The right of a defendant to an impartial hearing is set out in Article 67(1), and impartiality is specifically guaranteed from judges and the OTP in Articles 41(2)(a) and 42(7) respectively. The independence of the Prosecutor – essential at the preliminary stages of cases as the “‘gatekeeper’ of the ICC”⁸⁴ – is ensured in Article 42(1) and (5). Both standards are further laid out as “overarching principles” of case selection and

⁷⁶ *Ibid.*

⁷⁷ *Appeals Judgement on Allegations of Contempt, Prosecutor v Tadić*, No. IT-94-1-A-AR77, para 3

⁷⁸ Rome Statute Article 67(1)

⁷⁹ Rome Statute Article 17(2)

⁸⁰ Ellis (2015:14)

⁸¹ *Ibid.*

⁸² Bangamwabo (2009:246)

⁸³ Bangamwabo (2009:247)

⁸⁴ Badagard and Klamberg (2016)

prioritisation by the OTP in a recent draft policy paper⁸⁵. The Statute therefore also affords procedural protection to normative demands of impartiality.

Beyond the international human rights agenda, the unique role of the Court (and perhaps other international criminal law institutions) in ensuring justice against individuals responsible for the worst atrocities has led to the emergence of specific norms for the ICC. Notable here is the norm against impunity. The norm against impunity finds its foundation in the Preamble of the Statute, which both *affirms* “that the most serious crimes... must not go unpunished and that their effective prosecution must be ensured”⁸⁶; and *emphasises* the determination “to put an end to impunity for the perpetrators of these crimes”⁸⁷. References to an “impunity norm” are frequent within literature discussing the role of the ICC⁸⁸, particularly in the work of Max Pensky. Pensky defines impunity as

“the circumstance in which an individual person does not receive the criminal legal attention that is due to her or him for alleged acts that, but for some special circumstance..., she or he would normally receive”⁸⁹.

Offering further detail, he describes the “legitimacy-generating”⁹⁰ nature of the normative claim against impunity, and highlights the “mutually reinforcing” relationship between impunity and “protection” (the principle central to international human rights law)⁹¹. Specific ICC-focused norms therefore compliment the broader normative human rights agenda guiding the Court.

Drawing together the above, on a very narrow definition, the scope of normative legitimacy coincides with that of procedural legitimacy, insofar as both centre around the core criminal law principle of legality. However, as developed in this sub-section, the normative legitimacy of the ICC more accurately corresponds with the institution’s adherence to the liberal human rights agenda, as articulated in international human rights standards, and the specific norms which have developed around international criminal law institutions. As made clear in subsequent chapters of this thesis, in the Libyan context, the former centres upon due process

⁸⁵ OTP *Draft Policy Paper on Case Selection and Prioritisation* (Feb 2016:7)

⁸⁶ Rome Statute, Preamble, para 4

⁸⁷ Rome Statute, Preamble, para 5

⁸⁸ See for example Pensky (2008) and UN Chronicle (Dec 2012)

⁸⁹ Pensky (2016:488)

⁹⁰ Pensky (2016:489)

⁹¹ Pensky (2016:488)

rights, specifically the right to a fair trial by an independent and impartial Court, and the latter refers to the norm against impunity.

2.3. Sociological Legitimacy

Sociological legitimacy, or “popular legitimacy”⁹², differs fundamentally in premise from procedural and normative accounts. As summarised by Grossman, “sociological legitimacy is subjective, agent-relative, and dynamic”⁹³. This renders the sociological understanding the most unpredictable and complex legitimising factor to measure. Ontologically, the approach becomes individual – at least at a collective level – and the epistemological focus is internal or “psychological”⁹⁴, seeking to *understand* how an institution is viewed and judged. The core idea centres on those implicated in violations of international criminal law, or the “stakeholders”⁹⁵, having greater say in how they define their own needs.

A preliminary consideration concerns the precise weight to be afforded to the sociological measure in constructing legitimacy for the ICC. At the national level, expressions of “collective conscience”⁹⁶ and democratic credentials are the “most familiar basis”⁹⁷ for claims of legitimacy. However, in the present context, Glasius explains that few propose that the legitimacy of international criminal justice should rest upon “democratic foundations in a direct, representative sense”⁹⁸. She questions whether a determinative “collective conscience” could ever properly exist in practice. Clark explains that courts will “always struggle to deliver justice that transcends ethnic and political divides” in our multi-cultural and legally pluralist world, and thus their legitimacy is always left open to doubt⁹⁹. This holds particularly true in the societies relevant to the ICC’s jurisdiction, facing deep-rooted divides following the recent or ongoing commission of the “most serious crimes”¹⁰⁰.

Furthermore, concerns arise regarding collective conscience where what is *perceived* or preferred as legitimate by a particular society does not correspond with ideas about what is *right* (normative) or *legal* (procedural). A particularly illustrative, if extreme, example is

⁹² Takemura (2012:6)

⁹³ Grossman (2009:116-7)

⁹⁴ Hurd (2007b).

⁹⁵ Takemura (2012:6)

⁹⁶ Durkheim (1893/1997:79)

⁹⁷ Danner (2003:535)

⁹⁸ Glasius (2012:56)

⁹⁹ Clark (2015:769)

¹⁰⁰ Rome Statute, Preamble para 4 and Glasius (2012:56)

offered by Hurd¹⁰¹: if a society voluntarily complied with a Nazi government regime, on a sociological approach, this regime would be legitimate. Where conclusions can be so clearly at odds with the fundamental principles widely associated with international criminal justice, it appears that the sociological approach alone fails to realistically explain how legitimacy works within this context. However, the subjective basis of sociological legitimacy introduces important theoretical dynamics, missing from the two alternative conceptions of legitimacy discussed above. In the wave of more critical reflection on the court, this additional dimension is described as having “taken centre stage”¹⁰² and carrying increasing legitimizing weight within the related literature¹⁰³. The emerging consensus therefore demands that in constructing its legitimacy, the ICC can no longer (if they ever could) overlook the views of those subjected to their jurisdiction.

Measuring legitimacy through this empirical lens first requires identification of who the stakeholders of international criminal justice are. Takemura explains that as the International Criminal Court is a treaty-based organization, its stakeholders comprise of the States party to the Court’s founding Statute of Rome¹⁰⁴. Yet while technically correct, confining relevant stakeholders to states misses the intended focus of ‘popular legitimacy’. It is important to also consider that the ICC is an international court dealing with the acts of *individuals*¹⁰⁵. ‘Individuals’ requires further specification. At the heart of the Court’s investigations and prosecutions are those accused of committing the crimes falling within its jurisdiction, as well as their victims. Yet as a result of the nature of international crimes, whole communities or populations within a situation area can be ‘affected’ or “afflicted”¹⁰⁶ by their commission. A notable example within Libya would be the approximately 30,000 Tawerghans forcibly displaced by militias in Misrata in August 2011, and the treatment of whom several authors have argued amounts to ethnic cleansing, or even genocide¹⁰⁷.

Taking ‘individuals’ one step further, as a Court exercising jurisdiction over crimes of *international concern*¹⁰⁸, it can be argued that *all individuals* – including those beyond ICC situation areas – have some interest the activities and objectives of the Court in The Hague. As

¹⁰¹ Hurd (2007b)

¹⁰² Smith Cody, Stover, Balthazard and Keonig (2015:12)

¹⁰³ *Ibid.* Also, REDRESS (2015); ICC Assembly of States Parties (2012:¶24); and Dixon and Tenove (2013:408)

¹⁰⁴ Takemura (2012:6).

¹⁰⁵ Takemura (2012:4)

¹⁰⁶ *Ibid.*

¹⁰⁷ See Heller (2012) and Human Rights Investigations (2011)

¹⁰⁸ Rome Statute, Article 1. Emphasis added.

noted by the ICTY Appeals Chamber in *Krstic*, the crimes in the jurisdiction of the ICC are “crimes against all of humankind” – their “harm being felt not only by the group targeted”, but due to their gravity, “by all of humanity”¹⁰⁹. However, the preferred definition here is to confine focus to perspectives of the Court within affected communities. Aside from considerations of feasibility, requiring closer proximity to the crimes under investigation can be reasoned on a principled basis. As effectively summarised by Waters, “to speak of “crimes against humanity” – as if the offense were shared in full moral measure – is to deny the particular suffering of the Libyan people in a way that is, paradoxically, inhumane”¹¹⁰.

After definition of the ICC’s stakeholders, the next question asks what are the relevant perspectives that implicate, and in turn (de-)construct, the Court’s legitimacy? As a minimum preliminary within the societies affected by ICC interventions, the Court in The Hague must be regarded as both a relevant and accessible institution. This makes sense, as “those lacking information do not have enough grounds to evaluate the activities of the ICC in the first place”¹¹¹. Uninformed societies create “a danger that... sociological legitimacy will become slanted”¹¹². The Court of course carries the primary responsibility in communicating its functions to those concerned by them (as well as more broadly). It is the core task of the ICC’s Public Information and Documentation Section (PIDS), one branch of the Court’s Outreach efforts, to disperse “accurate and timely information about the principles, objectives and activities of the Court to the public at large”¹¹³.

Following the empirical relevance of the Court, two further perspectives are central to sociological legitimacy. First, whether or not affected communities regard the ICC to have acted in accordance with its own (procedural and normative) limitations and goals. On a sociological view, it is insufficient that the Court adheres to procedures set out in the Rome Statute or acts in accordance with norms *in fact*, they must also be *perceived* as doing so. Accordingly, sociologically normative legitimacy would require “a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially-constructed system of norms, values, beliefs and definitions”.¹¹⁴ The way in which the

¹⁰⁹ *Radislav Krstic*, IT-98-33-A, para 36

¹¹⁰ Waters (2011)

¹¹¹ Takemura (2012:14)

¹¹² *Ibid.*

¹¹³ ICC Integrated Strategy for External Relations, Public Information and Outreach (n.d.)

¹¹⁴ Suchman (1995:574) referenced by Clark (2015:765)

Offices of the Court opt to conduct themselves within situation areas is decisive in “synchronizing”¹¹⁵ the normative and procedural with the sociological.

In contrast, what the Court cannot itself influence is the extent to which its objectives within a situation area resonate with the grievances and expectations anticipated by those on the ground. For example, so long as some within affected communities view those that the Court is attempting to try as war criminals as still possessing lawful and/or just authority, the sociological legitimacy of the Court’s investigations and prosecutions is undermined. Moreover, (as relevant in the Libyan context, below), where victim groups seek punishment for crimes beyond the ICC’s formal mandate, or punishment harsher than is permitted under the Rome Statute (e.g. the death penalty), the Court cannot satisfactorily respond to empirical demands. Accordingly, the ICC’s legitimacy, as viewed through a sociological lens, is heavily dependent upon the volatile political contexts within individual situation areas.

A final hurdle in exploring sociological legitimacy concerns how to measure the relevant perspectives set out above. The empirical dependency of this understanding of legitimacy implies a need to engage to some extent with relevant affected communities. However, on a genuine subjective, *understanding* epistemology, looking at social practices is insufficient. Weber explains that “the merely external fact of the order [or court ruling] being obeyed is not sufficient to signify” that it is seen as legitimate¹¹⁶. More depth is possible through extensive interviews within the affected society, as done very recently by Berkley’s Human Rights Centre, which interviewed 622 ICC victim participants in four situation countries¹¹⁷. However, commissioning similar empirical surveys for each and every conflict-affected society in which the ICC intervenes is doubtful as a workable solution on the Court’s already significantly overstretched budget¹¹⁸. But in the face of the wide divergence in perspectives of the Court across different situation areas revealed in such studies¹¹⁹, legitimacy cannot simply be assumed in the absence of situation area-specific evidence.

This poses significant obstacles for research lacking empirical footing – which, due primarily to the current security difficulties faced in travelling to affected Libyan communities, includes this thesis. The question then becomes whether it is otherwise possible to properly access

¹¹⁵ Brants, Brants and Gould (2013:157)

¹¹⁶ Weber (1978:946)

¹¹⁷ Smith Cody, Stover, Balthazard and Keonig (2015)

¹¹⁸ In 2014, the approved budget for ICC victim programmes was €6,287,900, ICC Assembly of States Parties (2014) cited in Smith Cody, Stover, Balthazard and Keonig (2015:7)

¹¹⁹ See further, Vinck and Pham (2008:48); Vinck and Pham (2010a:19); and Vinck and Pham (2010b:44)

sociological perspectives. It is possible to make several predictions regarding some of the relevant perspectives from examination of Court practice. We can *assume* that well-funded and consistently implemented Outreach efforts by the ICC will result in communities knowledgeable on the functions of the Court. Furthermore, we can *expect* empirical support for the Court to decline if its actions or discourse are normatively or procedurally questionable. However, such hypotheses tell us nothing about the Court's resonance within a particular political context, and further cannot result in reliable data for the purposes of painting a convincing picture of the ICC's legitimacy in a given situation.

An alternative possibility for circumventing inadequate access to affected communities, at least in regions that have democratically-elected governments, is to look to the state for expressions of popular perspectives of the Court. Yet as Glasius recognizes, in practice the democratic credentials of many of the regions warranting ICC intervention can be described as weak at best¹²⁰. In such contexts, Nonet and Selznick suggest that international institutions are likely to be influenced as much by the “coercive [political] needs of those in power” as by any notion of (moral) collective conscience¹²¹. Clark paradoxically labels this “heavily unbalanced” interplay between legal and illegitimate political drivers as “pragmatic legitimacy”: “in a nutshell, states will co-operate with institutions like the ICC only when it is in their interests to do so”¹²².

Dialogue with third parties – including NGOs and CSOs – may have the potential to offer a more genuine reflection, at least for specified victim groups. However, though “pragmatic legitimacy”¹²³ may be a lesser concern with organisations independent of governmental power relations, it should not be overlooked that such organisations have “mandates that are broader than cooperation with the ICC”¹²⁴ - e.g. guiding government law and policy¹²⁵ or “advancing the cause of human rights”¹²⁶. To the extent that the narratives of these groups diverge both from the popular narrative, *and* from ICC objectives that they, as intermediaries, communicate to affected communities, sociological perceptions once again risk being misrepresented. With this and the preceding paragraphs in mind, it is concluded that much caution should be exercised by researchers without access to affected communities seeking to represent their perspectives

¹²⁰ Glasius (2012:49)

¹²¹ Nonet & Selznick (2001:51)

¹²² Clark (2015:776)

¹²³ Clark (2015:776)

¹²⁴ International Justice Monitor (2015)

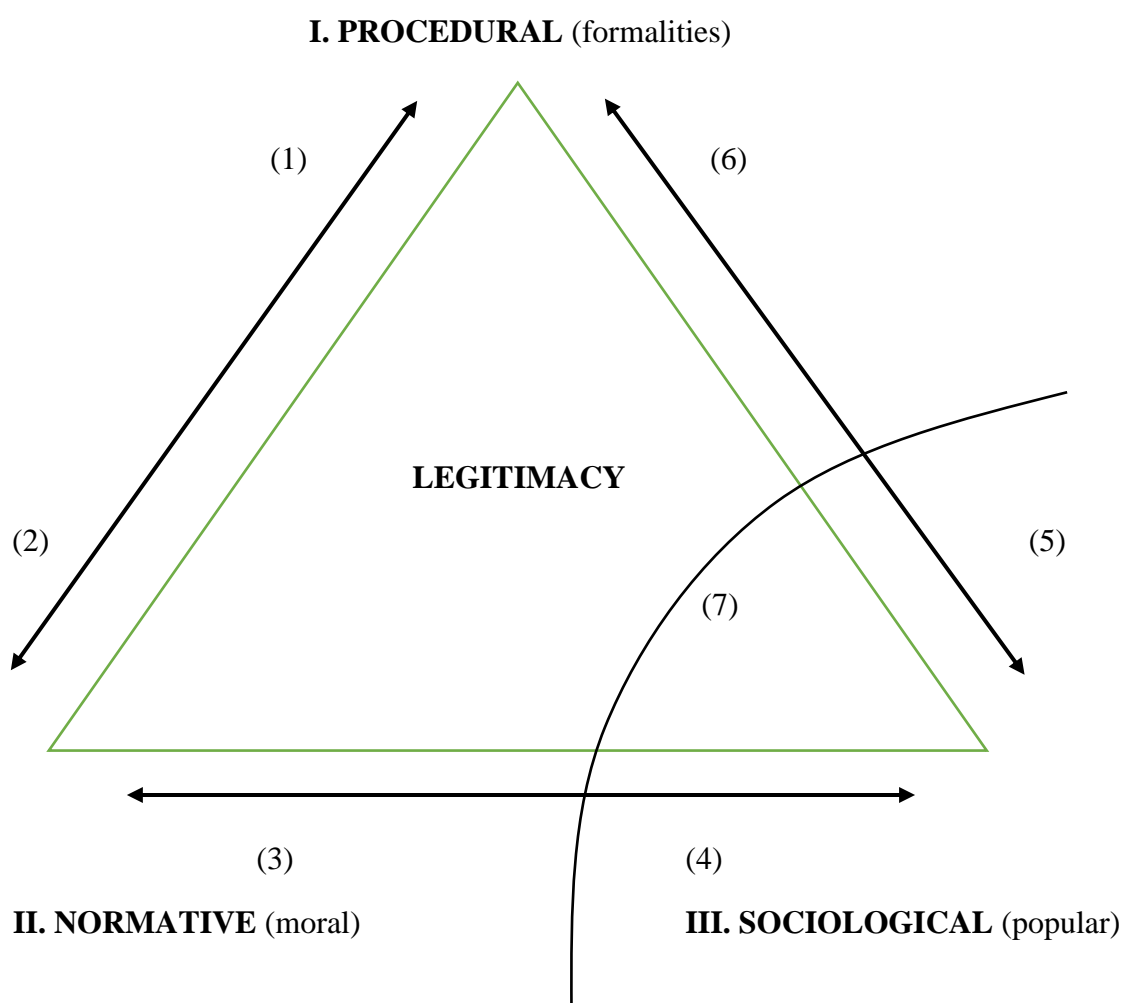
¹²⁵ *Ibid.*

¹²⁶ Human Rights Watch, Mission Statement (n.d.)

for the purposes of drawing conclusions on sociological legitimacy. The implications of such conclusions on the present research are set out below.

2.4. Mapping the Analytical Concept of Legitimacy

Procedural, normative and sociological ‘legitimisers’ are tightly and intrinsically linked. To conclude exploration of the different constituent factors of legitimacy, the below diagram and corresponding explanations ‘map’ the dynamics of this interdependence.



Interrelation between the constituent components of legitimacy:

- (1) Procedural formalities can more clearly delineate and add required specificity to moral norms, serving to secure and bolster the normative principles. For example, Articles 67(1) and Articles 41(2)(a) embody the normative requirement of an impartial Court.

Therefore, in many of its functions the Court concurrently constructs its procedural and normative legitimacy.

However, procedural practicalities can also limit the scope of wider human rights principles or ideals. Accordingly, strict adherence to procedural limits can frustrate further realisation of measures for normative legitimacy. This has been the case with interpretation of “due process” under Article 17(2) Rome Statute, discussed later.

- (2) Moral norms can be procedural in nature – e.g. the right to a fair trial - and thus part of the procedural formalities required of/upheld by the Court. To the extent that the Court falls short of such duties, both its procedural and normative legitimacy will be undermined.
- (3) To the extent that the Court is perceived as failing to comply with the normative expectations expected of it – e.g. impartiality - sociological legitimacy can become undermined.
- (4) Norms, in theory, represent social consensus regarding moral issues. But norms become socially problematic where they uphold values out of line with those shared in affected communities, e.g. the incompatibility of death penalties with international human rights standards.
- (5) Affected communities have their own perceptions on the fulfilment of the Court’s procedural criteria (e.g. the “unwilling” and “unable” thresholds in Article 17). Wider social expectations can also result in broader interpretations of procedural thresholds – e.g. positive complementarity influencing interpretation of Article 17.
- (6) The Rome Statute sets out several procedural obligations for the Court pertaining to specific implicated individuals (e.g. rights of the accused; participation of victims and witnesses). The Court is also limited to formal scope and procedures which may fall short of social demands, e.g. for examination of wider crimes or for harsher punishment.
- (7) Pragmatic influences (e.g. contra normative or political agendas) can both motivate or discourage Court interventions and distort genuine sociological perspectives.

Throughout this Chapter, several preliminary questions have been explored, and hopefully answered. First, what are the constitutive factors of the ICC's legitimacy? Three independent theoretical understandings have been identified from the literature – labelled procedural; normative; and sociological. Second, how can these components be measured? Sub-sections one, two and three have highlighted both definitions and context-relevant indicators of each of the three accounts of legitimacy. To recap, procedural legitimacy is measured via the Court's adherence to the statutory requirements set out in the Rome Statute – in Libya, the focus is confined to the pre-trial procedures. Normative legitimacy in practice translates into compliance with both international human rights standards and norms of international criminal law – in particular, various elements of the right to due process and a norm against impunity. Finally, sociological legitimacy corresponds with perceptions of 'affected communities' regarding the activities and objectives of the Court. More specifically, perceptions regarding how far the ICC adheres to its procedural duties and normative intentions, and the Court's resonance with the political context in a situation area – dependent in the first place on sufficient knowledge within affected communities.

While scrutiny of Court practice is sufficient to determine both procedural and normative indicators, for the reasons set out above, it is strongly doubted whether a reliable measure of sociological legitimacy can result from research without some direct access to relevant affected communities. Alternative possibilities (e.g. indirect representations) can increase the feasibility of access to sociological perspectives, but at cost to the accuracy of any conclusions reached. For this reason, while the above theoretical model is proposed as a comprehensive framework by which to analyse the complexity of the ICC's legitimacy in various contexts, the below exploration of the concept in the context of post-Gaddafi Libya focuses on the procedural-normative dynamic of this triangle of factors. Several cautious references to indirect reflections on perspectives within Libyan will be made, with the intention of giving a first insight into the ICC's sociological legitimacy in post-Gaddafi Libya. Nonetheless, empirical research on the Court's role in Libya would be required once the situation on the ground – set out below – can be secured.

Third, on a theoretical understanding, how do the different components of legitimacy relate to one another? As 'mapped' above, there are strong interlinkages between procedural, normative and sociological factors of legitimacy. Yet, as also made clear, the three indicators of ICC legitimacy will not always operate in sync, rendering legitimacy an unpredictable and sometimes paradoxical concept in practice. Whilst each of the three different theoretical

accounts have explanatory power regarding the legitimacy of the Court, no one can independently offer a comprehensive review of how the concept works in this context. Each is therefore required within an applicable framework of legitimacy. Combining the subjective and the objective renders the framework for legitimacy complex. However, a theoretically transparent and workable understanding of legitimacy of course outweighs ontological and epistemological simplicity or ‘neatness’.

Combining competing accounts of legitimacy naturally leads to questions of balance or hierarchy within the concept. Determining the proper weight to be assigned to procedural, normative and sociological accounts cannot be done in the abstract. Prioritisation inherently depends upon *who* asks the question of legitimacy. For societies victim to international crimes, sociological accounts likely reign supreme. *C.f.* international human rights advocacy groups, whose focus is more likely to be the normative demands on the ICC. However, “as a minimum”, Hansen has sensibly proposed that the Court should preserve a “core of legality”: “the Court cannot *breach* rules in the Statute”¹²⁷. This undoubtedly makes sense. Even with other abstract normative or unpredictable sociological accounts, decisions of a *Court*, to properly be called such, must always at the very least be lawful. Procedural legitimacy therefore provides a threshold for ICC interventions.

From this basis, discussion now turns to a fourth, more empirical focus and the foundation of the research puzzle guiding this thesis – the presence of and interplay between the procedural and normative constructing components of the ICC’s legitimacy in different interventions in post-Gaddafi Libya.

¹²⁷ Hansen (2014:23)

3. The Cases before the Court:

Saif al-Islam Gaddafi and Abdullah Al-Senussi

3.1. Introducing the cases

Before the Court's adherence to procedural and normative measures of legitimacy can be evaluated, the two different dynamics of the ICC's Libyan interventions need to be introduced. As set out at the beginning of this thesis, two case studies will be taken in turn. The focus of this Chapter is the two cases which the Court has formally considered from the Libyan situation – against Saif al-Islam Gaddafi and Abdullah Al-Senussi. In the first place, it can be noted that in the five years since the referral of the Libya to the Court, no individuals have yet been tried before the ICC for crimes alleged. Nonetheless, even at the pre-trial stages of the Gaddafi and Al-Senussi cases, tensions have emerged between the Court and other actors in the conflict regarding *by whom* and *where* the former regime members should properly be brought to justice.

Though not a State Party to the Rome Statute, following the UN Security Council referral under Article 13(b) Rome Statute, Libya (as a UN Member State) became subjected to obligations derived from Resolution 1970. As set out in paragraph 5 of the Resolution:

“the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.”¹²⁸

On 3 March 2011, the ICC Prosecutor opened his formal investigation into the situation in Libya. Three months later, Prosecutor Moreno-Ocampo sought three arrest warrants under Article 58 of the Rome Statute, which were formally issued by the Court's Pre-Trial Chamber I (PTC I) on 27 June 2011. The three arrest warrants indicted former Libyan regime leader Muammar Gaddafi¹²⁹, his son Saif Al-Islam Gaddafi¹³⁰ and Director of Military Intelligence Abdullah Al-Senussi¹³¹ for alleged crimes against humanity committed in Libya since 15

¹²⁸ UNSC Resolution 1970 (2011: para 5)

¹²⁹ *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi*, ICC-01/11

¹³⁰ *Warrant of Arrest for Saif Al-Islam Gaddafi*, ICC-01/11

¹³¹ *Warrant of Arrest for Abdullah Al-Senussi*, ICC-01/11

February 2011. On issuance of the warrants, Libya's duty to cooperate extended to assisting the Court in bringing these indicted individuals to The Hague. Following the killing of Muammar Gaddafi by National Transitional Council 'rebel' forces, this concerned only Saif Gaddafi and Al-Senussi¹³².

Even under the warrants, the Court's jurisdiction remained constrained by possible challenges to the admissibility of the cases under Article 17, the Statute's procedural articulation of the idea that ICC jurisdiction is subsidiary or *complementary* to national prosecutions. As effectively summarised by Ferstman, Heller, Taylor and Wilmshurst, the onus lies on the relevant state challenging admissibility to demonstrate that the grounds for inadmissibility in Article 17(1)¹³³ are satisfied. There are three elements to this: "first, that [the state] is actively investigating the same case (i.e. the same person and substantially the same conduct)"; second, *willingness* to "genuinely"¹³⁴ investigate and, if necessary, prosecute; and finally, the *ability* to do so¹³⁵.

In May 2012, the Libyan government challenged the admissibility of both cases before the Court. In a decision one year later, the Chamber rejected the admissibility challenge against the Saif Gaddafi case. The decision was made on the grounds that the Libyan government had failed to convince the Chamber that their own investigation of Gaddafi concerned the same conduct as that in the case before the Court; *and* that Libya was genuinely unable to investigate and prosecute the case¹³⁶. In assessing Libya's inability, the Court relied on evidence regarding practical difficulties in securing proper legal representation and transferring Gaddafi from detention by local militias into the government's custody¹³⁷. The decision was upheld by the Appeals Chamber in May 2014¹³⁸. Conversely, in October 2013, the Pre-Trial Chamber ruled – for the first time in any challenge brought before them – that Abdullah Al-Senussi's case was *inadmissible* before the Court¹³⁹. Despite similar concerns about lacking legal representation,

¹³² *Decision to Terminate the Case Against Muammar Gaddafi*, ICC-01/11-01/11-28

¹³³ Ferstman, Heller, Taylor and Wilmshurst (2014:2)

¹³⁴ Rome Statute, Article 17(1)(a) and (b), and 17(2).

¹³⁵ Ferstman, Heller, Taylor and Wilmshurst (2014:2).

¹³⁶ *Decision on the admissibility of the case against Saif Al-Islam Gaddafi*, No. ICC-01/11-01/11

¹³⁷ Ferstman, Heller, Taylor and Wilmshurst (2014:3)

¹³⁸ *Judgement on the appeal of 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'*, No. ICC-01/11-01/11 OA4,

¹³⁹ *Decision on the admissibility of the case against Abdullah Al-Senussi*, No. ICC-01/11-01/11

the PTC nonetheless found the Libyan government to be both genuinely willing and able to investigate and prosecute in a domestic case. The PTC decision was again upheld on appeal¹⁴⁰.

Despite the Court's definitive rulings regarding the admissibility of both cases, the question of who ought to prosecute continues to create divisions between the Court and the Libyan government; and further, has revealed divergence between the different organs of the Court¹⁴¹. In terms of the former, the post-revolution Libyan government appears on the face of it to have noted and accepted its obligations to cooperate with the Court. In April 2011, in a letter to the OTP, the Libyan Interim National Council stated that it was "fully committed to supporting the fast implementation of such arrest warrants"¹⁴². More recently (February 2013), in submissions to the Court, the Libyan government confirmed that it "does not dispute that it is bound by Security Council Resolution 1970"¹⁴³.

In practice, however, the Libyan government has consistently failed to comply with requests for cooperation from The Hague. One month prior to the admissibility challenges, the Libya Justice Minister reported to media outlets that "there is no intention to hand him [Saif Al-Islam] over to the ICC"¹⁴⁴. Holding true to this position, over five years since Saif Gaddafi was first detained in Zintan, and more than two years after the Appeals Chamber's confirmation that his case was admissible, he has yet to be brought before Court. The domestic trial and sentencing to death of both Gaddafi and Al-Senussi in July of last year by Tripoli's Court of Assize thus represents the 'icing on the cake' of this standoff between the ICC and the Libyan government. Responding to Libya's unfulfilled obligations, and following fifteen requests from Gaddafi's defence counsel¹⁴⁵, the Pre-Trial Chamber issued a finding of non-compliance under Article 87(7) of the Statute¹⁴⁶, and also referred the situation to the UN Security Council under Regulation 109(4) of the Regulations of the Court.

Divergence in approaches to the prosecution of Gaddafi and Al-Senussi has also emerged from within the Court – notably between the Office of the Prosecutor (OTP) and the Office of Public

¹⁴⁰ *Judgment on appeal of 'Decision on the admissibility of the case against Abdullah Al-Senussi'*, No. ICC-01/11-01/11 OA6

¹⁴¹ Kersten (2014:12)

¹⁴² ICC Prosecutor 1st Report to UNSC, May 2011, para 54

¹⁴³ *Response of the Libyan Government to the "Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations"*, No. ICC-01/11-01/11, para 22

¹⁴⁴ Al Jazeera (April 2012)

¹⁴⁵ Most recently, *Defence Request concerning Mr Gaddafi's continued detention in Libya*, Pre-Trial Chamber I, ICC-01/11-01/11.

¹⁴⁶ *Decision on the Non-compliance by Libya with requests for cooperation by the Court*, ICC-01/11-01/11-577

Counsel for the Defence (OPCD). As discussed in depth by Kersten¹⁴⁷, the OPCD has consistently stood by the ICC's right to prosecute *both* Gaddafi and Al-Senussi, considering the possibility of a fair trial in Libya, or at least one that satisfies the criteria demanded by Article 17 Rome Statute, "all but impossible"¹⁴⁸. Conversely, the OTP has shown "considerable flexibility" to the question of where Gaddafi and Al-Senussi ought to be tried¹⁴⁹. Speaking in January 2012, Prosecutor Moreno-Ocampo publicly explained that

"I respect that it's important for the cases to be tried in Libya... and I am not competing for the case."¹⁵⁰

Complicating the situation further, distinctions can be drawn between the OTP's submissions to the Pre-Trial Chamber during admissibility challenges in the Al-Senussi and Gaddafi cases. Whilst in the former the OTP maintained its support for domestic trial of Al-Senussi, and inadmissibility of the case before the Court¹⁵¹; in the Gaddafi case, the OTP rather concluded that Libya had failed to provide "sufficient supporting evidence" to meet the requirements of inadmissibility before the Court¹⁵². Responding to the difference in approach, Ferstman, Heller, Taylor and Wilmschurst interestingly suggest that "the Prosecutor's position in each case can go a long way in explaining the different outcomes and raises broader questions of the proper role of the prosecutor in admissibility challenges before the ICC"¹⁵³.

Accordingly, competing stances to prosecute Gaddafi and Al-Senussi cannot be over simplified or polarised between ICC requests for cooperation and the Libyan government's preference for domestic trials. Divisions extend to the different organs of the Court itself, as well as within the complexity of the Libya situation more generally. Specific details of these tensions will now be examined through the procedural and normative lenses of legitimacy.

¹⁴⁷ Kersten (2014:12-16)

¹⁴⁸ Kersten (2014:12)

¹⁴⁹ Stahn (2012:5)

¹⁵⁰ BBC (January 2012) in Kersten (2014:14)

¹⁵¹ *Prosecution's Response to "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute"* No. ICC-01/11-01/11.

¹⁵² *Prosecution's Response to "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi"* No. ICC-01/11-01/11, para 45

¹⁵³ Ferstman, Heller, Taylor and Wilmschurst (2014:4)

3.2. The procedural question: Rome Statute compliance

How far has the ICC adhered to the requirements set out in the pre-trial provisions of the Rome Statute throughout its investigations, issuance of arrest warrants and requests for cooperation in the Saif Al-Islam Gaddafi and Abdullah Al-Senussi cases, from the Office of the Prosecutor's formal opening of the investigation (3 March 2011) until present?

Before a focused analysis can be undertaken on Rome Statute adherence in the Gaddafi and Al-Senussi cases and corresponding conclusions on procedural legitimacy drawn, the applicable pre-trial provisions of the Statute must be identified. The focus of critical discussion on the ICC's role in the two cases, both in the literature examined and the interviews conducted, has centred on interpretation and application of the admissibility criteria in Article 17. Beyond this, two further provisions became relevant. First Article 19(10), which facilitates the review of admissibility decisions already made by the Court, on application of the Prosecutor. Second Article 3(3), which allows for the Court to "sit elsewhere" – i.e. to move proceedings from The Hague to a relevant situation area.

Determining admissibility

To recap, Article 17(1)(a) of the Rome Statute holds that a case will be inadmissible before the Court in The Hague where a state challenging admissibility can demonstrate that it is "actively investigating or prosecuting the same case"¹⁵⁴; and that it is both *willing* and *able* to effectively address crimes committed through this process. From the data collected, significant criticism has been levelled at the ICC following the alleged inconsistency with which this provision has been interpreted and applied at various stages of the Gaddafi and Al-Senussi cases. As will be set out below, the critiques of inconsistency respond to several emerging trends: the divergence in approaches between the OTP and the OPCD (already introduced above); the approach(es) taken in other earlier situation areas, seemingly at odds with the Libyan cases; and the purportedly inconsistent outcomes of the Gaddafi and Al-Senussi admissibility challenges themselves.

Even before the Court formally considered Article 17 following the Libyan government's challenges, the OTP (notably former Prosecutor Luis Moreno-Ocampo) is viewed, with few

¹⁵⁴ Ferstman, Heller, Taylor and Wilmschurst (2014:2)

exceptions, as having taken an unprecedentedly lenient¹⁵⁵ approach to the admissibility question in Libya, deferring largely to the questionable capacity of the post-revolutionary authorities. Comparisons were drawn across the data collected with the position taken in earlier situations, notably Kenya, to demonstrate how “Prosecutorial practice has been inconsistent”¹⁵⁶. As explained by one former counsel for the OPCD,

“the Libya admissibility challenges happened a year after the Kenya ones and in Kenya the OTP took a very stringent approach, like ‘nope... you have to show us concrete evidence that you’re investigating and we need to know exactly what the charges are’. Libya was the opposite.”¹⁵⁷

In contrast to the Kenyan interventions, the Office’s approach in Libya has been characterised as “hands-off”¹⁵⁸ - demonstrating a “pretty troubling”¹⁵⁹ level of deference. This now external Defence counsel went on to note that particularly in the Libyan context – where “from the very outset there were question marks”¹⁶⁰ surrounding national justice following the killing of Muammar Gaddafi – it was both “strange” and “puzzling” for the Prosecutor to adopt such a lenient approach¹⁶¹. As implied by these critical reflections from the Defence, and as also introduced above, this level of leniency did not align with the position taken by the OPCD to the admissibility of the Libyan cases. Kersten, a researcher on the effects of ICC interventions, described how the OPCD “has taken aim at the Prosecution’s acquiescence with Libya’s demands to prosecute Saif and Senussi”, resulting in an “acrimonious rift”¹⁶² between the Offices:

“Just days after Saif’s arrest, on 28 November 2011, the OPCD asserted that the OTP was employing double-standards with regards to its conception of complementarity.”¹⁶³

As an unofficial political undertone, the detention of four ICC staff in Zintan during an official visit to Saif Gaddafi for the purpose of his defence, is likely to have done little to sway the OPCD in favour of a domestic trial. As Kersten notes, the Court is “neither dumb or blind” to

¹⁵⁵ Kersten (2012a:14)

¹⁵⁶ Stahn (2012:4)

¹⁵⁷ Author’s interview with Melinda Taylor, one of the four ICC staff detained in Libya, on 14 April 2016 [11:30]; comparisons also made in author’s interview with Mark Kersten, 18 April 2016 [07:44]

¹⁵⁸ Stahn (2014:5)

¹⁵⁹ Author’s interview with Kevin Jon Heller, on 30 April 2016 [02:00]

¹⁶⁰ Author’s interview with Melinda Taylor, on 14 April 2016 [30:27]

¹⁶¹ *Ibid.*

¹⁶² Kersten (2012a:15)

¹⁶³ *Ibid.* OPCD Request for Authorisation to Present Observations in Proceedings concerning Mr Saif Gaddafi, ICC-01/11-01/11, (November 28 2011)

the political reality of its relations with Libya¹⁶⁴. The deferential approach taken by the OTP falls more in line with broader ideas of positive complementarity than with the strict procedural hurdles of Article 17. This reality is consistent with Kersten's perception that "the Court's too complicated to have one strategy on complementarity"¹⁶⁵. However, questions then arise regarding the 'legal weight' of broader ideas of complementarity beyond the Statute, relied on by the Prosecutor. Kersten went on to doubt whether they could legally "hold much water"¹⁶⁶. As noted by PTC I itself in the Gaddafi Admissibility decision,

"[t]he principle of complementarity expresses a preference for national investigations and prosecutions but does not relieve a State, in general, from substantiating all requirements set forth by the law when seeking to successfully challenge the admissibility of a case".¹⁶⁷

Instead, Kersten contended that complementarity as a 'big idea'¹⁶⁸ is better understood as a "very useful framing device for the OTP"¹⁶⁹. Risking looking impotent following early signs of Libyan authorities' reluctance to cooperate, and short of doing nothing,

"they [OTP] realised that their third way out was to invoke positive complementarity in such a way that would suggest that their role wasn't, in fact, to prosecute anybody, but was to push Libya towards prosecuting these individuals".¹⁷⁰

Accordingly, the flexibility of positive complementarity allowed scope for pragmatic decisions of the Prosecutor, and in turn the apparent acquiescence of the Office. Similar sentiments were echoed by de Bertodano, who considers it "naïve to imagine there is no prospect" of the Court "being influenced by political considerations regarding the state concerned", and their willingness to cooperate (or lack of) – "[t]his problem is inherent in the principle of complementarity"¹⁷¹. To the extent that the ICC Prosecutor can rely on more generous conceptions of the principle of complementarity than the procedural hurdles laid down in Article 17, the OTP's adherence to the text of the Statute is doubted. Moreover, this calls into

¹⁶⁴ Kersten (July 2012)

¹⁶⁵ Author's interview with Mark Kersten, 18 April 2016 [12:16]

¹⁶⁶ Author's interview with Mark Kersten, 18 April 2016 [11:06]

¹⁶⁷ *Decision on the admissibility of the case against Saif Al-Islam Gaddafi*, No. ICC-01/11-01/11, para 52

¹⁶⁸ Nouwen (2013:11)

¹⁶⁹ Author's interview with Mark Kersten, 18 April 2016 [11:01]

¹⁷⁰ Author's interview with Mark Kersten, 18 April 2016 [09:13]

¹⁷¹ de Bertodano (2001:426)

question more fundamental principles of independence and impartiality, as will be explored under the normatively-focused sub-question below.

Besides the OTP, it is contended in several accounts that the Chambers of the Court have also erred in their interpretation of Article 17's criteria in the two Libyan challenges. Criticisms principally alleged that the opposite outcomes regarding the admissibility of the Gaddafi and Al-Senussi cases cannot be defended on a principled basis¹⁷². Rather, as developed in detail by Tedeschini, the "inconsistency affecting the two decisions... is due to a conflicting assessment of the same element: Libya's failure to provide the accused with legal counsel"¹⁷³. On the one hand, lacking legal representation was a compelling consideration in the Chambers finding the Libyan government unable to genuinely prosecute Gaddafi. On the other, the Chambers were nonetheless willing to find the Al-Senussi case inadmissible, "speculating"¹⁷⁴ that legal counsel would be secured in the near future (which hindsight shows to have been a mistaken assumption). For Tedeschini, taking into account the "potential developments"¹⁷⁵ of a case is clearly at odds with previous jurisprudence:

"[i]n the Al-Senussi case, the PTC should not have taken into account the argument that Libya was going to nominate an attorney, given that speculative consideration clash with the 'at the time' requirement informing the admissibility test"¹⁷⁶.

Tedeschini highlights the "risks stemming from inconsistent holdings, namely that of exposing the Court to criticisms based on its alleged politicisation" – in other words, the "recurrent accusation... of being heavily influenced by political factors"¹⁷⁷. Once again then, inconsistent readings of Article 17 have opened the institution up to normative critiques of its independence and impartiality.

One final issue with the Chambers' application of Article 17(1)(a) emerging from the data concerned the PTC's failure in the Gaddafi challenge to rule on the question of whether or not Libya was *willing* to genuinely prosecute due to the lack of defence counsel. Instead, curiously¹⁷⁸, the Chamber determined the decision on the basis that Libya was *unable* to do so. However, as explained by Heller,

¹⁷² Tedeschini (2015) and author's interview with Kevin Jon Heller, on 30 April 2016 [01:15]

¹⁷³ Tedeschini (2015:77)

¹⁷⁴ Author's interview with Kevin Jon Heller, on 30 April 2016 [01:15]

¹⁷⁵ Tedeschini (2015:88)

¹⁷⁶ Tedeschini (2015:93). See *Al-Senussi* Admissibility Decision (October 2013:para 307).

¹⁷⁷ *Ibid.*

¹⁷⁸ Heller (June 2013)

“[t]here is nothing structurally wrong with Libya’s criminal-justice system, because the Libyan Code of Criminal Procedure protects Saif’s right to counsel. The problem is the Libyan government: although it has the ability to provide Saif with competent defence counsel — international or national — it simply does not want to”.¹⁷⁹

Accordingly, “its assessment... would probably have been more apt under a ‘willingness’ assessment”¹⁸⁰. Why then was the more suited statutory provision seemingly disregarded? Heller reasons this again on grounds of “realpolitik imperatives”¹⁸¹, and the fact that a ruling of inability rather than unwillingness would “minimize the potential affront to Libya”¹⁸². Yet aside from the argument that state failings should be assigned their proper moral weight, the Chamber’s ambiguous approach to labelling the criteria, allegedly driven by political convenience, also leaves their decision “legally problematic”¹⁸³ in terms of the ICC’s procedural legitimacy.

Reconsideration for Al-Senussi

Under Article 19(10) of the Statute,

“[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.”¹⁸⁴

Following the Court’s ruling that the Abdullah Al-Senussi case was inadmissible before the Court, there have been persistent calls for reconsideration of the case under Article 19(10). Calls are based not only on the continued failure to secure proper legal representation for Senussi – in contrast to the Chambers’ speculations – but also, and perhaps more forcefully, on the worrying treatment of Al-Senussi within Libya. Melinda Taylor recalled the implications of mistreatment of Al-Senussi in Al-Hadba prison that emerged from videos leaked last year revealing the torture of another son of the former dictator, Saadi Gaddafi¹⁸⁵. Moreover, around the same time, Al-Senussi was sentenced to death by a court in Tripoli, in a trial subject to

¹⁷⁹ Heller (June 2013)

¹⁸⁰ McGonigle Leyh (October 2013)

¹⁸¹ Tedeschi (2015:97)

¹⁸² Heller (June 2013)

¹⁸³ *Ibid.*

¹⁸⁴ Article 19(10) Rome Statute

¹⁸⁵ Author’s interview with Melinda Taylor, on 14 April 2016 [13:23]

much criticism since¹⁸⁶. In light of such events, Kevin Jon Heller, a member of international law blog *Opinio Juris*, has explained that “whatever the merits of the Appeals Chamber’s decision at the time — and they’re limited — recent events in Libya have obviously rendered it obsolete”¹⁸⁷. In similar vein, Kersten has characterised the reconsideration of Libya’s ability to genuinely prosecute Al-Senussi as a “slam dunk case”¹⁸⁸.

The question then becomes on *whom* does the duty to request review of the Chamber decision fall? Heller has, very interestingly, discussed and in turn discounted the possibility of Al-Senussi challenging the earlier decision himself on a strict reading of the text of the Statute¹⁸⁹. From this basis, Heller contends (in line with the calls of many others) that

“the better solution remains the one that is staring us right in the face: the OTP should challenge inadmissibility on al-Senussi’s behalf”.¹⁹⁰

However, recent reports and statements from current Prosecutor Fatou Bensouda have confirmed that review of the inadmissibility of the Al-Senussi case is not part of the OTP’s present agenda. Speaking on the situation in Libya before the UN Security Council, the Prosecutor emphasised

“that under article 19(10) of the Rome Statute, my Office can only submit a request for review of the Pre-Trial Chamber’s decision if it is “fully satisfied” that there are new facts which negate the basis of that decision”¹⁹¹.

On the basis of the information currently available to the OTP, she went on to hold that

“[a]t this time, the Office is not fully satisfied that new facts have arisen which negate the basis on which Pre-Trial Chamber I found Mr Al-Senussi’s case inadmissible.”¹⁹²

The OTP’s position with regards to Article 19(10) is consistently and fervently contested across the data collected. From within the ICC, former counsel for the OPCD questioned that if the Prosecutor currently cannot see any grounds, following the events listed above, “what does it take?”¹⁹³ Heller has declared it “now impossible to argue”¹⁹⁴ that Libya is able to genuinely

¹⁸⁶ *The State of Libya v Saif al-Gaddafi, Abdullah al-Senussi and others*, referenced in Ellis (2015:16)

¹⁸⁷ Heller (Sept 2014)

¹⁸⁸ Author’s interview with Mark Kersten, 18 April 2016 [14:50]

¹⁸⁹ Heller (Sept 2014)

¹⁹⁰ Heller (Sept 2014)

¹⁹¹ ICC Prosecutor 10th Report to UNSC, Nov 2015, para 36

¹⁹² ICC Prosecutor 11th Report to UNSC, 26 May 2016, para 6

¹⁹³ Heller (Sept 2014)

¹⁹⁴ *Ibid.*

prosecute; finding there to be “no possible justification”¹⁹⁵ for not initiating a review. Showing the breadth of dissent, Mark Ellis, Executive Director of the International Bar Association, commented that he does not know of “any organisation or entity that has looked at [the issue of reconsideration] in any serious way that has come to any different conclusion”¹⁹⁶, with the obvious exception of the Prosecutor.

It is worth noting that on the wording of Article 19(10), the OTP only ‘*may*’, rather than must initiate such a review. Yet the extent of opposition to the OTP’s position can be interpreted as a response to a failure to act in the exact situation envisaged for reconsideration by the statutory provision. Ellis went on to conclude “the standard that the OTP is relying on or adhering to seems to be a bit much”¹⁹⁷. Alluding to wider implications of the OTP’s failure to act, McDermott has argued that the Office has “given its consent for Al-Senussi’s death sentence after a deeply flawed trial – another strike against its already tattered reputation”¹⁹⁸. Accordingly, the implications of Prosecutorial hesitation towards Article 19(10) are (on the basis of this data) likely to be damaging not only in a direct sense, to the accused himself, but also in the long-term to at least procedural understandings of the legitimacy of the OTP, as well the ICC more generally.

Trial in the The Hague vs. trial in Libya

A final debate across the data collected on the ICC’s role in the Gaddafi and Al-Senussi cases concerns the “multitude”¹⁹⁹ of alternative options open for consideration within the polarised “battle”²⁰⁰ between a Libyan trial and trial in The Hague. Contained within this multiteity is, or at least was, a range of both political and legal options²⁰¹ consistent with the ICC’s obligations under the Statute. One example discussed by various data sources is a sequencing of the international judicial process and Libyan trials (the latter for crimes allegedly committed by Gaddafi and/or Al-Senussi which fall outside of the Court’s mandate under Resolution 1970). However, even more relevant in terms of the Court’s procedural obligations is the option facilitated by the Statute itself, under Article 3. Sub-section 3 of Article 3 creates the possibility

¹⁹⁵ Heller (Sept 2014)

¹⁹⁶ Author’s interview with Mark Ellis, on 23 June 2016 [05:20]

¹⁹⁷ *Ibid.*

¹⁹⁸ McDermott (Aug 2015)

¹⁹⁹ Saudi, BBC Radio4 (2012: 16:27)

²⁰⁰ Kersten (2012a:19)

²⁰¹ *Ibid.*

for the Court to “sit elsewhere”- including of course within Libya – “whenever it considers desirable”, “in the interests of justice”²⁰².

On the basis of Article 3(3), the Court is clearly not required to move proceedings to a situation area whenever “the exercise of jurisdiction by the ICC has met political resistance”²⁰³, as in post-Gaddafi Libya. What then is the nature of its commitments with regards to *in situ* trials? Elham Saudi of Lawyers for Justice in Libya (LFJL) describes the Court as having “an active responsibility and a positive duty to inform the Libyans of all their options, and to assist them in achieving their options”²⁰⁴. The duty is one to inform and consider. There is variance in responses across the data with regards to how far the ICC has afforded sufficient attention to the possibility of relocation of trials to Libya, as well as to broader alternatives. However, one broad pattern does emerge. Earlier criticisms of the Court’s exclusive focus on ICC *or* Libyan trials appears, in more recent accounts, to have been replaced with an acceptance or even forgiveness of the ICC’s neglect of possible alternatives.

Earlier reflections on the relevance of Article 3(3) to the Libyan situation area present the option of an ICC trial *in situ* as a potential “compromised solution”²⁰⁵ to the “legal tug-of-war”²⁰⁶ between Libya and the Court, and by others still as the “best option”²⁰⁷. Both Kaye and McGonigle Leyh have described the “practical and symbolic benefits” of a trial in Tripoli²⁰⁸. Libyan-grounded ICC hearings would have both rendered the international Court more visible and accessible to affected communities, *and* promoted direct engagement from the ICC with the context from which the cases arose²⁰⁹. Kersten similarly summarised that

“Holding hearings and a trial in Libya would allow the Court to retain control over the proceedings and thus guarantee international legal standards... all the while illustrating that the ICC isn’t simply interested in extracting leaders from the very context in which the victims and survivors it purports to work for live.”²¹⁰

²⁰² Rules of Procedure and Evidence, Article 100(1)

²⁰³ Stahn (2012:4)

²⁰⁴ Saudi, BBC Radio4 (2012: 16:48)

²⁰⁵ McGonigle Leyh (2013)

²⁰⁶ *Ibid.*

²⁰⁷ Kersten (November 2011)

²⁰⁸ Kaye (August 2011) and McGonigle Leyh (2013). Such benefits would also likely increase the sociological legitimacy of the institution on the ground in Libya.

²⁰⁹ *Ibid.*

²¹⁰ Kersten (August 2011)

In the face of such promise, Kersten concluded that a trial within Libya would have palpable benefits – “for the Court, for Libya and for justice”²¹¹. Similar support was shown toward the option of a sequencing of trials, which “would have given time for Libya to stabilize the country and build an independent judiciary capable of subsequently trying Saif and Senussi domestically for crimes beyond the ICC's warrant against them”²¹². Recounting the extent of consideration for such options by the Court, Kersten explains that the option was not entirely overlooked:

“The OTP initially saw the option of an in situ trial favourably and presented it to the NTC during a visit in November 2011 to discuss the fate of Saif.”²¹³

However, despite this initial discussion, Kersten has since found such options not to have been “sufficiently elaborated or explored”²¹⁴ by the Office (or by Libya for that matter). In similar vein, Saudi described the Court as “failing”²¹⁵ in its function to properly bring this, and other options, to light.

Despite previous promotion of alternative options for justice, including Article 3 of the Statute, recent accounts have reflected more doubtfully on their practicality. Hindsight of both the continued (if not increasing) security threats following the breakout of the second civil war in 2014, and the revelation of the extent to which Libyan authorities were *not* prepared to cooperate with the ICC appear to have dampened calls for such alternatives. As set out by Melinda Taylor:

“A trial in situ would mean that the ICC would have to actually go there, which would mean there would have to be sufficient security. And, my understanding is that the problem... was that one of the primary objections was the [Libyan authorities’] fear that Saif could be acquitted or not get the death penalty. Now a trial in situ doesn’t eliminate those fears, because they still can’t give the death penalty and there is still a risk that he might be acquitted in a fair and impartial trial.”²¹⁶

²¹¹ *Ibid.*

²¹² Kersten (2012a:20)

²¹³ *Ibid.* See further, *Office of the Prosecutor, Prosecutor’s Submissions on the Prosecutor’s recent trip to Libya*, ICC-01/11-01/11, (November 25 2011)

²¹⁴ Kersten (2012a:10)

²¹⁵ Saudi, BBC Radio4 (2012: 16:34)

²¹⁶ Author’s interview with Melinda Taylor, on 14 April 2016 [17:26]

Consistently, both Kersten and McGonigle Leyh recently similarly doubted the feasibility of what they considered to be promising possibilities initially²¹⁷. While recognising that “at the time it wasn’t a bad idea”²¹⁸ and that he nonetheless “certainly thought it should get more consideration”, Kersten explained that “of course, in hindsight, it would have been completely infeasible”²¹⁹. A passage of time, in which situations have failed to improve within Libya, therefore appears to have ‘saved’ the Court from former critiques as to its responsibility to at least properly consider additional options.

It must be noted however, that the pattern set out was not without exceptions across the data. Some, notably Timothy William Waters have, from the earliest months of ICC intervention in Libya argued that “a choice between two versions of justice – Libya’s and The Hague’s – is unavoidable”²²⁰:

“Even if the ICC held its own trial on Libyan soil, it would still be far from true local justice. The sight of English-speaking judges listening to Arabic on headphones would leave Libyans doubtful that their stories were being told, much less understood”.²²¹

Waters’ reflections are grounded in considerations consistent with sociological measures of legitimacy, though the empirical basis for such assertions was not evident. Raising similar questions with a sequencing of trials, Waters made reference to the “geologic pace of international trials”²²² and Taylor suggested the value of sequencing was always undermined by the likelihood of a Libyan death sentence²²³. On the other hand, others have continued to call for consideration of alternatives by the Court. In February of last year, Saudi and Ebbs of Lawyers for Justice in Libya suggested again that “the ICC might hold its trials in Libya”, while stating too its frustration that there has of yet been “no attempt to pursue alternative approaches”²²⁴. Setting out the prevailing benefits, they noted that

“Doing so would increase the likelihood of the Court being able to actually proceed to trial in the Saif al-Islam case, and lower the political and financial costs currently associated with admissibility challenges. It might also make it easier to work in tandem

²¹⁷ Authors interview with Mark Kersten, 18 April 2016; speaking informally with Brianne McGonigle Leyh, 30 May 2016.

²¹⁸ Authors interview with Mark Kersten, 18 April 2016 [08:10]

²¹⁹ *Ibid.*

²²⁰ Waters (Oct 2013)

²²¹ Waters (Dec 2011).

²²² Waters (Oct 2013)

²²³ Author’s interview with Melinda Taylor, on 14 April [17:19]

²²⁴ Ebbs and Saudi (2015)

with national reconciliation efforts. And it might open up vital space for the Prosecutor to carry out additional investigations into on-going crimes.”²²⁵

Accordingly, it appears that no consistent conclusion on the suitability of alternative approaches to securing justice in the Gaddafi and Al-Senussi prosecutions can be reached on the basis of data collected. However, as set out above, the procedural obligation under Article 3(3) is not one to *pursue* alternatives, only for proper weight and attention to be afforded to such options, even if only temporarily possible. In the latter sense, the data suggests that the Court may have fallen short. While of limited future relevance to ICC-Libyan animosity on “the fate of Saif and Senussi”²²⁶ then, this “missed opportunity”²²⁷ (even if only to broaden the debate) is nonetheless a further blemish on the Court’s Libyan record.

3.3. The normative question: due process protection

How far has the ICC acted in accordance with standards of international human rights law, specifically rights to a fair trial, throughout its investigations, issuance of arrest warrants and requests for cooperation in the Saif Al-Islam Gaddafi and Abdullah Al-Senussi cases, from the Office of the Prosecutor’s formal opening of the investigation (3 March 2011) until present?

The Court’s approach to fair trials and due process, central to the international human rights standards with which the ICC’s normative function has aligned, has been challenged on several grounds across the data collected. First, in terms of the standard of human rights protection demanded from situation States in admissibility challenges. Second, regarding the Court’s, or more specifically the Prosecutor’s, own approach at the international level. Each is now addressed in turn.

Due Process at the National Level

Since the fall of the Gaddafi regime, there have been persistent concerns about the process by which former regime leaders Gaddafi and Al-Senussi would be brought to justice within Libya. As explained by Waters,

²²⁵ *Ibid.* On the last point, see Chapter 4.

²²⁶ Kersten (2012:21)

²²⁷ Kersten (2012:19)

“Legal justice is hardly assured in Libya these days, although the other, rougher kind sometimes is: Al-Islam’s lawyers have warned that their client faces the death penalty or a lynch mob, with no due process either way”²²⁸.

Painting a similar picture, Human Rights Watch last year recalled how

“[a] Human Rights Watch conducted in January 2014 revealed that Libya had failed to grant Sanussi, Saif al-Islam Gaddafi, and co-defendants basic due process rights. In February 2015, a UN human rights report indicated concern that [a Libyan] trial risked falling short of basic international standards”²²⁹.

Against this backdrop, even before the ICC formally had the opportunity to consider the apparent absence of due process within Libya and the treatment of the accused, concerns about the possibility of either Saif Gaddafi or Al-Senussi’s cases being held inadmissible were being vocalised. Kersten expressed that the Court accepting the Libyan admissibility challenge “would be tantamount to reaffirming behaviour that undermined the very role of the ICC in Libya – to fairly and impartially investigate and prosecute those most responsible for international crimes”²³⁰.

When the admissibility of both Libyan cases did come before the Court, several issues pertaining to due process were considered in depth by both the Pre-Trial and later the Appeals Chamber. Under Article 17(2) of the Statute, the Court shall have regard to principles of due process when determining “unwillingness” for the purposes of admissibility²³¹. Further, as set out above, in both cases the Chambers examined of the accused’s access to legal counsel – one of the rights constitutive of a fair trial. On appeal of the Al-Senussi inadmissibility ruling, the Court discussed the proper function of due process consideration in admissibility challenges. The Appeals Chamber opted for a narrow interpretation, holding that whether due process rights have been violated does not *per se* determine unwillingness, and thus admissibility²³².

Following the Court’s interpretation, international due process demands and thresholds for fair trials do not extend to domestic proceedings in States challenging the jurisdiction of the Court in The Hague. As a result, the level of protection afforded to the accused’s due process rights is placed at odds with the preference for national justice under the principle of

²²⁸ Waters (Oct 2013)

²²⁹ HRW (May 2015)

²³⁰ Kersten (2012:28)

²³¹ Rome Statute Article 17(2)

²³² *Judgment on the appeal of Mr Abdullah Al-Senussi*, ICC-01/11-01/11-565, para 2

complementarity. Reflecting on this discord, Heller has suggested that in limiting the Court's due process examination, "[t]he principle of complementarity... fundamentally undermines the Court's ability to 'set a model for the world of how a criminal court should function'"²³³. He characterises this dynamic as the "shadow side of complementarity"²³⁴.

Following the Appeals Chamber's decisive statements on issues of due process, the ruling that Al-Senussi's case was inadmissible before the ICC has been subject to significant normative criticism. Before exploring such critiques, it is worth noting that the Appeals Chamber's decision has been defended in terms of its compliance with the text of the Rome Statute – i.e. its procedural legitimacy. On the one hand, McDermott has argued that the "reference to "due process" in the complementarity clause is perfectly ambiguous" and "certainly leaves room for the Court to take fair trial considerations into account"²³⁵. However, on the other, Heller, (unpopularly as he notes himself²³⁶) rejects the "due process thesis", which he considers to be "contradicted by the text, context, purpose and history of Article 17"²³⁷. Exploring a few of these, *textually*, he argues that the requirement to "have regard to principles of due process" in Article 17(2) is a "sub-ordinate clause", which "simply explains how the Court should determine whether one or more of the paragraphs [the criteria for admissibility in Articles 17(2)(a-c)] are satisfied"²³⁸. It is not an independent base on which to challenge admissibility. Furthermore, *historically*, proposals that due process *should* be a basis for determining admissibility were rejected by many delegates to the Court²³⁹. This echoes the words of Prosecutor Moreno-Ocampo several years earlier that "[w]e are not a human rights Court. We are not checking the fairness of the proceedings"²⁴⁰. On the basis of this interpretation of the statutory provisions, the Court appears not to have erred procedurally.

Yet criticisms have nonetheless been levelled at the Court's interpretation of Article 17(2) on normative grounds. International human rights organisations, like Amnesty International and Human Rights Watch, have pointed out that Libya is bound to comply with the ICCPR and its fair trial stipulations, and advanced "that the Court should emphasize international standards"²⁴¹. Such calls have only been heightened following the trial of Gaddafi and Al-

²³³ Heller (2006:FN76)

²³⁴ Heller (2006:23)

²³⁵ McDermott (Aug 2015)

²³⁶ Heller (Aug 2012b)

²³⁷ Heller (2006:19)

²³⁸ Heller (2006:8)

²³⁹ Heller (2006:18) citing Holmes (1999:50)

²⁴⁰ O'Donoghue and Rigney (June 2012)

²⁴¹ McGonigle Leyh (2013:3)

Senussi in Tripoli last year, in which both of the accused were given death sentences. Diver and Miller have opposed the domestic trial as an “outrageous violation of the detainees’ right to a fair trial”, which they consider “clear proof of the incompetence of the Libyan judicial system as it stands today”²⁴². Questioning the normative credentials of Libyan justice in a more measured way, Mark Ellis’ comprehensive evaluation of the trial in Tripoli concluded

“it has been found that, on balance, shortcomings in the proceedings and the volatile security situation have severely compromised the fairness of the trial”²⁴³.

In the face of a domestic trial which falls short of international standards, Mark Ellis has since reflected on the position taken by the Court towards due process as “absolutely the wrong decision”²⁴⁴. He observes the implications of such an interpretation to extend beyond the Al-Senussi case, and the Libyan situation, to affect the very core of the ICC’s functions:

“I don’t understand how an international court can, under the principle of complementarity, justify upholding a legal process that is unfair, that does not meet international standards. It seems to me at a very fundamental level that the International Criminal Court cannot support that position, and yet it seems to be doing just that”²⁴⁵.

Interestingly, despite proposing that the Appeals Chamber’s approach is procedurally defensible, Heller similarly contends that the position is nonetheless morally problematic. Quoting Fletcher, he explains that

“insofar as international criminal law seeks to extend the rule of law to atrocities and crimes against humanity, it too must remain faithful to the demands of fairness’. Indeed, if the ICC simply turns a blind eye to unfair national trials – the inevitable effect of article 17 as written – it will simply permit States to replace one kind of impunity with another”²⁴⁶.

In response to his recognition of the need to necessitate fair trials, he advocates that “there is room to debate how a due process requirement could best be incorporated into Article 17”²⁴⁷. Writing about the disjuncture even before the Libyan situation was brought before the Court,

²⁴² Diver and Miller (2015:235)

²⁴³ Ellis (2015:55)

²⁴⁴ Authors interview with Mark Ellis, 22 June 2016

²⁴⁵ *Ibid.*

²⁴⁶ Heller (2006:26) citing Fletcher and Ohin (2005:541)

²⁴⁷ *Ibid.*

he proposed the radical and “difficult task of amending Article 17 to recognise due process”²⁴⁸. However, there seems to be other routes by which the Court could have provided further due process protection under Article 17. Some have proposed that the extent of Libya’s failure to observe Al-Senussi’s due process rights can trigger the more specific (and higher) thresholds for ‘unwillingness’ set out in Article 17(2)(c). Tedeschini has proposed that the total denial of legal representation can be included “in the list of telements potentially indicating that a trial is too flawed not to be considered a farce”²⁴⁹. Robertson too has suggested that Libya’s justice system can be considered to be in “total collapse” or “unavailable”, thus leaving the Gaddafi and Senussi cases admissible under Article 17(3)²⁵⁰.

Heller himself has more recently proposed another possibility. As he effectively summarises,

“Although the ICC was not designed to pass judgment on whether national criminal-justice systems live up to international standards of due process, there is nothing wrong with the Court ensuring that states do not undermine the viability of domestic prosecutions by ignoring *their own* due-process protections.”²⁵¹

The Pre-Trial Chamber itself noted when considering the admissibility of the Gaddafi case that its assessment should be “in accordance with the substantive and procedural law applicable in Libya”²⁵². In addition to Libya being a signatory of the ICCPR, under Article 53 Libyan Prison Law No. 47 and Article 106 Libyan Code of Criminal Procedure, Libyan law secures the rights of Al-Senussi and Gaddafi to lawyers during both detention and interrogation²⁵³. Moreover, speaking to the UN Security Council last year, the Prosecutor explained that Libya had explained that

“the death sentence against Saif Al-Islam Gaddafi was non-enforceable in Libya because his trial was held in absentia, and that he will enjoy an absolute right to a new trial when he is transferred from Zintan into the custody of the Libyan authorities.”²⁵⁴

Where a state’s “own criminal-justice system requires due process”, yet they persist in denying it, “the state is, in fact, conducting the proceedings in a manner ‘inconsistent with an intent to

²⁴⁸ Heller (2006:25)

²⁴⁹ Tedeschini (2015:95), citing Megrét and Samson (2013:1.2)

²⁵⁰ Robertson (Nov 2011)

²⁵¹ Heller (June 2013) emphasis added. See too McGonigle Leyh (2013:4).

²⁵² *Decision on the admissibility of the case against Saif Al-Islam Gaddafi*, ICC-01/11-01/11, para 200

²⁵³ Diver and Miller (2015:235)

²⁵⁴ ICC Prosecutor 10th Statement to UNSC, Oct 2015, para 33

bring the person concerned to justice”²⁵⁵ – also another ground for admissibility under Article 17(2)(c).

Accordingly, on the basis of either the severity of Libya’s departure from due process or the requirements of its own national laws, it appears that the normative demands on the ICC to respond to flagrant violation of rights to a fair trial can be met on the basis of the Statute, more specifically ‘unwillingness’ under Article 17(2). Yet while creativity in interpretation of Article 17 in theory enables the Court to act on Libyan violations of the accused’s human rights, both defendants continue to remain without access to legal representation. Beyond Libya, in other situations where violations are less severe and where the State in question lacks sufficient domestic human rights protection, the Chambers may have set a dangerous moral precedent through their narrow reading of the role of due process under Article 17(2).

Furthermore, the Court’s deferential position with regards to due process distances the Court from the normative principles on which it is based. The Court’s claimed inability to ensure fair trials can be taken to demonstrate that “the ICC just can’t fulfil the same moral function as other tribunals”²⁵⁶. These concerns are particularly apparent when another fundamental principle of the Court, i.e. complementarity, appears to have pulled the Court to decisions detrimental in effect to international human rights standards. For a majority across the data collected, from the understanding of the ICC as a “standard setter or model” of the highest standard of international justice²⁵⁷, the position laid down by the Court in the Libya cases leads to a “depressing analysis”²⁵⁸ for the normative legitimacy of the ICC.

Due Process at the International Level

While there may be some scope to debate the extent to which fair trial thresholds permeate through decisions of the Court to the activities of relevant States, the normative obligation on the Offices and Chambers of the ICC themselves to adhere to international standards of due process seems beyond doubt. As discussed in Chapter 2, one right constitutive of a fair trial is of particular relevance to the Court’s own actions during the pre-trial stages of the Gaddafi and Al-Senussi cases – that is, the right to an independent and impartial tribunal. Recognising this

²⁵⁵ Heller (Aug 2012a)

²⁵⁶ McDermott (Aug 2015)

²⁵⁷ Chazal (2015:71)

²⁵⁸ Heller (2006:21)

normative obligation, speaking generally about her Office's work earlier this year, Prosecutor Bensouda stated clearly that "the Court's decisions have been and will continue to be independent, impartial and fair"²⁵⁹. However, while the OTP itself unsurprisingly defends its commitment to these principles, others dispute that neither the Court's independence nor its impartiality can be so assuredly asserted in the context of the Gaddafi and Al-Senussi cases.

The "unprecedented"²⁶⁰ leniency shown by the Prosecutor to the post-revolutionary Libyan state authorities through the admissibility criteria under Article 17, discussed above, was alluded to in several data sources with regards to alleged influence on or partiality of the Prosecutor. Yet doubts amongst the data collected have focused primarily on the actions and objectives of the Prosecutor beyond this. In the first place, "many questioned the Prosecutor's speed"²⁶¹. After opening the formal investigation into Libya only five days after the situation was referred under UNSC Resolution 1970, Prosecutor Luis Moreno-Ocampo advanced investigations in Libya with "lightning speed"²⁶² – seeking the three arrest warrants only three months later. Four days of preliminary examination and three months of full-scale investigation stand in sharp contrast to precedents set in earlier situation areas. After referral in December 2004, the ICC Prosecutor waited over two years before opening a formal investigation into the situation in the Central African Republic, with arrest warrants not being issued for a further year²⁶³. Commenting on this, former UN High Commissioner for Human Rights, Louise Arbour, once again applies the word "unprecedented" to the Libyan situation²⁶⁴.

As pointed out by one external counsel for the ICC's Defence²⁶⁵, arrest warrants were sought prior to the full conclusion of the International Commission of Inquiry on Libya, mandated "to investigate all alleged violations of international human rights law in Libya"²⁶⁶. Reflecting on this, she suggested that

"the objective opinion is that if you have a three-month gap, time period, and in that three-month time period the Prosecutor hasn't actually had any concrete investigations

²⁵⁹ Journalists for Justice (April 2016)

²⁶⁰ Kersten (2012a:14)

²⁶¹ McGonigle Leyh (2013:2)

²⁶² Stahn (2012:3)

²⁶³ icc-cpi.int > Situations and Cases > Central African Republic > Bemba; also see Hoile (Sept 2014)

²⁶⁴ Arbour (April 2011)

²⁶⁵ Author's interview with Melinda Taylor, on 14 April 2016 [09:04]

²⁶⁶ Full conclusions were published the following year: Report of the International Commission of Inquiry on Libya (March 2012:1).

on the ground, it does beg the question as to was it a very rigorous investigation and what it was based on”²⁶⁷.

Kersten too cautiously advanced the idea of “shortcuts” with regards to the OTP’s gathering of evidence during preliminary Libyan investigations, however, he did note that this may be “a little bit too pejorative”²⁶⁸ of a conclusion.

On the contrary, it has been suggested by others that these largely critical reflections on the Prosecutor’s expeditious three-month initial investigation may be unfair. Capturing his problematic position across various situations, Prosecutor Moreno-Ocampo himself explained

“I received criticism because I was too slow in Sudan, too fast in Libya... That is the life of the Prosecutor. I’m not in a popularity contest. I respect my legal mandate; standards were fully respected.”²⁶⁹

Discussing the pace of OTP’s involvement, the Report of the Independent Commission of Inquiry on Libya nonetheless concluded that “it was vital that the ICC Prosecutor seize the initiative and move with all deliberate speed to investigate the offences”²⁷⁰:

“This creates the potential for the court to act as a deterrent for future atrocities, and alter the conflict dynamics in a game-changing manner.”²⁷¹

Such a view is largely consistent with the “well-known maxim”, ‘justice delayed is justice denied’²⁷². It implies that the speed of the Prosecutor ought to be seen in terms of effectiveness²⁷³, through which the ICC can function as a mechanism not only for securing accountability for international crimes but also to prevent or minimise their commission. Such a Court would certainly be welcome. However, in practice, Grandison has suggested (and as emerges from the data collected) that stark inconsistencies more likely lead prosecutorial decisions to “become less credible”, tainting the image of impartiality²⁷⁴.

²⁶⁷ Author’s interview with Melinda Taylor, on 14 April 2016 [08:56]

²⁶⁸ Author’s interview with Mark Kersten, 18 April 2016

²⁶⁹ Global Observatory interview with Luis Moreno-Ocampo (Jan 2012)

²⁷⁰ Report of the International Commission of Inquiry on Libya (March 2012:3)

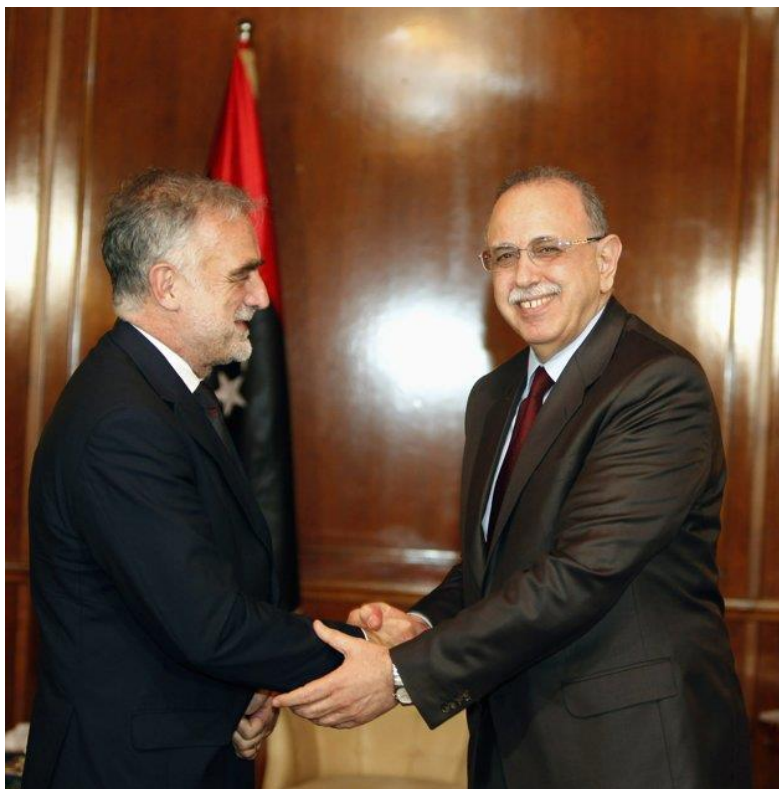
²⁷¹ *Ibid.*

²⁷² Grandison (February 2012)

²⁷³ Proposed too by Lindburg (June 2011)

²⁷⁴ *Ibid.* Moreover, Melinda Taylor has questioned the appropriateness of the *Independent* Commission’s interim 2011 report having alluded to the Prosecutor’s interventions – author’s follow up (19 July 2016) on interview with Melinda Taylor, on 14 April 2016.

In addition to questions around the timing of the OTP's interventions, critics have also targeted Prosecutor Moreno-Ocampo's individual affiliation with the post-regime Libyan authorities. Though seemingly no longer available, Rosenthal has documented on several occasions a photograph taken 29 June 2011 (previously featured on the ICC's website) of Prosecutor Moreno-Ocampo shaking hands with Mahmoud Jibril, head of the Libyan National Transitional Council, on the steps of the Court in The Hague²⁷⁵. Another image displays the Prosecutor similarly gesturing with the later interim Libyan Prime Minister, Abdel Rahim al-Kib.



Libyan Prime Minister Abdel Rahim al-Kib (R) shakes hands with ICC Prosecutor Luis Moreno-Ocampo (L) during a press conference in Tripoli (Source: GettyImages, 19 April 2012)

Reflecting on the image mentioned in his own discussion, Rosenthal explains that what this “symbolically-charged handshake” makes clear is that “the ICC is not an impartial judicial authority”, categorising the institution instead as a “partisan activist court”²⁷⁶. Criticisms of the “apparent coalescence of Prosecution and State interests”²⁷⁷ have not been confined to

²⁷⁵ Rosenthal (July 2011) and (Oct 2011)

²⁷⁶ *Ibid.*

²⁷⁷ Stahn (2012:5) citing *OPCD Request for Authorisation to Present Observations in Proceedings Concerning Mr. Saif Gaddafi, Gaddafi and Al-Senussi*, ICC-01/11-01 /11-33, para 10

academic discussion. Kersten recounts how the “OPCD also took issue with Moreno-Ocampo’s public comments and appearances”²⁷⁸:

“In May 2012, the OPCD filed a motion with the ICC's Appeals Chamber to disqualify Moreno-Ocampo from the Libyan case due to “an objective appearance that the Prosecutor is affiliated with both the political cause and legal positions of the NTC government.”²⁷⁹ While the motion was ultimately unsuccessful, just four days before the end of Moreno-Ocampo's tenure, the Appeals Chamber's chamber issued a scathing ruling²⁸⁰ which claimed that the Prosecutor's behaviour was clearly inappropriate.”²⁸¹

Concluding on the implications of the Prosecutor’s position for the “integrity of the Court as a whole”²⁸², Kersten has argued that

“The OTP's leniency towards Libya and its currying favour with the NTC is certainly something that must be more critically assessed as it severely diminished the Court's desire to appear impartial and independent.”²⁸³

How the Prosecutor has acted is of course an important element of questioning both independence and impartiality. However, it is not the full story. Determining whether the Office, and thus the Court, has acted partially to the Libyan government or has been influenced inappropriately also requires examination of the reasons motivating OTP decisions. Despite initial contact with several, no in depth interviews were secured with OTP personnel for the purpose of the present research. Therefore, it cannot be stated definitely *why* certain decisions or public appearances/alliances were made by Prosecutor Moreno-Ocampo or his Office. How far any such individuals would have been willing or even able to disclose any external or improper considerations is extremely doubtful anyway. Nonetheless, two motivations have been consistently proposed across the data collected: “one, to be seen as useful to the Security Council”, and two, to have some “potential impact” on the ongoing cases²⁸⁴.

Considering first the latter, Walt has explained that the Prosecutorial leniency in the Gaddafi and Al-Senussi cases underscores a “major shortcoming” of the Court, specifically the OTP:

²⁷⁸ Kersten (2012a:16)

²⁷⁹ *Request to Disqualify the Prosecutor from the Case Against Gaddafi*, ICC-01/1101/11, para. 2

²⁸⁰ *Decision on the Request for Disqualification of the Prosecutor*, ICC-01/11-01/11 OA 3, (June 12, 2012)

²⁸¹ Kersten (2012a:16)

²⁸² *Ibid.*

²⁸³ Kersten (2012a:35)

²⁸⁴ Authors interview with Mark Kersten, 18 April 2016 [00:48]

“its inability to stand down resistance from governments”²⁸⁵. Without cooperation from the post-regime Libyan authorities – in detaining the accused, protecting witnesses and safeguarding evidence - the Prosecutor’s chances of ever securing justice, either directly or indirectly (through national trials), are significantly diminished. Accordingly, as argued by David Bosco,

“the ICC at the moment has a clear interest in *downplaying* Libya’s obligations while it negotiates”²⁸⁶.

Loud OTP insistence “that Libya is already in violation of its legal obligations” renders Libyan authorities’ cooperation less likely, and ultimately “would only highlight the [ICC]’s impotence”²⁸⁷. The dependence of the OTP and the Court on Libyan cooperation therefore implicates the impartiality of the ICC in the Gaddafi and Al-Senussi proceedings to which state authorities are party. With this in mind, any apparent leniency or acquiescence shown by the Prosecutor can be interpreted as “a pragmatic response aimed at ensuring the cooperation of Libyan authorities so as “to have any hope of influencing” the cases²⁸⁸.

The second reason proposed to underpin decisions of the OTP, notably regarding the speed of interventions in the Libyan conflict, concerns the role of the UN Security Council in the referral of the situation. The basic contention here is that “international criminal justice cannot be sheltered from political considerations when [it is] administered by the quintessential political body”²⁸⁹. Such arguments relate to potential external influence on, and thus the independence of the Court. Referring the situation to the ICC, the Security Council’s focus was far from confined to achieving justice. Resolution 1970 also facilitated an arms embargo, various travel bans and asset freezes, and preceded Resolution 1973 only three weeks later which authorised UN Member States “to *take all necessary means*” (i.e. military force) to protect civilians²⁹⁰.

From this mixed political-legal, military-judicial context, several data sources have doubted the role of the ICC envisaged by the UNSC under Resolution 1970, and sought by the OTP in its early interventions. These accounts rather suggest that referral of the Libyan situation can

²⁸⁵ Walt (June 2013)

²⁸⁶ Bosco (Nov 2011)

²⁸⁷ *Ibid* and Kersten (Jan 2012)

²⁸⁸ Kersten (2012a:14) referencing Waters (Dec 2011)

²⁸⁹ Stahn (2012:2-3)

²⁹⁰ Moss (2012:9)

more accurately be understood as bolstering the simultaneous military intervention. A former advisor on external relations to the ICC Registry has contended

“that when the Security Council was discussing the situation in Libya, and taking the decision to refer the situation to the Court, the aim was to create a necessary pressure on Gaddafi...and also to create legitimacy for further steps of NATO countries for an intervention... That was the main preoccupation.”²⁹¹

In similar vein, Moss has discussed the likelihood of proponents of Resolution 1970 having “sought the referral for political purposes”²⁹². Supporting this, less than one month after Resolution 1970, two of its the ICC referral’s strongest champions – the UK and France – were involved in military action. Moreover, in defence of the US’s own military efforts in Libya, President Obama’s address to the American people in late March 2011 was couched in rhetoric of the “principles of justice and human dignity”²⁹³. As Peskin and Boduszynski note, the ICC, and its “moral authority as [an] apolitical, impartial legal actor”, has “great political appeal”²⁹⁴.

The continued influence of the politics- and security-driven Security Council on the two cases considered before the Court has also been highlighted. Moss explains how after the initial “embrace” of the Court, “Security Council members have not voiced support for the continuing ICC proceedings”, preferring to “push the judicial process aside”²⁹⁵. By November 2012, the US (influential in Libyan interventions, though not party to the Rome Statute) stated publicly in Tripoli that it would “not press for Saif Gadhafi’s surrender to the ICC”²⁹⁶. Reflecting on this, Kersten explains that

“the relationship between those who invoked the ICC... should be understood more as a relationship of convenience than a true commitment to the principles and project of international criminal justice.”²⁹⁷

²⁹¹ Author’s interview with Alexander Khodakov, 5 April 2016 [01:03:53]

²⁹² Moss (2012:10)

²⁹³ The White House, Office of the Press Secretary (March 2011)

²⁹⁴ Peskin and Boduszynski (2016:7)

²⁹⁵ Moss (2012:10).

²⁹⁶ *Ibid.*

²⁹⁷ Kersten (2015:22)

However, it cannot be assumed simply because the intentions of the international political community may have diverged from the ICC's judicial focus, that the Prosecutor's own independence was similarly affected. Moreno-Ocampo has fervently rejected such arguments:

“Some people were thinking the ICC could be like a new threat to force negotiations; one that can be used and then be taken away. This is not the ICC; the ICC is a judicial system... It's not my business to be involved in peace processes.”²⁹⁸

Yet the disjuncture between the unanimous and expeditious support of the Security Council for the Court in its referral and its apathy only months later echoes trends in the OTP's own interventions. Within a similar timescale, the Prosecution's accelerated initial pace of investigations became a novel leniency and advocacy of positive conceptions of complementarity, combined with very public endorsement of Libyan authorities also implicated in the cases. The parallel discords in Security Council support and OTP readiness to bring both Gaddafi and Al-Senussi before the Court appear to at least implicate the Office's independence, and thus its normative legitimacy, in the absence of an explanation otherwise. This is somewhat ironic considering the ICC's role in *legitimising* military interventions in Libya.

At a more fundamental level, others have proposed that political dynamics cannot ever be external to the functioning of the ICC – the Court is “inherently political”²⁹⁹. For a Court with the function of intervening on ongoing conflicts – which are in themselves battlegrounds for political forms of legitimacy – also dependent on either state governments or the international community for jurisdiction³⁰⁰, sharp law-politics dichotomies seem misplaced. Accordingly, as Nouwen and Werner nicely summarise: “the Court is not a non-political oasis in a political world”³⁰¹. From this revised basis, both authors “underline that a sound normative evaluation of the Court's activities can be made only when its political dimensions are acknowledged and understood”³⁰².

²⁹⁸ Global Observatory interview with Luis Moreno-Ocampo (Jan 2012)

²⁹⁹ Nouwen and Werner (2010:946)

³⁰⁰ Nouwen and Werner (2010:963-964)

³⁰¹ Nouwen and Werner (2010:964)

³⁰² *Ibid.*

The political reality of the ICC is an important realisation, but it is also one that comes with limits. While the politics of the UN Security Council are necessary to some extent in referrals under Article 13(b), accelerated investigations and public appearances with implicated parties are less easily justifiable. Moreover, noting their inevitability, Nouwen and Werner propose the acknowledgement of political dimensions by the Court³⁰³. However, as above, Prosecutor Moreno-Ocampo has “explicitly reject[ed] the idea that the ICC is ‘political’”³⁰⁴. Rather, in Libya, it appears more accurate to say that a “‘camouflaging’ of policy preferences” as “matter[s] of complying” with more conventional legal norms and rules³⁰⁵ has been undertaken. Accordingly, to the extent that the Prosecutor has been inappropriately or not openly politically-influenced in its Libyan interventions, the independence and ultimately the normative legitimacy of the ICC is called into question.

³⁰³ Nouwen and Werner (2010:946)

³⁰⁴ Nouwen and Werner (2010:962)

³⁰⁵ Hansen (2014:23)

4. The Ongoing Violence in Libya

4.1. Setting the scene of continuing crimes

The second focus of ICC interventions into post-Gaddafi Libya explored in this thesis is, in fact, more accurately described in terms of where the Court has *not* intervened. Beyond the crimes alleged against former regime figures Al-Senussi and Gaddafi, incidents of grave and/or mass violence have been, and continue to be, committed across Libya since conflict began in early 2011. Before analysis of the Court's proper or *legitimate* function in the ongoing conflict(s), the different dynamics of the violence and reactions to it are set out in brief.

Following overthrow of the Gaddafi regime, the interim revolutionary authorities and subsequently elected Libyan government have extended "one-sided justice and vengeance against those associated with the regime"³⁰⁶. In May 2012, the government passed 'Law 38', granting general amnesty for revolutionary crimes, or more specifically for

"...military, security or civil actions dictated by the February 17 Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution."³⁰⁷

Remarking on the motivations behind the amnesty, the Chatham House Libyan Working Group has explained that Law 38 was not aimed at the public interest, "but rather served the interests of other groups (such as protecting members of the NTC [Libya's transitional government] from future prosecution...)"³⁰⁸. Consistent with shielding prosecutions, the UN Commission of Inquiry on Libya has concluded that the *thuwar* (the Arabic term used by and to describe Libyan revolutionary militias³⁰⁹) "committed serious violations, including war crimes and breaches of international human rights law"³¹⁰. The trend continues - in June of this year, Amnesty International condemned the murder of twelve former Gaddafi soldiers³¹¹. In light of the documented atrocities committed by supporters of the revolution, Law 38 poses a

³⁰⁶ Kersten (2016b:3)

³⁰⁷ HRW (May 2012a)

³⁰⁸ Chatham House (2012:11)

³⁰⁹ Friedman (2011)

³¹⁰ HRC, International Commission of Inquiry on Libya (March 2012:1)

³¹¹ Amnesty International (June 2016)

significant barrier to achieving accountability at the domestic level. Responding to this, Richard Dicker, Director of Human Rights Watch’s international justice programme, has called for the ICC to act:

“With the NTC now openly trying to shield militia leaders from justice, it falls to the ICC prosecutor to vigorously examine these crimes.”³¹²

As a Libyan law, the Court in The Hague is of course not bound by Law 38, and remains free to investigate and prosecute individuals falling within its scope – a fact recognised explicitly by Prosecutor Moreno-Ocampo at a Press Conference in May 2012. However, despite consistent commitment by the OTP –

“My Office is ready to play its full part in accordance with the Rome Statute by ensuring accountability for atrocity crimes in Libya”³¹³ -

limited reportable action has yet to be initiated.

In addition to crimes of the revolution, crimes of significant gravity and magnitude continue to be committed by competing militias across Libya, backing rival governments, and in many cases now aligned with radical Islamist groups. As documented by Ebbs and Saudi,

“[T]he Libyan media reported almost 3000 conflict-related deaths in 2014 alone, many of which were civilians.... Over 390,000 people have become internally displaced since the escalation of violence”.³¹⁴

The intensity of specific instances of violence – such as the forced displacement and alleged genocide³¹⁵ of the Tawerghan community at the hands of the Misratan militia – is also mentionable. The Court has remained neither silent nor blind to the “rampant” and “staggering” scale of abuse³¹⁶. The Prosecutor has stressed “the importance of the undertaking investigations with respect to the ongoing atrocity crimes in Libya”, and further reiterated “[her] Office’s every desire to do so”³¹⁷. Yet the promise of such statements remains qualified by a five year time-lapse since investigations last resulted in concrete arrest warrants.

³¹² HRW (May 2012c)

³¹³ ICC Prosecutor 10th Statement to UNSC, Oct 2015, para 12

³¹⁴ *Ibid.*

³¹⁵ Heller (August 2012) and Human Rights Investigations (2011)

³¹⁶ Amnesty International (Feb 2016)

³¹⁷ ICC Prosecutor 10th Statement to UNSC, Oct 2015, para 12

As a final note, an increasing focus for the ICC's ongoing role in Libya concerns the use of violence against citizens by groups allegiant to the Islamic State or "ISIL". A recent Human Rights Watch report has documented cases of crucifixion and forcible disappearances amongst many other crimes³¹⁸. Speaking to the Security Council last year, Prosecutor Fatou Bensouda highlighted that the number of civilian deaths "attributed to ISIL has been consistently higher in number than those of other perpetrators"³¹⁹. The nature and scale of the atrocities committed by such groups has undoubtedly brought a new dynamic to the ongoing hostilities in Libya, and as discussed below, most likely also to ICC interventions within the situation.

4.2. The procedural question: proper jurisdiction

In light of the documented atrocities committed in Libya, both during the revolution, in the years since and at present, how far has the ICC, specifically the Office of the Prosecutor, adhered to its obligations under the pre-trial provisions of the Rome Statute?

Once again, in seeking to evaluate the procedural legitimacy of the Court in this context, it is in the first place necessary to highlight the specific pre-trial statutory obligations that have provoked discussion across the data collected. In both interviews conducted and literature explored, arguments centre around the proper scope of the ICC's jurisdiction in the situation. The focus becomes the Prosecutor - already described as the "gatekeeper" of the cases to be opened within a situation area³²⁰. Questions arise as to whether the Prosecutors (both Moreno-Ocampo and now Bensouda) have been simultaneously too narrow and, relevant more recently, too broad in their approach to jurisdiction.

As set out above, the source of the Court's jurisdiction within the Libyan situation is, under Article 13(b) of the Statute, a referral to the Prosecutor by the UN Security Council. Determining the actual scope of the Court's jurisdiction therefore also entails scrutiny of UNSC Resolution 1970. Perhaps the product of a Resolution passed with "extraordinary speed"³²¹, Resolution 1970 offers little detail on the precise boundaries of the Court's function in Libya. Under paragraph 4, the referral simply covers "the situation in the Libyan Arab Jamahiriya since February 2011". Several points can be noted here. First, "since February 2011" offers a clear limit on investigation by the Prosecutor of crimes committed during the regime years.

³¹⁸ HRW (May 2016)

³¹⁹ ICC Prosecutor 10th Report to UNSC, Nov 2015, para 27

³²⁰ Badagard and Klamberg (2016)

³²¹ Moss (March 2012)

Though beyond the scope of the research possible here, this is likely to be significant for the Court's sociological legitimacy in post-Gaddafi Libya. Elham Saudi, Director of LFJL has noted that for "most [Libyan] people", the focus for justice is on crimes committed earlier than the mandate of the ICC³²². Second, and more relevant to the below discussion, the Court's jurisdiction over the situation is forward-looking, and thus of course also includes any crimes committed since the first Libyan civil war and referral in 2011.

Under Resolution 1970, the Prosecutor is required to "equally" investigate all available evidence relating to the commission of international crimes, in order to determine both whether to open a formal investigation into a situation and then whether to initiate individual cases³²³. From this basis, Kersten summarises the first line of critique across the data:

"Despite significant evidence that crimes were committed by other actors in the conflict, including Libyan rebels, or 'thuhwar'... Saif and Senussi remain the only two individuals indicted by the Court"³²⁴.

Also making the point, Melinda Taylor contended that there has been "a complete disregard for anything other than Gaddafi crimes"³²⁵ in the five years of OTP investigations. Such an approach corresponds with the one-sided justice pursued by post-revolutionary Libyan authorities described above. Calling out the Court, leading human rights organisations Amnesty International and Human Rights Watch continue to record militia atrocities, and urge the current ICC Prosecutor, Fatou Bensouda, to "consider serious ongoing violations beyond the scope of her current investigation"³²⁶. Both LFJL and the Redress Trust have appeared before the court to "underscore that no cases against revolutionaries have commenced"³²⁷. Crucially, the OTP itself has acknowledged its role in securing justice for a broader scope of crimes. In the first year following the referral of the situation, Prosecutor Moreno-Ocampo explained that his Office was investigating allegations of war crimes committed by "anti-Gaddafi forces" during the civil war³²⁸. As above, in May 2012, he also publicly noted that the ICC remains free to investigate and prosecute individuals falling within the scope of amnesty Law

³²² Saudi, BBC Radio4 (April 2012)

³²³ Rome Statute, Articles 54(1)(a)

³²⁴ Kersten (2012:4)

³²⁵ Author's interview with Melinda Taylor, on 14 April 2016 [18:39]

³²⁶ HRW (May 2015); see also Amnesty International (Feb 2016)

³²⁷ *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, para 29

³²⁸ Charbonneau (Dec 2011)

38³²⁹. More recently, current Prosecutor Bensouda, in a statement to the UN Security Council, asserted that it was of “paramount importance that the ongoing crimes committed by different actors in Libya are investigated”³³⁰.

Such acknowledgements from the two ICC Prosecutors suggest neither has misinterpreted the neutral jurisdiction laid down in Resolution 1970, inclusive of both regime and revolutionary/militia crimes. Accordingly, it appears inaccurate to say that the Court, or the Office of the Prosecutor, has failed to fully respond to their full jurisdictional function in Libya. It has not been denied that ICC accountability is required for crimes committed by former anti-Gaddafi forces, and intentions have been stated to do so. However, while the failure in practice to initiate any further cases since 2011 may not amount to departure from any legal basis – as a measure of procedural legitimacy – it nonetheless has significance for the OTP, and the Court more generally. Through the Prosecutor’s narrow focus on the two former regime leaders, and continued lack of action elsewhere has, as contended by Heller, “the ICC has made itself look partial, and just a tool of political forces”³³¹. As in the previous case study, questions of impartiality concern the standards of due process upheld by the institution, as an indicator of normative legitimacy. With this in mind, the proper place to explore this issue further is within the scope of the following normative sub-question, below.

Beyond this, in recent years, the Prosecutor’s reported focus in her investigations has shifted to reflect new dynamics in Libyan hostilities. As introduced above, reacting to the scale of crimes committed by Islamic extremist groups within Libya, the Prosecutor now considers that “ICC jurisdiction over Libya granted by UNSCR 1970 (2011) *prima facie* extends to such crimes”³³². Potential ICC investigation of IS crimes has been met with loud support from some. Discussing the ICC’s role in targeting IS terrorism more generally – i.e. beyond the Libyan context; also in Iraq and Syria – Stephen Twigg has argued that “[t]he barbaric perpetrators of these most heinous crimes must be brought to justice”³³³. He recalls with support the motion passed in the UK House of Commons in April 2016 which

³²⁹ HRW (May 2012c)

³³⁰ ICC Prosecutor 10th Statement to UNSC, Oct 2015, para 18

³³¹ Author’s interview with Kevin Jon Heller, on 30 April 2016 [07:30]

³³² ICC Prosecutor 9th Report to UNSC, Nov 2015, para 19

³³³ Twigg (April 2016)

“calls on the Government to make an immediate referral to the UN Security Council with a view to conferring jurisdiction upon the International Criminal Court so that perpetrators can be brought to justice.”³³⁴

Consistently, the European Parliament passed a resolution in February of this year condemning the atrocities committed by ISIS/Daesh and calling for perpetrators “to be brought to justice and prosecuted for violations of international law”³³⁵ – with specific reference to the Rome Statute. “[A]s horrendous crimes multiply”, Dicker, international justice director for Human Rights Watch, has suggested that “it’s time for the ICC prosecutor to expand her investigations”³³⁶.

However, while arguments as to the abhorrent nature of crimes committed carry much moral weight, analysis of proper jurisdiction basis for the purposes of measuring procedural legitimacy is a more technical exercise. As explained in the recent OTP draft policy document on case selection and prioritisation,

“[P]ursuant to article 19, a case must fall within the scope of, or be sufficiently linked to, a situation that has been referred by a State Party or the Security Council... This means that the case cannot exceed the temporal, territorial or personal parameters defining the situation under investigation.”³³⁷

In Libya, this of course means the wording of paragraph 4 Resolution 1970. From the open-ended reference to “the situation in the Libyan Arab Jamahiriya”, there is clearly nothing in the wording of paragraph 4 to bar its application to IS crimes. However, regardless, several data sources have questioned whether the scope of Resolution 1970 should, on a proper interpretation, cover acts of terrorism committed by the so-called Islamic State. Reflecting on the predicament for the Prosecutor, Kersten suggested that

“there’d be some interesting thinking that would have to be done in order to justify how you can use a Security Council referral that was clearly about an uprising and civil war in 2011 to deal with a broader conflict – which sure is a spin off, and they’re related no doubt... to then use that for almost a different character of a case on ISIS”³³⁸.

³³⁴ *Ibid.*

³³⁵ European Union, European Parliament, ‘Resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called ‘ISIS/Daesh’, para 2

³³⁶ HRW (May 2015)

³³⁷ OTP *Draft Policy Paper on Case Selection and Prioritisation* (Feb 2016:8-9)

³³⁸ Author’s interview with Mark Kersten, 18 April 2016 [21:40]

In similar vein, Heller has offered doubts on the OTP trying to “fold IS into the Security Council’s referral”³³⁹:

“Yes, one can certainly read the Security Council’s referral to include it, but that wasn’t really about the situation to which the Security Council were referring – they were dealing with the situation involving the overthrow of Gaddafi.”³⁴⁰

Mark Kersten drew comparisons with the ICC investigations in the Central African Republic. The Court already had jurisdiction to investigate in CAR on the basis of a referral regarding a conflict beginning 2002. Nonetheless, in responding to additional (though still to some extent related) crimes committed in a conflict in CAR a decade later (August 2012), the Prosecutor opted to do so on the basis of an independent investigation. So, as Kersten summarises, “they have two CAR cases, because they’re so divorced from each other in terms of what they’re concerned with”³⁴¹. The question then becomes why this should also not be the proper approach to addressing IS crimes in the Libyan situation.

As Libya remains a non-State party to the Rome Statute, opening a new, independent investigation would require another Security Council referral under Article 13(b) Rome Statute aimed at IS accountability. The Prosecutor’s broad interpretation of Resolution 1970 has avoided requests for such a resolution being on the OTP’s agenda. However, nonetheless, the Prosecutor has in some instances relied Resolution 2214 regarding the Libyan situation passed last year by the Security Council. This Resolution made specific reference to IS crimes in Libya, *deploring* “the terrorist acts being committed by ISIL”³⁴². Though Resolution 2214 brings IS crimes to the focus in the Libyan situation, it should not be mistaken as an expansion of the OTP’s mandate – the Court is not mentioned in the document. This is perhaps unsurprising in light of trend, within the data collected, of increased UN Security Council apathy towards the ICC’s role in ongoing Libyan hostilities.

Support of the strict need for a proper jurisdictional basis can be found in Prosecutor Fatou Bensouda’s approach to the broader context of IS crimes. The Prosecutor has resisted pressure from “politicians, human rights groups, and editorial writers”³⁴³, in the face of “ample reports of ‘crimes of unspeakable cruelty’”³⁴⁴, to open investigation in to IS crimes in both Syria and

³³⁹ Author’s interview with Kevin Jon Heller, on 30 April 2016 [06:30]

³⁴⁰ *Ibid.*

³⁴¹ Author’s interview with Mark Kersten, 18 April 2016 [21:20]

³⁴² ICC Prosecutor 9th Report to UNSC, Nov 2015, para 19

³⁴³ Simons (April 2015)

³⁴⁴ *Ibid.* See, for example Yazda and the Free Yezidi Foundation (Sept 2015)

Iraq. Her decision was based on a lack of authority over the states not party to the Rome Statute in the absence of UNSC referral³⁴⁵. On the one hand, the OTP's position demonstrates commitment to proper jurisdiction even where normative demands pull towards the opposite conclusion. However, on the other, the OTP *has* interpreted jurisdiction over such crimes in Libya. Whereas the Office has no existing role in either Iraq or Syria, the referral of the Libya following the civil war in 2011 offers *some* flexibility and scope without further Security Council action. Therefore, concerns arise regarding Libya, and Resolution 1970, becoming the "back-door"³⁴⁶ through which the Prosecutor, on a less controversial though still not entirely proper jurisdictional foundation, can respond to calls for tackle widespread IS human rights abuses.

4.3. The normative question: an impartial Court to end impunity

In light of the documented atrocities committed in Libya, both during the revolution, in the years since and at present, how far has the ICC, specifically the Office of the Prosecutor, acted in accordance with standards of international human rights law, specifically the rights constitutive of a fair trial, and with the international criminal law norm against impunity?

Impartial Investigations

Recapping a conclusion of the procedural measure of legitimacy, despite the OTP's isolated focus on a small number of former regime leaders, the Prosecutors' repeated acknowledgement of a wider mandate, coupled with ongoing investigations, is likely sufficient compliance with both the Statute and Resolution 1970 for the purposes of procedural legitimacy. However, through a normative lens, the fact that these commitments have translated into no actual progress in holding perpetrators of opposition and militias crimes accountable raises significant legitimacy questions. The requirement for an impartial ICC, as a constitutive guarantee of due process, central to the Court's normative base in international human rights standards, has been set out above. Specific to the Prosecutor, a recent OTP draft policy paper categorises

³⁴⁵ Simons (April 2015)

³⁴⁶ Jakobsson (May 2015)

impartiality as a “general principle” of case selection and prioritisation³⁴⁷. Summarising the requirements of impartiality in case selection, the papers sets out that

“the Office will apply the same processes, methods, criteria and thresholds for members of all groups to determine whether crimes committed by them warrant investigations”³⁴⁸.

It is important to note here, as emphasised by the OTP, that “impartiality does not mean ‘equivalence of blame’ within a situation”³⁴⁹. As an element of due process, impartiality is a norm of procedural nature, requiring consistency only within decision-making processes, not in the actual outcomes of decisions.

As echoed across the data collected, “the ICC has issued only 3 indictments in Libya”, all of which have been targeted on former regime officials, “and no new ones since 2011”³⁵⁰. On the basis of the above then, it would be expected that – after applying the same methods and criteria – there was found to be insufficient evidence that other parties within the conflict (e.g. revolutionaries and militias) were responsible for crimes within the jurisdiction of the Court. However, on the contrary, this thesis has already referred to various sources of evidence in support of such actors being responsible for serious human rights abuses³⁵¹. Furthermore, the Prosecutor herself has publicly expressed concern “that large scale crimes, including those of the ICC jurisdiction are being committed by *all parties* in the conflict”³⁵². Despite this, Kersten contends that the Office has had “no discernible effect on accountability for crimes committed by Libyan opposition forces”³⁵³ – in the words of Heller, “they haven’t made a peep”³⁵⁴. In the face of strong evidence of ongoing crimes, the Prosecutor’s failure to respond and initiate further arrest warrants implicates the Office’s impartiality. As explained by Evenson:

“[s]elective cases often bypass major perpetrators and undermine a Prosecutor’s impartiality”³⁵⁵.

³⁴⁷ OTP *Draft* Policy Paper on Case Selection and Prioritisation (Feb 2016:7). Also a “core principle”, OTP Code of Conduct (Sept 2013: Ch.6.2).

³⁴⁸ OTP *Draft* Policy Paper on Case Selection and Prioritisation (Feb 2016:7)

³⁴⁹ *Ibid.*

³⁵⁰ Ebbs and Saudi (Feb 2015)

³⁵¹ *Ibid.* See notably the Report of the International Commission of Inquiry on Libya (March 2012)

³⁵² ICC Prosecutor 10th Report to UNSC, Nov 2015, para 39. Emphasis added.

³⁵³ Kersten (2016a:155)

³⁵⁴ Author’s interview with Kevin Jon Heller, on 30 April 2016 [07:20]

³⁵⁵ Evenson (Sept 2011)

The effects of the apparent partiality in the selection of Libyan cases have been recently described by Kersten. For him, the Prosecution's role in the conflict becomes defined by

“what the OTP did *not* do rather than what it *has* done. In deciding not to prosecute alleged militia atrocities during the civil war or since its conclusion, the Court has confirmed Libya's conflict narrative”³⁵⁶.

Reflecting on this narrative, Kersten brands justice in Libya as “victor's justice”³⁵⁷. This notion has emerged as a theme within the literature on the ICC's role in the Libyan situation. Alleblas has explained the one-sided OTP indictments “fuel criticism that the Court serves victor's justice”³⁵⁸. Furthermore, Murray described how this approach from the Court was particularly significant in the first months of intervention in the ongoing hostilities:

“In Libya, they [ICC] have been drawn into initiating the victor's justice before they [Libyan revolutionaries] have actually won”³⁵⁹.

Such arguments suggest that partial case selection and prioritisation has the potential to shape or even *legitimise* one party rather than another in hostilities – attaching far-reaching political and social consequences to judicial decisions. Through beyond the strict scope of this thesis, several sources also suggested that problems of “partial justice”³⁶⁰ extend beyond Libya, and are prevalent in several of the ICC's situation areas. Human Rights Watch published a report in the wake of the referral of the Libyan situation, entitled ‘Unfinished Business: Closing Gaps in the Selection of Cases’³⁶¹. Its content highlighted similar dynamics in earlier OTP investigations – notably the DR Congo and Uganda – damaging both the “credibility and legitimacy” of the Court³⁶². Capturing the breadth, Alleblas has described the Court as now “plagued by the stigma of victor's justice”³⁶³. Commenting on the principle of impartiality, the HRW report advocated that

“[r]ather than provide ‘victor's justice’, the ICC should investigate and prosecute crimes committed by all sides, even where doing so is politically inconvenient.”³⁶⁴.

³⁵⁶ Kersten (2016:161)

³⁵⁷ *Ibid.*

³⁵⁸ Alleblas (July 2013)

³⁵⁹ Murray (May 2011)

³⁶⁰ *Ibid.*

³⁶¹ HRW (2011)

³⁶² HRW (2011:46)

³⁶³ Alleblas (July 2013)

³⁶⁴ HRW (2011:5)

Reference to what is “politically inconvenient” for the Court once again takes analysis of impartiality beyond the question of *how* the Court has acted, to ask for what reasons they have done so. As with the deferential approach taken by the Prosecutor to the admissibility of the Gaddafi and Al-Senussi cases, questionable cooperation from Libyan authorities is also a factor in the initiation of opposition cases. In light of the Court’s struggle to attain any real assistance from Libyan authorities even in attempts to prosecute regime leaders, cooperation with regards to crimes committed by revolutionary-inspired militia, especially within the scope of Law 38, appears highly unlikely. Despite this, however, Kersten nonetheless dismisses such arguments as a defence for the lack of action from the OTP. First, he notes the symbolic value of any prosecutions initiated, regardless of consequences:

“[T]hey could do it now, with the full knowledge that they’ll never get the cooperation, and simply come out and be like ‘listen, we know we’re not going to get cooperation, Libya’s never really cooperated with us, but at least symbolically we want the world to know that these were crimes against humanity and these were war crimes committed by the other side... we’re not willing to sacrifice us telling the world that this was the case just because these people might not end up in the dock.’”³⁶⁵

Moreover, he recalls reports in Libyan media sources that have suggested cooperation with regards to militia crimes (particularly those committed by the Misratan and Zintani forces) may not be so unthinkable:

“Libya is looking into the possibility of allowing the International Criminal Court (ICC) to prosecute those responsible for the recent violence in Tripoli and elsewhere”.³⁶⁶

Such reports suggest that at least in the later of the five years since the referral of the Libyan situation, there may have been more scope for the Prosecutor to act than was translated into practice. Beyond cooperation, the Prosecutor has consistently cited the “combined effect of instability [in Libya] and lack of resources”³⁶⁷ as limitations to ongoing investigations, and in turn the opening of new opposition crime cases. Yet while this may be weighty defence to accusations that the Court has failed to pursue *enough* or *any* crimes – see the below subsection on impunity – it does not offer sufficient explanation as to why the Court has allocated resources it does have to regime crimes *only*. As questioned by Melinda Taylor,

³⁶⁵ Author’s interview with Mark Kersten, 18 April 2016 [40:05]

³⁶⁶ Kersten (July 2014)

³⁶⁷ ICC Prosecutor 10th Report to UNSC, Nov 2015, para 18

“[i]f they [ICC] were to have Saif Gaddafi you’d have one defendant, but a whole host of unprosecuted crimes, and is that an effective use of resources?”³⁶⁸

Once again then, the Court, and in particular, the Office of the Prosecutor has adopted (and maintained) a deferential position to current Libyan authorities. In addressing only one side of the Libyan hostilities, the OTP has called into question its impartiality, and thus crucially its normative legitimacy. As a final note, it can be argued that the consequences of this apparent partiality are perhaps more serious here than with the leniency shown towards national trials in the Gaddafi and Al-Senussi cases above, in light of the scale of ongoing crimes.

The Norm Against Impunity

Beyond issues of impartiality, the scale of the ongoing violence also triggers the ICC’s normative role in ending impunity for international crimes - the language of ‘impunity’ was dominant in many critiques of the Court’s continuing role in Libya. LFJL recently wrote to the Prosecutor, wishing to “express its concern” that her Office “has yet to play a substantial role in ending the impunity currently enjoyed by perpetrators of international crimes in Libya”³⁶⁹. In similar vein, others have spoken of the “huge impunity gap”³⁷⁰ and the reality that “to date, nothing has materialized from the Court’s continued investigations”³⁷¹. In the face of these fairly consistent accusations, precisely what is required of the Court in terms of its obligation to tackle impunity for international crimes warrants further examination.

Both for reasons of feasibility of case load and in line with the sovereignty of states (captured in the principle of complementarity),

“[i]t is not the responsibility or role of the Office to investigate and prosecute each and every alleged criminal act within a given situation, or every person allegedly responsible for such crimes”.³⁷²

Accordingly, some threshold is required of either the perpetrators of crimes, or the nature of crimes themselves, to qualify as potential cases for the OTP. As set out by the Prosecutor in his first report to the Security Council on the Libyan situation, the proper function of the Office

³⁶⁸ Author’s interview with Melinda Taylor, on 14 April 2016 [20:07]

³⁶⁹ LFJL (Feb 2016)

³⁷⁰ Author’s interview with Melinda Taylor, on 14 April 2016 [19:07]

³⁷¹ Kersten (2016b), in Langer and Brown (2016:308)

³⁷² OTP *Draft* Policy Paper on Case Selection and Prioritisation (Feb 2016:4)

in pursuing cases is to focus on those “who bear the greatest responsibility”³⁷³. Justifying this qualification, the Prosecutor explained that

“[t]his will allow the Office to carry out investigations expeditiously; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization”³⁷⁴.

Those with the greatest responsibility are defined as those with the “highest responsibility” – those who “ordered, incited, financed, or otherwise planned the commission of the alleged crimes”³⁷⁵ – as well as those responsible for the “gravest incidents”, determined on the basis of “scale, nature, manner of commission and impact”³⁷⁶. The three arrest warrants issued by the Court against Muammar Gaddafi, his son and Al-Senussi offer clear examples of the former. Further, though neither have yet led the Prosecutor to open cases, the alleged genocide of the Tawerghans at the hands of the Misratan militia, and the “unbearable atrocities” committed by ISIS in the Libyan city of Sirte³⁷⁷, are likely examples of sufficiently grave crimes.

Yet, of course, serious human rights abuses – including those constituting international crimes – are far from confined to this limited category of persons of concern for the Court. In answer to this reality, the OTP reasons that “if the Office does not deal with a particular individual, it does not mean that impunity is granted”³⁷⁸. Instead, “consistent with the principle of *positive* complementarity, the Office supports national investigations of alleged crimes that do not meet the criteria for ICC prosecution”³⁷⁹. Reflecting this position, a Memorandum of Understanding (MOU) signed between the OTP and the Libyan government in 2013 holds that “Libyan authorities... have responsibility for investigating offences committed by Libyans who remained in Libya”³⁸⁰. The OTP would rather continue investigations “with a focus in particular on pro-Gaddafi officials outside of Libya”³⁸¹.

³⁷³ ICC Prosecutor 1st Report to UNSC, May 2011, para 25. See too OTP Strategic Plan, 2016-2018 (Nov 2015).

³⁷⁴ ICC Office of the Prosecutor (May 2011) “First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970” para 26

³⁷⁵ ICC Prosecutor 1st Report to UNSC, May 2011, para 25

³⁷⁶ *Ibid.*, para 7

³⁷⁷ Dearden (May 2016)

³⁷⁸ ICC Prosecutor 1st Report to UNSC, May 2011, para 25

³⁷⁹ *Ibid.* Emphasis added.

³⁸⁰ Ferstman, Heller, Taylor and Wilmschurst (2014:6)

³⁸¹ *Ibid.*

However, concerns arise across the data regarding even the qualified scope of the OTP's normative responsibility to put an end to impunity, particularly with regards to the impact of the MOU on the continued violence. Taylor has characterised the MOU as an unintended "free pass"³⁸² by which those who have committed crimes can avoid being held accountable. "Libyans who remain in Libya" includes of course various important militia figures, who would likely otherwise qualify as some of those "most responsible" for serious human rights violations and potential international crimes within the Court's jurisdiction. The Office's allocation of such individuals to the Libyan government, is coupled with both the apparent inability (Libya is now a "tale of two governments"³⁸³) and reluctance (evidenced by continuing amnesty laws) of Libyan authorities to "rein in these abuses"³⁸⁴. With this in mind, serious doubts emerge regarding the accountability which can be achieved through such "burden-sharing"³⁸⁵. Lawyers for Justice for Libya have stated,

"We believe that the Memorandum may therefore risk resulting in continued impunity and result in victims' access to justice being dependent on the location of the perpetrator of crimes."³⁸⁶

It is worth mentioning that the current status of the 2013 MOU remains unclear. In April of this year, the OTP filed a request with P-TC I for an order transmitting the request for arrest and surrender of Gaddafi directly to the Abu-Bakr al-Siddiq Battalion who, at least until July of this year, were detaining Saif Gaddafi in Zintan³⁸⁷. This clear circumvention of Libyan State authorities has led some to speculate that the Memorandum is now likely "dead"³⁸⁸. This may, in theory, open up scope for new ICC cases following Libyan government failures. This much is implied in the very recent Tweets of Kobler, Special Representative, Head of United Nations Support Mission in Libya:

³⁸² Author's interview with Melinda Taylor, on 14 April 2016 [19:02]

³⁸³ Murray (April 2015)

³⁸⁴ HRW (May 2015)

³⁸⁵ ICC Prosecutor 6th Report to UNSC, Nov 2013

³⁸⁶ LFJL (Feb 2016)

³⁸⁷ ICC Prosecutor 11th Report to UNSC, May 2016, para 4. NB: there have been unconfirmed and debated reports emerge that Gaddafi is released from custody and his death sentenced quashed, see Stephen (July 2016) and AfricaNews (July 2016)

³⁸⁸ Libyan Prospect (June 2016)

“I followed up with the ICC General Prosecutor the issue of investigating on the new crimes in Libya... The ICC is about to investigate new crimes”³⁸⁹.

Yet, with regards to the Court’s normative obligations to fight impunity, it can be asked whether such advances come too little too late, both for Libyan communities affected by the violence *and* the Court’s reputation. As cautioned by Kersten,

“[w]hatever action #ICC takes now in #Libya, needs to be seen in context of five years of impunity”³⁹⁰.

What, then, can be said – on the basis of the data collected – about the OTP’s adherence to the norm against impunity with regards to the ongoing violence in Libya? Reflecting on the nature of the OTP’s duty to investigate and prosecute those ‘most responsible’, Heller noted that the unclear scope of the threshold rendered it difficult for “one to say that they [the Office and Court] have failed an actual affirmative legal obligation”³⁹¹. Such language is more consistent with indicators of *procedural* legitimacy. However, Heller went on to suggest that the OTP “have certainly failed the test of legitimacy”³⁹². Such a ‘test’, when contrasted with precise legal obligations, can be understood in the present analysis as referring to broader normative expectations of legitimacy. Similarly, for Ebbs and Saudi,

“The Court’s engagement in Libya shows opening an investigation is no guarantee that those who commit crimes will be pursued with rigour, or that the Court’s work will have much impact on challenging impunity and preventing further violence.”³⁹³

For both members of LFJL, to the extent that the ICC fails to do more than merely acknowledge the likely commission of severe human rights abuses and international crimes, it undermines the “very *raison d’être*”³⁹⁴ of the institution – or, to put it another way, a core normative function by which it is driven.

³⁸⁹ Tweeted by Kaufman (@kaufman_law), 25 May 2016, 03:19PM

³⁹⁰ Tweeted by Kersten (@MarkKersten), 14 June 2016, 10:27AM

³⁹¹ Author’s interview with Kevin Jon Heller, on 30 April 2016

³⁹² *Ibid.*

³⁹³ Ebbs and Saudi (2015)

³⁹⁴ *Ibid.*

As implied above however, lack of further interventions by the Court in Libya have consistently been reasoned on external grounds – i.e. the “combined effect of instability [in Libya] and lack of resources”³⁹⁵. In terms of security, the Court has experienced first-hand the risks inherent in direct interventions in continuing hostilities. In June 2012 four ICC staff members were arrested and detained for several weeks by the Zintan-based militia - treatment “emblematic” of the trend of targeting legal professionals in post-Gaddafi Libya³⁹⁶. The risks of ICC activities within such a context are twofold. Not only must the Court secure the safety of its personnel on the ground, but it must also ensure that affected communities are not put at further risk through contact with the institution. The impact of instability has also extended beyond the ICC. As described by Heller, conclusive findings of the International Commission of Inquiry on Libya were not produced until March 2012, over one year after the Commission was established, due to security difficulties limiting initial investigative abilities³⁹⁷.

Regarding resources, an overstretched budget has plagued the ICC’s interventions in Libya since the referral. In early 2011, then ICC President Sang-Hyun Song noted that the Court may be required to rely on its contingency fund should it fail to “absorb the cost of the Libya situation within the framework of the existing budget”³⁹⁸ – a reality which eventually played out³⁹⁹. As recounted by Stahn, ICC State Parties then neglected to accommodate the Libyan situation into the 2012 budget:

“[T]he former prosecutor, Luis Moreno Ocampo criticized Britain, France and Germany for supporting the referral of the situation in Libya to the ICC by the Security Council while simultaneously calling for a cap on the ICC’s budget... ‘State parties referred Libya to us and now they say they can’t pay’ he said.”⁴⁰⁰

Continuing the theme, Ebbs and Saudi noted that “only €603,000 [was] allocated for investigations in Libya” in the 2014 budget⁴⁰¹ - “on an anticipated per case basis, it is the smallest allocation ever made by the court”⁴⁰².

³⁹⁵ ICC Prosecutor 10th Report to UNSC, Nov 2015, para 18

³⁹⁶ Author’s interview with Melinda Taylor, counsel for the OPCD and one of the four ICC staff detained in Libya, 14 April 2016.

³⁹⁷ Heller (2012:2)

³⁹⁸ Gray-Block (April 2011)

³⁹⁹ Reydam, Wouters and Ryngaert (2012:139)

⁴⁰⁰ Stahn (2015:89)

⁴⁰¹ Ebbs and Saudi (2015)

⁴⁰² *Ibid.*

In situations referred to the Court by the UN Security Council, like Libya, there is an “additional funding option”⁴⁰³ available to the ICC. Honourable Stephen J Rapp has explained that “[t]he Rome Statute was drafted with the explicit expectation that the costs of UNSC referrals under Chapter 7 of the UN Charter would be borne by the United Nations”⁴⁰⁴. This expectation is articulated in Article 115(b) of the Statute. However, in stark contradiction, paragraph 8 of Resolution 1970 referring the Libyan situation to the ICC

“[r]ecognizes that none of the expenses incurred in connection with the referral... shall be borne by the United Nations”.

This barring language⁴⁰⁵ leaves an under-resourced Court limited in options. This much is evident from the consistent, but thus far unanswered, invitations of the Prosecutor to the Security Council to “seriously consider assisting the Office” in Libya⁴⁰⁶.

Beyond impeding the OTP’s capacity to gather evidence to open and conduct investigations into suspected international crimes, security and resource obstacles have permeated every aspect of the ICC’s interventions in Libya. This includes the OCPD’s ability to properly represent their detained client; and options for Outreach in Libya, as contributory to sociological legitimacy. To the extent that finance and stability have prevented the OTP tackling the “huge impunity gap”⁴⁰⁷ in post-Gaddafi Libya, they have undermined the institutions normative legitimacy. However, comparing this to the pragmatic and political motives highlighted across the data above, these ‘external’ influences on the ICC appear less damning. Several data sources have nonetheless suggested that more could have been done by the ICC. While acknowledging “the practical and financial restrictions the OTP currently faces in making its mandate operational in Libya”, a recent letter from LFJL still proposed that more effort was needed to “support and mobilise intermediaries”, who may be able to assist in the documentation of crimes⁴⁰⁸. Others however – notably Mark Ellis, who has recent experience of the difficulties of empirical research in Libya⁴⁰⁹ – have, on the contrary, argued that such additional responsibilities extend beyond the proper role of the ICC⁴¹⁰.

⁴⁰³ Rapp (2015)

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Rapp (2015)

⁴⁰⁶ ICC Prosecutor 10th Report to UNSC, Nov 2015, para 43

⁴⁰⁷ Author’s interview with Melinda Taylor, on 14 April 2016 [19:07]

⁴⁰⁸ LFJL Feb (2016)

⁴⁰⁹ Ellis (2015)

⁴¹⁰ Author’s interview with Mark Ellis, on 23 June 2016

5. Conclusions

5.1. A ‘legitimate’ ICC for post-Gaddafi Libya?

Drawing on the themes across the data in the two preceding chapters, significant questions arise as to the procedural and normative legitimacy of the International Criminal Court in post-Gaddafi Libya – *both* within the two cases the Court has opened from the situation, and with the ongoing violence on the ground. In terms of procedure, themes of inconsistency and leniency have emerged across the majority of legal bases considered. Criticism was both more focused on and stronger with regards to the Gaddafi and Al-Senussi proceedings. This is unsurprising in light of the OTP having actually initiated proceedings in these specific cases, and challenges having been brought before the Chambers of the Court. More pre-trial procedures are inherently triggered in such instances, compared to the procedures concerning the *potential* cases stemming from the ongoing violence.

The nature of the statutory provisions discussed has tended to concern what the Prosecutor/the Court *may* do or leave scope for interpretation of contestable thresholds – e.g. “willing”, “able”, “fully satisfied”, “the situation in the Libyan Arab Jamahiriya”. This renders it difficult to definitively state whether or not the ICC has failed to satisfy any concrete legal duties under the Statute. Nonetheless, the Court’s procedural record remains nonetheless jeopardised, on present data, when considering the effects of decisions on the ‘certainty of law’, an essential element of the principle of legality at the heart of procedural legitimacy⁴¹¹. Alluding to several examples from above discussion, positive conceptions of the principle of complementarity, proposed by the Prosecutor in the Libyan admissibility challenges under Article 17, stand in sharp contrast to the Office’s approach in previous situations (e.g. Kenya), and the approach advocated by the OPCD. Moreover, both the refusal to reconsider the Al-Senussi case under Articles 19(10) and the recent extension of jurisdiction to IS crimes reveal the Court adopting positions on various formalities widely considered to be out of line with the purpose for which such provisions were envisaged.

To the extent that the Court has not adopted a clear nor consistent approach to its statutory procedures in Libya, the procedural legitimacy of the institution – at least on the basis of the data relied upon – becomes markedly undermined. Doubts regarding procedural legitimacy are

⁴¹¹ Caracciolo (1999:231) and Rome Statute, Article 21(2)

of course damaging to the ICC in themselves. As reflected at the beginning of this thesis, for a Court increasingly called upon as a response to violence conflict, adjudicating on issues which both disturb the sovereignty of situation area States and attach serious potential consequences for those implicated in them, accusations against its legitimacy are particularly worrying. Yet, perhaps unsurprising in the complex realm of legitimacy, consequences also extend further. First, for Al-Senussi. Through leniency in his admissibility challenge and reluctance in reconsideration, the Prosecutor and Chambers have inadvertently authorised the rights-violating trial and death sentence Al-Senussi received in Tripoli last summer⁴¹². Furthermore, deferential or incoherent approaches to Rome Statute provisions set ambiguous precedents for future interventions, potentially calling into question the procedural legitimacy of both additional cases brought under the Libyan mandate *and* from other situation areas. Finally, narrow interpretations and high thresholds given to procedural tests which also capture broader normative principles – for example, Article 17(2)’s reference to due process – can have implications on indicators of the Court’s normative legitimacy.

Turning to normative indicators, once again, the abstract character of norms requiring impartiality or condemning impunity renders precise adherence difficult to determine. However, ICC interventions in post-Gaddafi Libya have certainly “muddied the waters”⁴¹³ regarding the stringency with which such standards ought to be upheld in ICC interventions. The Appeals Chamber categorically dismissed due process violations as sufficient grounds, without more, to challenge admissibility – discordant with the ICC’s function as a “standard setter or model” of the highest standard of international justice⁴¹⁴. Even more problematic is the OTP’s consistent appearances of partiality and improper influence in the Libyan interventions: from persistent one-sided case selection; to public endorsements of implicated Libyan authorities. The normative credentials of a Court which fails to ensure proper due process from implicated states may be weakened. Yet it is difficult to see how an international court that – despite its own human rights-consistent discourse - appears (on present data) to have acted in conflict with principles at the heart of due process can properly be labelled normatively legitimate at all.

A *crucial* qualification to comprehensive conclusions on the legitimacy of the ICC’s Libyan record has been the inability to explore perspectives of ICC interventions across affected

⁴¹² McDermott (Aug 2015)

⁴¹³ Ferstman, Heller, Taylor and Wilmschurst (2014:8)

⁴¹⁴ Chazal (2015:71)

Libyan communities – as the measure for determining sociological legitimacy. As made clear in the theoretical discussion of Chapter 1, the subjective and widely variable dynamics of sociological legitimacy introduce an essential additional dynamic to the concept. A full and accurate measure of the legitimacy of ICC interventions therefore depends upon this further focus.

Despite this, as a starting point for future empirically-grounded research, several speculations as to the Court's sociological legitimacy can be made on the basis of the data explored. One data source referred to a strong Libyan preference for national trials, *particularly* for Abdullah Al-Senussi⁴¹⁵. The Chamber's procedurally questionable finding of inadmissibility in the Al-Senussi case, and the Prosecutor's subsequent refusal to reconsider, are likely therefore to have resonated with communities on the ground. On the other hand, the Prosecutor's regime-focused interventions are likely also to have resulted in appearances of partiality on the ground in Libya, particularly for victims of *thuwar* crimes. Nonetheless, consistent with the definition of sociological legitimacy proposed, such conclusions can be nothing more than speculative without access to these communities themselves, not possible in the current climate of instability.

Critiques across the data as to the Court's performance against the measures of legitimacy are largely premised upon decisions of political convenience from the Prosecutor⁴¹⁶. Contrarily, shortcomings, where acknowledged by the Court, are defended (notably by the Prosecutor) on grounds of resource and security limitations. It has been recognised that while both influences have impacted negatively upon the institution's legitimacy, the former, internal motivations do greater damage to the Court's reputation than external justifications. Deciphering the precise strength and reach of the underlying influences of underfunding and security risks on ICC interventions is problematic. However, the persuasiveness of these factors as a defence for *all* ICC shortcomings is doubtful across much of the data, where critiques concern interventions unrestricted by security and resources – such as the speed of initial interventions, and the interpretation of due process under Article 17. Accordingly, at least in these instances, if not more broadly, the data understands the ICC's to have been motivated away from procedurally and normatively legitimate interventions by improper and unarticulated political considerations.

⁴¹⁵ Saudi, BBC Radio4 (2012)
⁴¹⁶

It is important to note, following the arguments of Nouwen and Werner, the fact that OTP decisions are influenced by political realities “does not necessarily mean [they] betray justice or the rule of law” nor that the Court acts “extra-statutorily”⁴¹⁷. Yet where pragmatism and politics fail to be properly articulated, and are instead camouflaged in legal formalisms (e.g. Article 17) and moral principles⁴¹⁸, the Prosecutor does not properly “do justice to the political”⁴¹⁹.

Returning to the research puzzle that has guided this thesis, following the dynamics of interventions (or lack of) detailed throughout Chapters 3 and 4 of this thesis, procedural and normative indicators have played a larger role in *deconstructing* the ICC’s legitimacy in Libya. Libya is the sixth situation in which ICC investigations have been initiated, almost a decade after its inception. Moreover, normative and procedural indicators are the elements of legitimacy over which the ICC has influence (*c.f.* the unpredictability of political resonance inherent in sociological measures). The combination of these two realities renders the conclusion of this research – that Libya “is for many a major example of the failure of allowing political considerations... to trump legal and rule of law principles”⁴²⁰ - particularly damning.

5.2. Conflicts of legitimacy

Yet measures and critiques of legitimacy are not as straightforward as the above discussion perhaps suggests. As predicted in the theoretical discussion of the concept, the procedural and normative demands have on several occasions operated out of sync, resulting paradoxical conclusions on the legitimacy of ICC interventions in Libya. Such divergence confirms the introductory reflections regarding the inherent complexity of legitimacy, as a concept which borders legal, moral, social and political issues⁴²¹.

Looking more closely at the competing dynamics, measures of normative legitimacy have consistently been more demanding on the Court than the procedural counterparts. Different parts of the Court have responded differently to the varying scopes of legitimacy. Perhaps predictably, the Chambers of the Court appear to have erred on the side of strict statutory interpretation, more consistent with procedural indicators, as evidenced by restrictive

⁴¹⁷ Nouwen and Werner (2010:964)

⁴¹⁸ Hansen (2014:23)

⁴¹⁹ Nouwen and Werner (2010)

⁴²⁰ CICC (May 2015)

⁴²¹ Vasiliev (2015:2)

interpretation of due process in admissibility challenges.⁴²² On the contrary, the Prosecutor, subjected to greater pressure from international advocacy groups, has in some instances been more responsive to broader normative expectations. This much is evident from considerations of alleged IS crimes despite doubtful, or at least unclear, jurisdiction under Resolution 1970. Such trends suggest that procedural and normative measures of legitimacy have fluctuating significance across the divisions of the Court, with their distinct functions, ultimately further complicating Court interventions.

The indicators of legitimacy have also come into conflict with other fundamental principles of the Court, notably the principle of complementarity. Article 17's procedural articulation of the principle is skewed by wider positive conceptions of complementarity from the Prosecutor. Moreover, the ICC's normative function in upholding standards of international due process in situation states operates at odds with complementarity's default preference to defer to national jurisdictions, apparently regardless of national moral credentials. As both examples evidence, complementarity (and its shadow side⁴²³) has reigned supreme over contrary procedural and normative commitments in the Libyan cases. Where procedural and normative indicators can operate at odds with other "cornerstone"⁴²⁴ principles of the ICC's jurisdiction, the Court's claims to be a legitimate institution become impeded to an even greater extent.

Similar conflicts can be predicted with sociological measures – perhaps to an even greater extent in light of the fundamentally different empirical-grounding of legitimacy's third lens. The Prosecutor's normatively worrying deference to rights-violating Libyan trials may, on the contrary, have strengthened sociological legitimacy so far as reports that many Libyans called for death sentences are accurate⁴²⁵. Furthermore, Libyan calls for examination of earlier regime crimes, beyond the ICC's mandate, allow legitimacy (on the sociological account) to fit better with complementarity's similar preference for national prosecutions. Once again then, sociological measures likely introduce new dynamics to understandings of legitimacy, confirming their necessity to a complete theoretical framework of the concept.

Conflicts of and with legitimacy do not render explorations and determinations of the concept a futile exercise. Where restrictive interpretations of human rights thresholds or the aim of ending impunity can be articulated on the basis of clear formalities within the Statute,

⁴²² Heller (2006)

⁴²³ Heller (2006)

⁴²⁴ Nouwen (2013:16)

⁴²⁵ Author's interview with Melinda Taylor, on 14 April 2016 [17:26]; Saudi (Sept 2011) and (April 2012).

deficiencies in normative legitimacy can be defensible on grounds of strict adherence to requirements of procedural legitimacy. On the other hand, where statutory formalities seemingly offer no bars to rights-compliant decisions, restrictive interpretations perhaps evidence the fact that other, illegitimate factors may be at play. Reflecting on the Libyan interventions, a broader reading of ICC jurisdiction under Resolution 1970 to include IS crimes appears grounded in normative motivations. Yet the limiting of due process under Article 17(2), and the reluctance to reconsider Al-Senussi's case under Article 19(10) despite violation of his rights, appear to lack this 'legitimate' defence. Accordingly, clearly delineated indicators of legitimacy, even where competing, bring transparency to a concept which it has been all too easy for both champions of the Court to assert and its critics to reject.

5.3. Final thoughts

Referral of the Libyan situation to the Court represented a novel possibility for the ICC. In addition to its function as an "ex post facto mechanism"⁴²⁶ of accountability, the institution had the opportunity to play a role in the prevention of international crimes in ongoing hostilities - a shift with potential legitimising weight in itself⁴²⁷. Yet disappointingly for the reputation of the Court, as a model of the highest international standard of rights protection and legality, and tragically for affected Libyan communities in need of justice, the five years following the referral have likely had more effect on the Court than on the situation itself⁴²⁸.

Legitimacy is a messy and complicated phenomenon in the context of international criminal justice. Post-Gaddafi Libya – as the Court's "latest failure"⁴²⁹, at least through procedural and normative lenses – offers a compelling example of the need for greater transparency and a more theoretically-grounded framework by which to evaluate commitments to this influential concept.

⁴²⁶ Stahn (2012:2)

⁴²⁷ van Bommel (Nov 2011)

⁴²⁸ Kersten (2015:30)

⁴²⁹ McDermott (Aug 2015)

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