Complementarity-Based Prosecution: Does the Domestic Prosecution in Libya Accord with the Complementarity Regime of the Rome Statute?

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Abstract

On 24 July 2014, the Appeals Chamber of the International Criminal Court (ICC) confirmed the decision of the Pre-Trial Chamber that the case against *Abdullah Al-Senussi* is inadmissible. In essence, the Appeals Chamber was satisfied that Libya met the statutory criteria for preventing the Office of the Prosecutor (OTP) from continuing its prosecution of Abdullah Al-Senussi. By contrast, regarding *Saif Al-Islam Gaddafi*, the same Chamber ruled the case admissible before the ICC on the grounds that Libya has failed to meet the legal criteria for making this case inadmissible. Complementarity puts the primary responsibility to investigate and prosecute international crimes on states, as the ICC is only meant to complement national efforts. Nevertheless, the debate on the domestic prosecution of international crimes is on-going. Analysing the Chamber's decisions in the Libya cases, this article questions what may properly constitute domestic prosecution based on the complementarity envisioned by the Rome Statute.

Keywords: International Criminal Court; International Crimes; Complementarity; Domestic Prosecution

Introduction

It is argued in this article that a complementarity-based approach to domestic prosecution may be better for states to successfully assert their criminal jurisdictions over international crimes than the 'sentence'[1] and 'process'[2] based approaches that have been advanced by others. In essence, for any domestic prosecution to accord with the complementarity regime of the Rome Statute, it is suggested that the crimes in the Statute should underpin the process. Consequently, it is maintained that although the proceedings against Abdullah Al-Senussi in Libya may constitute credible measures to ensure accountability domestically, they may not be in strict harmony with the complementarity envisioned by the Statute.

In furtherance of this, an examination is undertaken of the decisions of the ICC's Pre-Trial Chamber I (the 'Chamber' or the 'PTCI') of 31 May 2013 in the admissibility challenge to the *Saif Al-Islam Gaddafi*[3] case. Although the Chamber accepted that Libya could prosecute Saif Al-Islam based on ordinary domestic crimes, it nevertheless concluded that Libya was unable to prosecute Saif because of having failed to meet the legal criteria for

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[1] Heller, K. J. 'A Sentence-Based Theory of Complementarity' (below n 79).
[2] Robinson, D. 'Three Theories of Complementarity: Charge, Sentence or Process? (below n 99).
[3] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11-344-Red 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi' Pre-Trial Chamber I, 31 May 2013. Available at <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf> (Accessed 10 February 2014) (hereinafter 'Saif Al-Islam Admissibility Decision').

making this case inadmissible. The Appeals Chamber affirmed this decision on 21 May 2014.[4] In contrast, the same PTCI decided on 11 October 2013, in the admissibility challenge regarding *Abdullah Al-Senussi*[5] case, that the case was inadmissible. In essence, the PTCI was satisfied that, in this case, Libya met the statutory criteria for preventing the Office of the Prosecutor (OTP) from continuing its investigations and prosecution of Abdullah Al-Senussi. This decision was also affirmed by the Appeals Chamber on 24 July 2014.

This article scrutinises the reasons for the opposing decisions in these cases. It is argued that in order for African states to avoid the finding of 'unwillingness' or 'inability', their domestic prosecutions should be based on the Rome Statute crimes and not on ordinary domestic crimes. The article is divided into three sections. The first section analyses complementarity vis-à-vis the decision of the PTC1 of 31 May 2013 in the *Saif Al-Islam* case. Its subsequent decision of 11 October 2013 regarding Abdullah Al-Senussi is also analysed and some inferences are made as to why the decisions were different.

The second section discusses the different theories of domestic prosecutions based on the complementarity regime of the Rome Statute. These are the 'sentence-based' and the 'process-based' theories. The analysis reveals that granted that these theories are sound, they nevertheless fail to address the differences between international crimes and ordinary domestic crimes. Consequently, a 'complementarity-based' theory, which is a holistic approach that seeks to ensure that domestic prosecutions are carried out based on international crimes and not on ordinary domestic crimes, is proposed. It is argued that while the proceedings regarding Abdullah Al-Senussi in Libya may be plausible, they may not strictly accord with the complementarity regime of the Rome Statute.

The differences between domestic prosecution and complementarity-based prosecution together with the interactions between the International Criminal Tribunal for Rwanda (ICTR) and Rwandan national courts in the transfer of cases from the former to the later are discussed in the third section. The analysis demonstrates that the nature, scale, gravity, context and impact of international crimes are higher than of ordinary domestic crimes and therefore domestic prosecution of ordinary domestic crimes may not serve the interests that the complementarity regime seeks to protect. Furthermore, the transfer of cases involving intermediate and lower lever perpetrators under Rule 11*bis* from the ICTR to Rwanda national courts was only possible after the latter adopted international crimes into its domestic criminal law. It is argued that the jurisprudence may be instructive for the complementarity regime of the Rome Statute.

Moreover, the ICC's jurisprudence of prosecuting those who bear the greatest responsibility for the gravest crimes, suggests that the ICC is the best forum to prosecute both Saif Al-Islam and Abdullah Al-Senussi. This is because in the context of the atrocities carried out in Libya, the position and the role that they both played in the overall plan make them fall

[4] *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11 OA 4 Judgment on the Appeal of Libya against the Decision of the Pre-Trial Chamber I of 31 May 2013, Appeals Chamber, 21 May 2014.

[5] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Case No ICC-01/11-01/11 Decision on the Admissibility of the case Against Abdullah Al-Senussi Pre-Trial Chamber I, 11 October 2013. Available at http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf> (Accessed 10 February 2014). (Hereinafter 'Al-Senussi Admissibility Decision').

into the category of those who bore the greatest responsibility. The Libyan authority can then bring intermediate and lower-level perpetrators to justice.

1. Complementarity *versus* the Admissibility Challenge by Libya

1.1 Complementarity in the Rome Statute

The ultimate aim of the complementarity regime of the Rome Statute is for states to undertake the investigation and prosecution of international crimes domestically, as the ICC is only meant to intervene where states are unwilling or genuinely unable to act. Nevertheless, the debate on the domestic prosecution of international crimes is on-going. Amongst others, there is the question as to whether such domestic prosecution should be based on an individual state's ordinary criminal law or on the Rome Statute crimes. This section analyses the decisions of the PTCI in the two Libyan cases to ascertain whether domestic prosecution based on Libya's criminal law satisfies the complementarity regime of the Rome Statute.

Complementarity entails the allocation of jurisdiction between the ICC and states over international crimes, with the later taking priority. Complementarity is implied in all articles of the Rome Statute, including the preamble, making it an overriding theme. For example, the preamble declares that it is 'the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes',[6] and further stipulates that the prosecution of international crimes '…must be ensured by taking measures at the national level…'[7] Thus, complementarity enacts the primacy of domestic jurisdiction over international crimes.

Justifying domestic prosecution, Bruce Broomhall noted that holding trials in the state on whose territory an alleged crime was committed or whose national is the alleged suspect has a number of advantages.[8] According to him, evidence is typically and more easily available, the cost of investigation, transporting witnesses are minimised and the proceedings have the greatest legitimacy and impact in the eyes of the society most immediately interested in them.[9] In addition, domestic prosecutions have the greatest potential for promoting reconciliation and restoring social equilibrium in transitional situations. Arguably, they may also have the impact of closing impunity gaps and ensuring accountability.

Plausible as the notion of states' primacy of jurisdiction over international crimes may appear, the Rome Statute does not establish any obligations regarding how this should be done. Thus, neither the Rome Statute nor the underlying principle of complementarity obliges state parties to enact criminal legislation incorporating the Rome Statute crimes. Rather, national systems retain their autonomy with regards to their criminal law provisions even after becoming party to the Rome Statute. In any case, Libya is not a party to the Rome Statute.

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[6] Rome statute of the International Criminal Court available at <http://legal.un.org/icc/statute/romefra.htm> (Accessed 28 March 2014) para 6 of the Preamble.
[7] Ibid, para 4 of the Preamble.
[8] See Broomhall, B. (2003) *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press) 84.
[9] Broomhall, (above n 8).

Despite the Rome Statute regime hinging on complementarity, the word is not mentioned in the Statute. The provision that the 'ICC shall be complementary to national jurisdictions' was reflected only twice; in the preamble and in Article 1 of the Statute. Consequently, complementarity is regulated by admissibility provisions contained in Article 17, which states:

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court.[10]

This provision reveals four conditions in which a case will be inadmissible and the ICC is expected to defer to a national proceeding.[11] The conditions are: (a) a domestic investigation or prosecution is in progress; (b) a domestic investigation has been completed with a decision not to prosecute; (c) a prosecution has been completed or (d) the case is deemed not to be sufficiently serious.[12] Based on these conditions, the ICC, in ascertaining admissibility, must first carry out an assessment of the national justice system to see whether a state could reasonably be expected to investigate or prosecute genuinely.[13] Second, the ICC must determine that the matter indeed warrants its intervention.[14]

1.2 The Pre-Trial Chamber I Decision in the Saif Al-Islam Gaddafi Admissibility Challenge

On 31 May 2013, the PTCI of the ICC rejected Libya's admissibility challenge in the case against *Saif Al-Islam Gaddafi*[15] and ordered the surrender of Saif al-Islam to The Hague.[16] In accordance with Article 82(1) of the Rome Statute and Rule 156 of the Rules of Procedure and Evidence (RPE),[17] Libya appealed this decision on 7 June 2013 and sought temporary suspension of the order of transfer, pending the determination of the appeal. On 18

[10] Rome Statute, Art 17 (1).
[11] Robinson, D. (2010) The Mysterious Mysteriousness of Complementarity. Criminal Law Forum, 21, 67-102.
[12] Perrin, B. (2006) Making Sense of Complementarity: The Relationship between the International Criminal Court and National Jurisdictions. Sri Lanka Journal of International Law, 18, 301-326, 304.
[13] *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/06 10 February 2006, para 29.
[14] Rome Statute, Article 17(1)(d).
[15] Saif Al-Islam Admissibility Decision (above n 1).
[16] Ibid, para 219.
[17] Rome Statute, Article 82(1)(a) allows either party to appeal a decision with respect to jurisdiction or admissibility.

July 2013,[18] the Appeals Chamber ruled that Saif al-Islam should be surrendered to The Hague pending the determination of the appeal.[19]

The situation in Libya and the cases emanating therefrom have been cited as the true test of complementarity.[20] In line with this argument, Alison Smith contends that considering that the ICC does not need Saif al-Islam for trial at least until the jurisdictional challenge is resolved, the Appeals Chamber should have kept the legal *status quo* until the determination of the admissibility challenge.[21] She further noted that 'when the ICC requests cooperation from states, it needs to do so based on clear, sound and well-explained decisions, otherwise the only result will be to multiply instances of non-cooperation'.[22]

Certainly the ICC can only prosecute those who are physically present before it, as the Rome Statute does not permit proceedings *in absentia*.[23] Given that the ICC does not have its own police force to make arrests and collect evidence, these responsibilities inevitably fall to states. The ICC is therefore in a disadvantaged position with respect to continuing any proceedings because it requires the cooperation of states to surrender suspects that it seeks to prosecute.

1.2.1 Determining Libya's Genuine Ability to Try Saif AL-Islam Gaddafi

In determining whether Libya was genuinely able to investigate or prosecute the case against *Saif al-Islam Gaddafi* in the admissibility challenge, the PTCI recalled that according to Article 17(3) of the Statute:

> In order to determine inability in a particular case, the Court shall consider whether due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings.[24]

The Chamber noted that a 'collapse' suggests a 'lack of judicial infrastructure as well as of trained and equipped personnel responsible for carrying out the different phases of domestic proceedings'.[25] A collapse is considered 'substantial' if it is 'of such intensity that it affects a significant or considerable part of the domestic justice system' and is 'sufficient to paralyse the system in fulfilling its functions in relation to investigation, prosecution, trial and execution of sentences'.[26]

The Chamber considered that the ability of a state to genuinely carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures.[27] Thus, the Chamber assessed whether the Libyan authorities were capable of investigating or prosecuting Saif Al-Islam in accordance with the substantive and procedural

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[18] The Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* ICC-01/11-01/11-387 'Decision on the Request for the Suspensive Effect and Related Issues' 18 July 2013. Available at <http://www.icc-cpi.int/iccdocs/doc/doc1620847.pdf> (Accessed 20 January 2014).
[19] Ibid, para 27.
[20] Smith, A. Libya/ICC: Saif Al-Islam Custody Decision: ICC Should do Better. Available at http://www.npwj.org/ICC/LibyaICC-%E2%80%9CSaif-Al-Islam-custody-decision-ICC-should-do-better%E2%80%9D.html> (Accessed 28 January 2014).
[21] Ibid.
[22] Ibid.
[23] Rome Statute, Art 63.
[24] Rome Statute, Article 17(3).
[25] Saif Al-Islam Admissibility Decision, para 147.
[26] Ibid.
[27] Ibid.

law applicable in Libya.[28] In assessing the applicable law in Libya, the PTCI noted that the Libyan Code of Criminal Procedure, which is based on the Italian model, regulates the four phases of Libyan criminal proceedings: investigation, accusation, trial and appeal.[29] It also noted that Article 59 of the Criminal Code provides for the confidentiality of investigations, and under Article 106, the defendant has the right to a lawyer during the investigation phase; he also has the right to review evidence presented against him under Article 435 of the Code.[30] Libya's international law instruments were also considered.[31]

The PTCI further analysed the unavailability of Libya's national system[32] with reference to its 'inability to obtain the accused',[33] 'inability to obtain testimonies'[34] and 'otherwise unable to carry out its proceedings'.[35] Consequently, the Chamber held that Libya was unable to genuinely investigate and prosecute Saif Al-Islam based on (i) the lack of substantive criminal legislation; (ii) the current security situation; and (iii) the failure of the relevant authorities to secure the transfer of the suspect.[36]

> The Chamber notes the multiple challenges that Libya continues to face, [resulting] in substantial difficulties in exercising its judicial powers fully across the entire territory. Due to these difficulties…the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus 'unavailable within the terms of article 17(3) of the Statute'. As a consequence, Libya is unable to obtain the accused and the necessary testimony and is also otherwise unable to carry out the proceedings in the case against Mr Gaddafi…[37]

Since Libya was found to be unable genuinely to carry out the investigation or prosecution against Mr Gaddafi, the Chamber did not address the alternative requirement of 'unwillingness'.[38] Under the Statute, 'unwillingness' connotes a situation in which a state wants to shield the offender from criminal responsibility. With respect to Libya however, this condition appears contestable because due to the change in circumstances, it could be argued that Libya would not have been found unwilling to bring Siaf Al-Islam Gaddafi to justice. However, unwillingness could also arise from the lack of implementing legislation criminalising international crimes domestically.

The decision of the Chamber in the Saif Al-Islam case demonstrates that there are certain requirements that states must satisfy in their domestic investigations and prosecutions in order to make a case inadmissible before the ICC. Thus, in order to determine that a state can try a particular case, the state must meet the thresholds of 'willingness' and 'genuine ability'. Implicitly, one of the steps Libya ought to have taken in furtherance of its genuine ability or willingness to bring Saif Al-Islam Gaddafi to justice was to proscribe the Rome Statute crimes in its domestic criminal law.

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[28] Ibid, paras 199 & 200.
[29] Ibid, para 201.
[30] Ibid.
[31] Ibid, footnotes 335 & 353.
[32] Saif Al-Islam Admissibility Decision, paras 204 & 205.
[33] Ibid, paras 206-208.
[34] Ibid, paras 209-211.
[35] Ibid, paras 212-214.
[36] Ibid, paras 148, 149, 152, 190, 191, 206 & 207.
[37] Ibid, para 205.
[38] Ibid, paras 138, 216 & 218.

1.2.2 Proscribing International Crimes in Domestic Criminal Law

Expecting states to incorporate international crimes into their domestic law might seem out of place because the Rome Statute does not expressly stipulate that states should do so. In fact, the Statute places no specific obligation upon states to implement the Statute's provisions *per se*.[39] It may be argued that some of the crimes defined in the Rome Statute, as well as the general principles, had been recognised by international law prior to the adoption of the Statute.[40] Therefore, a strong point may be made that since the crimes have been recognised by international law, it is superfluous to require states to incorporate them into their domestic criminal law. Nevertheless, for the distinctive regime of the Rome Statute, incorporating the Rome Statute crimes in domestic legal systems is necessary for states.

The Statute's silence on states' adoption of legislation proscribing international crimes has been read to mean that states may depend on ordinary domestic criminal law to prosecute international crimes. This was the position of the PTCI in its decision of 31 May 2013 regarding the admissibility challenge by Libya in the *Saif Al-Islam Gaddafi* case. The PTCI noted that 'a domestic investigation or prosecution for 'ordinary crimes' *to the extent that the case covers the same conduct* shall be considered sufficient'.[41] It was the Chamber's view that Libya's current lack of legislation criminalising crimes against humanity does not *per se* render the case admissible before the Court.[42] Nevertheless, the Chamber assessed Libya's ability in relation to the Libyan Code of Criminal Procedure, amongst others, and found that Libya was unable to investigate Mr Gaddafi. The PTCI decision was founded on Libya's failure to provide the Chamber with 'enough evidence with a sufficient degree of specificity and probative value to demonstrate that Libya's investigations *covered the same conduct* as those with the ICC'.[43]

In rejecting the admissibility challenge, the PTCI made reference to the Appeals Chamber's previous decisions in the two Kenyan cases,[44] in which the Chamber upheld the validity of the 'same person same conduct' test thus:

> The defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under Article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.[45]

The 'case', as referred to in Article 17 of the Statute, is characterised by two components: the person and the conduct. The PTCI further observed that while it is uncontested that national

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[39] Turns, D. (2004) Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States in McGoldrick, D. Rowe, P. & Donnelly, E. (eds) *The Permanent International Criminal Court: Legal and Policy Issues.* Hart Publishing 337-338.

[40] The Convention for the Prevention and Punishment of Genocide (1948) proscribed the crime of genocide, the Four Geneva Conventions of (1949) and the Additional Protocols I and II of 1977 (AP I & II) proscribed war crimes and crimes against humanity.

[41] Saif Al-Islam Admissibility Decision, paras 88, 108, 133, 200, 201 (emphasis added)

[42] Saif Al-Islam Admissibility Decision, para 88

[43] Ibid, paras 134, 135, 219 (emphasis added).

[44] *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11-307 Judgement on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 Appeals Chamber, 20 August 2011 para 40; *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* ICC-01/09-02/11-274 Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 Appeals Chamber 30 August 2011, (hereinafter '*Muthaura et al* case') para 39.

[45] *Muthaura et al case* paras 39, 40, 41, 42 & 61.

investigations must cover the 'same person',[46] the 'conduct' part of the test raises issues of interpretation and needs further clarification.[47]

Admittedly, the determination of what constitutes 'substantially the same conduct' as alleged in the proceedings before the Court will vary according to the concrete facts and circumstances of each case and therefore requires a case-by-case analysis.[48] However, it is argued that 'substantially the same conduct' cannot be interpreted in a manner that would allow variation in the underlying facts and incidents, as such a flexible interpretation would undermine the very purpose of complementarity.[49]

The ordinary crimes for which Saif Al-Islam Gaddafi was being investigated were intentional murder, torture, incitement to civil war, indiscriminate killings, misuse of authority against individuals, arresting people without just cause and unjustified deprivation of personal liberty pursuant to articles 368, 435, 293, 296, 431, 433 and 434 of the Libyan Criminal Code.[50] On the other hand, the ICC arrest warrant for Saif Al-Islam was for the commission of murder and persecution as crimes against humanity under Article 7(1)(a) and (h) of the Rome Statute.

The domestic crimes listed above with which Libya proposed to prosecute Saif Al-Islam are not the same as the crimes against humanity of murder and persecution, for which he has been indicted before the ICC. Although not expressly stated, this may account for the reasons, amongst others, why the PTCI found Libya to be genuinely unable to investigate and prosecute and therefore rejected the admissibility challenge. This argument finds support in the PTCI's assertion that 'a domestic investigation or prosecution for ordinary crimes is sufficient *provided that it covers the same conduct'*.[51] It is argued that this is possible only when the domestic law incorporates the Rome Statute crimes because international crimes are not usually known to domestic criminal law. In any case, the PTCI determined that the crimes which Libya proposed charging Saif Al-Islam with under Libyan legislation do not cover all aspects of the offences under the Rome Statute.[52]

In addition, the PTCI raised specific concerns regarding the ordinary crimes.[53] Two concerns noted by the Chamber were, first, that the crimes potentially applicable to Saif Al-Islam apply only to 'public officers' under Libyan legislation, which could raise problems, as Saif Al-Islam did not formally occupy an official position in Libya.[54] Second, since the crime of persecution was not known in Libyan law, the Chamber was not satisfied with Libya's claim that, though discriminatory intent was absent, it was an aggravating factor which would be taken into account in sentencing under articles 27 and 28 of the Libyan Criminal Code.[55]

With respect to the first concern and in light of the information and evidence, the Chamber noted that there were reasonable grounds to believe that Saif Al-Islam Gaddafi, although not having an official position, was Muammar Gaddafi's unspoken successor and the most influential person within his inner circle. Consequently, the Chamber found that at

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[46]*Muthaura et al case*, paras 1, 40-43.
[47] *Saif Al-Islam* Admissibility Decision, para 61
[48] Saif Al-Islam Admissibility Decision, para 77.
[49] Ibid, para 68.
[50] Ibid, paras 28 & 112.
[51] Ibid, paras 85, 86, 108, 133, 200, 201 (emphasis mine).
[52] Saif Al-Islam Admissibility Decision, para 113.
[53] Ibid, paras 108 & 109.
[54] Ibid, para 109.
[55] Iid, paras 111, 112 & 113.

all times relevant to the Prosecutor's Application, he exercised control over crucial parts of the state apparatus, including finances and logistics and had the powers of a *de facto* prime Minister.[56] Therefore, in line with the ICC's jurisprudence of prosecuting those who bear the greatest responsibility for the gravest crimes, Saif Al-Islam by reason of his role, qualifies for prosecution by the ICC.

In addition, the Chamber's argument inevitably leads to the inference that if Libya had incorporated the Rome Statute crimes into its domestic criminal law and its investigation was based on such, Libya would have been able to show the 'sufficient degree of specificity and probative value' required. Ultimately, a state that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible.[57] The Chamber's decision in the *Saif Al-Islam* case implies that the lack of substantive and procedural penal legislation in conformity with the Rome Statute rendered Libya's judicial system unavailable.

It is submitted that the Chamber's assertion that states do not have to integrate the Rome Statute crimes into their domestic criminal law is supported by the Statute only to the extent that the Rome Statute is silent on it. However, in the *Lotus*[58] case, the Permanent Court of International Justice (PCIJ) noted that as long as international law does not expressly prohibit something, it may be applied.[59] It is argued further that although not explicitly stated, such an obligation is implied and could be read into the Rome Statute, as it is not possible to 'put something on nothing and expect it to [stand], it will collapse.'[60] Complementarity can only stand on the effective criminal justice systems of states and the starting point for that effectiveness is criminalising the Rome Statute crimes in national legal systems.

1.2.3 The PTCI Decision in the Abdullah Al-Senussi Admissibility Challenge

The same PTCI which decided on 31 May 2013 that due to lack of substantive criminal legislation and security concerns, that Libya was unable to investigate and prosecute the case against Saif Al-Islam, on 11 October 2013, decided that Libya was able to investigate the case against Abdullah Al-Senussi. This section analyses the differences in the two cases and the reasons for the diverse decisions by the Chamber. Significantly, the analyses of the Chamber in the Libya admissibility challenges in both cases are the same. This is reasonably so because the cases relate to the same territory; Libya and the same situation; the commencement of the revolution on 15 February 2011 until the fall of Muammar Gaddafi on 20 October 2011.

In accordance with Article 19(2)(b), Libya brought the admissibility challenge, as a state having jurisdiction over the case against Mr Al-Senussi.[61] In the admissibility challenge, Libya claimed that 'its national judicial system was actively investigating Abdullah Al-Senussi for his alleged criminal responsibility for multiple acts of murder and persecution, committed pursuant to or in furtherance of state policy, amounting to crimes against

[56]Warrant of Arrest for Saif Al-Islam Gaddafi 27 June 2011 ICC-01/11-01/11-3. Available at http://www.iclklamberg.com/Caselaw/Libya/Gaddafietal/PTCI/3.pdf> (Accessed 13 February 2014) 5.
[57] *Saif Al-Islam* case, para 52; *Muthaura et al* case, para 62; Pre-Trial Chamber I Decision in *Saif Al-Islam* case 7 December 2012 para 9; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012 ICC-01/11-01/11-T-3-Red-ENG, 64-65.
[58] *SS Lotus*, (*France v Turkey*) PCIJ Series A No 10 (1927).
[59] Ibid, 19.
[60] *Per* Lord Denning in *Macfoy v UAC Ltd* (1961) 3 WLR (PC) 1405, 1409.
[61] The Admissibility Challenge was presented in three different versions: a confidential *ex parte* version, only available to the Prosecutor (ICC-01/11-01/11-307-Con-Exp); a confidential redacted version, available also to the Defence of Mr Al-Senussi and the Office of Public Counsel for Victims (ICC-01/11-01-307-Conf-Red); and a public redacted version (ICC-01/11-01/11-307-Red2).

humanity.'[62] Libya noted further that these 'acts allegedly committed as part of a widespread or systematic attack against Libyan civilians, include but are not limited to crimes committed in Benghazi during the period 15 to 20 February 2011.'[63] Accordingly, the details of these investigations show that the case against Mr Al-Senussi was being investigated at the domestic level and should therefore be inadmissible before the Court pursuant to Article 17(1)(a) of the Rome Statute.

Consequently, the PTCI noted that the case against Abdullah Al-Senussi was inadmissible because Libya provided concrete evidence to demonstrate that the national investigation regarding Al-Senussi was on-going.[64] Thus, the Chamber

> [Is] satisfied that the evidence relied upon by Libya for the purposes of the Admissibility Challenge demonstrates the taking of identifiable, concrete and progressive investigative steps in relation to Mr Al-Senussi's criminal responsibility (ultimately resulting in the transfer of the case to the Accusation Chamber)…[65]

It is important to note that the state challenging the admissibility of a case before the ICC has the responsibility to prove that the case is inadmissible. In the *Germain Katanga*[66] case, the Appeals Chamber observed that Article 17(1)(a) contemplates a two-step test, according to which the Chamber, in considering whether a case is admissible before the Court, shall address in turn two questions: (i) whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level (first limb).[67] In case the answer to the first limb of the question is in the affirmative, (ii) whether the state is unwilling or unable genuinely to carry out such investigation or prosecution (second limb).[68]

A case is therefore inadmissible before the Court when both limbs of Article 17(1)(a) of the Statute are satisfied. As held by the Chamber in the Saif Al-Islam Gaddafi case, 'the challenging state is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case.'[69] Indeed, the 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.[70]

In addition to the perceptible progress that was made in the Al-Senussi national proceedings, Libya also noted that Al-Senussi was in safe and secure government-controlled custody and the necessary evidence and testimony are available and accessible in Libya, as investigations were being conducted in accordance with law by the Prosecutor-General and his team.[71] This was not the case with Saif Al-Islam at the time of Libya's admissibility

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[62] Ibid, para 1.
[63] Ibid.
[64] Al-Senussi Admissibility Decision (above n 2) paras 121, 122.
[65] Ibid, para 162.
[66] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497 Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009, Appeals Chamber 25 September 2009.
[67] Ibid, para 1.
[68] Ibid, para 26.
[69] Saif Al-Islam Admissibility Decision, para 52.
[70] Ibid, paras 52 & 53. See also Al-Senussi Admissibility Decision 11 October 2013, para 27.
[71] Al-Senussi Admissibility Decision, paras 203, 204 & 206.

challenge, as Saif was in Zintan and the Libyan authority had no verifiable means of securing his transfer to the state's controlled detention facility.

Nevertheless, except for the difference in the identifiable, concrete and progressive steps in the Al-Senussi case, which resulted in the suspect being in the Libyan authorities' custody, the other grounds of lack of substantive criminal legislation and the current security situation remain. In addition to due process concerns and the security situation in Libya, could Libya's domestic prosecution based on its ordinary domestic crimes accord with the complementarity of the Rome Statute? In order to answer this question, analysis of the different theories of domestic prosecution would be undertaken in the next section.

2. Theories of Domestic Prosecution

The debate on the domestic prosecution of international crimes is on-going. Whilst some argue in its favour,[72] others think that international prosecution is better for the reason that domestic courts cannot be trusted with the effective prosecution of international crimes.[73] This is because the direct or indirect involvement of state authorities in the commission of these crimes sometimes results in the collapse or malfunctioning of the judicial system.[74]

As a consequence, international crimes raise intrinsic questions that go far beyond the usual tasks of judges and prosecutors in a domestic setting.[75] Moreover, since the crimes are designated as 'international', it follows that their prosecutions should be by an international institution established by the international community.[76] Nevertheless, the obstacles to international prosecution include limited resources and absolute dependence on the cooperation of states. These difficulties ultimately strengthen the argument for domestic prosecution.

There are two approaches to prosecuting international crimes domestically. The first approach allows states to carry out such prosecutions using domestic criminal law provisions for ordinary crimes.[77] This approach suggests that states should be permitted to prosecute the crimes of genocide, crimes against humanity and war crimes as the ordinary crimes of murder, manslaughter and rape. Adapting Fédéric Mégrét's propositions,[78] Kevin Jon Heller stated that allowing states to prosecute international crimes as ordinary crimes could be

[72] Elvarez, J. (1999) Crimes of States/Crimes of Hate: Lessons from Rwanda. *Yale Journal of International Law* 24, 365; Broomhall, (above n 8) 23-24; Schabas, W. (2007) *An Introduction to the International Criminal Court* (3rd edn, Cambridge University Press) 60, 175; Kleffner, J. (2009) *Complementarity in the Rome Statute and National Criminal Jurisdictions.* Oxford Online Scholarship 2; Jurdi, N. N. (2011) *The International Criminal Court and National Courts: A Contentious Relationship*. Ashgate, 34.
[73] Bickley, L. S (2000) US Resistance to the International Criminal Court: Is the Sword Mightier than the Law? Emory International Law Review. 14, 213. 272-275; Sadat, L. N & Carden, R. (2000) The New International Criminal Court: An Uneasy Revolution. Georgetown Law Journal, 88, 381, 383.
[74] Kleffner, ibid, (n 72) 124.
[75] Jessberger, F. (2010) International v. National Prosecution of International Crimes in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice.* Oxford University Press, 209, 214; Cassese, A. The Rationale for International Criminal Justice in Cassese, A. (ed) (2009) *The Oxford Companion to International Criminal Justice* 123, 127.
[76] Jessberger Ibid.
[77] Nouwen, S. (2011) Complementarity in Uganda: Domestic Diversity or International Imposition? in Stahn, C. & ElZeidy, M. (eds) (2011) *The International Criminal Court and Complementarity: From Theory to Practice* Vol II Cambridge University Press, 1127; Mégret, F. Too Much of a Good thing? Implementation and the Uses of Complementarity in Stahn, C. & ElZeidy, M. (eds) *The International Criminal Court and Complementarity: From Theory to Practice* Vol I Cambridge University Press, 361-390, 363.
[78] Mégret, 372.

termed the 'soft mirror thesis.'[79] The soft mirror thesis maintains that as long as the offenders are tried for correspondingly grave domestic crimes, it does not matter whether the trial was based on the international categorisation.[80]

The rationale behind this approach is that states are more familiar with domestic crimes and will not require additional expertise to handle their investigation and prosecution. In addition, it has been argued that requesting states to prosecute international crimes categorised as such may significantly increase the likelihood that domestic prosecutions will be unsuccessful.[81] This is because international crimes are far more difficult to investigate and prove than ordinary crimes, because their investigation and prosecution require better-trained personnel and significantly more financial resources.[82]

The foregoing argument for the soft mirror thesis, that states may prosecute international crimes as ordinary crimes, implies that states do not have to ratify the Rome Statute. States may also not be required to enact domestic legislation incorporating the Rome Statute crimes into their domestic criminal law. Ultimately, the justification for the soft mirror thesis could mean that the Rome Statute has little to no relevance.

However, Jann Kleffner proposes that states should incorporate the substantive provisions of the Rome Statute, because to meet the complementarity criteria, it is better for states to prosecute international crimes as such rather than as ordinary crimes.[83] Significantly, international crimes are different from ordinary crimes; the context in which they are committed, the nature, scale, gravity and the overall impact are usually greater than for ordinary crimes. Crimes against humanity, for example, must be committed within the context of an attack that is characterised as 'widespread or systematic', directed against a civilian population, and the accused must have had knowledge of the attack.[84] Therefore, murder as crime against humanity, for example, cannot be the same as the ordinary crime of murder under domestic criminal law.[85]

In line with this argument, the second approach proposes that domestic prosecution must be based on international crimes, categorised and defined as such, rather than on ordinary crimes.[86] Proponents of this approach argue that it is only by such prosecution that

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[79] Heller, K. J. (2012) A Sentence-Based Theory of Complementarity. Harvard International Law Journal, 53(1) 86-134, 87.
[80] Ibid, 87.
[81] Open Society Justice Initiative, (2010) Promoting Complementarity in Practice-Lessons from Three ICC Situation Countries. 2.
[82] Ibid.
[83] Kleffner, J. (2003) The Impact of Complementarity on National Implementation of the Substantive International Criminal Law. Journal of International Criminal Justice. 1, 86-113, 98. See also Seman, D. Should The Prosecution of Ordinary Crimes in Domestic Jurisdictions Satisfy the Complementarity Principle? In Stahn, C & van den Herik, L. (eds) (2010) *Future Perspectives on International Criminal Justice* Oxford University Press 259, 266.
[84] Rome Statute, art 7.
[85] Greppi, E. 'Inability to Investigate and Prosecute under Article 17' in Politi, M. & Gioia, F. (eds.) (2008) *The International Criminal Court and National Jurisdictions*. Ashgate.
[86] Terracino, J. B (2007) National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC. Journal of International Criminal Justice 5, 421, 439; Philippe, X. (2006) The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh? International Review of the Red Cross 88, 375, 390; see also Ellis, E. (2003) The International Criminal Court and Its Implication for Domestic Law and National Capacity Building. Florida Journal of International Law, 15, 215, 224–225 (arguing that states 'must also ensure that all ICC crimes are incorporated into national legislation' because 'the crime of murder found in national law is not the same as a crime against humanity…'); Zahar, A & Sluiter, G. (2008) *International Criminal Law: A Critical Introduction*. Oxford University Press 489; Halling, M. (2010) Push the

states can avoid the possibility of being considered 'unwilling' or 'unable', which facilitates intervention by the ICC.[87] Jon Heller classifies this approach as the 'hard mirror thesis'.[88] Prosecuting international crimes as ordinary domestic crimes undermines the fundamental concept on which the international criminal justice system is founded. This is because while prosecuting for ordinary crimes may fulfil the objective of closing impunity gaps, such prosecutions risk the danger of being perceived as 'sham' trials, which effectively shields perpetrators from criminal responsibility.[89]

Contrary to this argument, Mégrét asserts, that the intermediary position of 'sham' trials seems unlikely.[90] He observed that if a state is unwilling, it will be unwilling all the way as it can hardly be imagined that the Sudanese authorities would give Al-Bashir even a lenient trial.[91] Accordingly, he argues that it is unlikely that the ICC would undertake sophisticated qualitative analysis of domestic trials to see if they constitute 'genuine' proceedings or not.[92] Nevertheless, it is precisely the reason put forward by Mégrét that accounts for why the trials being conducted by the Special Criminal Court for the Events in Darfur (SCCED) could be regarded as 'sham' trials. As Sudan is not a party to the Rome Statute, its criminal laws do not reflect the Rome Statute crimes. This is the same position with Libya. Clearly, domestic proceedings in Libya and Sudan could only be based on ordinary crimes. Furthermore, the situation in Darfur, Sudan implicates Al-Bashir the President himself, it is therefore doubtful how the domestic prosecution in Sudan can be based on the complementarity of the Rome Statute.

There appears to be a slight variation with the Libya cases, since there was a fundamental change in circumstances. This is because the ruling Gaddafi regime was overthrown by the National Transitional Council who later handed over power to Libya's elected parliament, the General National Congress in August 2012. Be that as it may, the jurisprudence of the ICC, developed in the *Lubanga* case indicates that the ICC is the best forum to prosecute those who bear the greatest responsibility for the gravest crimes. Therefore with respect to Saif Al-Islam and Abdullah Al-Senussi, it is proposed that complementarity makes the ICC the best forum for their prosecution.

2.1 The Sentence-Based Theory of Complementarity

There is yet another approach; 'a sentence-based theory of complementarity' suggested by Jon Heller.[93] Discounting the earlier approaches, Jon Heller advanced a critique of both domestic prosecution based on ordinary crimes (soft mirror thesis) and domestic prosecutions based on international crimes (hard mirror thesis).[94] He proposed replacing both

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Envelope-Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity. Leiden Journal of International Law, 23, 827.

[87] See Ellis, 225; See also Kai Ambos, K. & Stegmiller, I. (2008) German Research on International Criminal Law with a Special Focus on the Implementation of the ICC Statute in National Jurisdictions. Criminla Law Forum, 19, 181-198.

[88] Heller, K. J. (above n 79) 87-89. (Noting that complementarity does not require that domestic prosecutions must be carried out in precise accord with the legal regime of the Rome Statute).

[89] See Zahar & Sluiter, (n 86) 489 (arguing that, 'the crimes set out in the Statute… must be implemented in domestic law as international crimes because prosecuting such crimes as ordinary crimes 'will in all likelihood result in an inability determination'); Halling, 839(Noting that complementarity requires that states prosecute crimes as they are spelled out in the Rome Statute; the prosecutions have to be for 'crimes against humanity,' not the murders, rapes, and so on that underlie the charge of crimes against humanity').

[90] Mégret, 'Too Much of a Good Thing?' (above n 77) 376.

[91] Ibid 376-377.

[92] Ibid. See also Nouwen, (n 77) 1129.

[93] Heller, K. J. (above n 79).

[94] Ibid, 88-107.

approaches with one focused exclusively on the sentence.[95] Rather than engage in the argument of the categorisation of the crimes concerned whether 'ordinary' or 'international', the outcome, which is the sentence, should be the focus. According to him, when a domestic prosecution ends with a sentence that is the same or higher than what is prescribed by the Rome Statute or what the ICC would have given in the same case, then domestic prosecution can be accepted regardless of the categorisation of the crime.[96]

It is submitted that proposing a sentence-based approach to complementarity that focuses exclusively on the severity of the sentence is not only contrary to the provisions of the Rome Statute,[97] but it may also present certain difficulties. The first is that a sentence-based approach does not reflect the differences in the crimes. Prosecuting international crimes as the ordinary crimes of murder or rape, rather than as their international counterparts, is not desirable, since ordinary crimes do not capture the scope, scale, gravity and impact of the conduct.[98]

Moreover, the sentence-based approach does not take into consideration that a domestic prosecution could end up in acquittal.[99] Acquittal may well be the appropriate outcome of a domestic prosecution and yet, where an accused is acquitted, there is of course no sentence, and it is therefore impossible to compare with the Rome Statute. The sentence-based approach also implies that one must wait until the end of the prosecution to determine the acceptability of the prosecution, in which case the ICC would be barred by the *ne bis in idem* rule.[100] Other questions that the sentence-based approach fails to address are; does the approach include traditional justice mechanisms? To what extent could high sentences achieved by alternative means in a domestic setting accord with the complementarity regime?

2.2 The Process-Based Theory of Complementarity

In response to Jon Heller's sentence-based theory, Darryl Robinson proposes a 'process-based' approach; stating that the genuineness of the process rather than its outcome should be the focus.[101] For Robinson, once it is shown that a state is carrying out or has carried out prosecutions in relation to a case,[102] the question should be whether the state is carrying out those prosecutions 'genuinely'.[103] Thus, in the context of Articles 17(2) and (3), 'genuinely' could be interpreted in two ways; in terms of the sincerity of the process, and in terms of exhibiting a rudimentary level of capacity.[104] Robinson proposes that 'process' is the

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[95] Ibid, 107-130.
[96] Heller, K. J. (above n 79) 130.
[97] Implicitly the sentence-based theory allows the death sentence which some states apply as the maximum sentence in consideration of the gravity of particular crimes. On the contrary, the maximum penalty under the Statute is life imprisonment, although it could be argued that article 80 which appears as a compromise allows states to apply the death penalty. See Schabas, W. A 'Penalties', in Cassese, A. *et al* (eds) (2002) *The Rome Statute of the International Criminal Court.* Oxford University Press, Vol. II, 1505.
[98] Bergsmo, B. Bekou, O. & Jones, A. (2010) Complementarity After Kampala: Capacity Building and the ICC's Legal Tools. Goettingen Journal of International Law, 2, 791-811, 801.
[99] Robinson, D. (2012) Three Theories of Complementarity: Charge, Sentence or Process? Harvard International Law Journal, 53, 165.
[100] See Rome Statute, articles 17(1)(c) & 20 (the rule against double jeopardy which states that no person shall be tried twice for the same conduct.
[101] Robinson (n 99).
[102] See Rome Statute, art 17(1)(a)-(c).
[103] Rome Statute, arts 17(1) (a) & (b) 20.
[104] Informal Expert Paper, (2009) The Principle of Complementarity in Practice. Available at <http://www.icccpi.int/iccdocs/doc/doc654724.pdf> 8; Holmes, J. T (2002) Complementarity: National Courts *versus* The ICC in Cassese, A. *et al* (eds) (2002) *The Rome Statute of the International Criminal Court.* Oxford University Press, 667.

master theory and that charges and sentences could be looked into insofar as they reveal something about the genuineness of the process.[105] Again, the process-based theory does not take into account the nature of the crimes.

2.3 The Complementarity-Based Theory

It is argued that both the process and sentence-based theories do not take into account the nature of the crimes and the differences between international crimes and ordinary domestic crimes. Consequently, a complementarity-based prosecution, which is a holistic and proactive approach, and which requires that states incorporate international crimes that conform to Rome Statute definitions into their domestic criminal law, is proposed.

Complementarity-based prosecutions are prosecutions of international crimes conducted by states, with the Rome Statute crimes underpinning the process. Such domestic prosecution aims at ensuring conformity with the Rome Statute both in the legal framework and in the institutional preparedness of states to prosecute international crimes domestically. It is also a practical way of avoiding a scenario in which a crime occurs that is not covered under domestic law. Libya's domestic criminal law, for example, does not recognise the crime of persecution.

The complementarity-based theory finds support in the Chamber's admissibility decision in the Al-Islam Gaddafi case. This is because the PTCI decision was founded on Libya's failure to provide the Chamber with enough evidence with a sufficient degree of specificity and probative value to demonstrate that Libya's investigations *covered the same conduct* as those with the ICC. As analysed above, this could have been possible if Libya's investigation covered the international and not ordinary domestic crimes.

1.3 The Differences between Domestic Prosecution and Complementarity-Based Prosecution.

There are several reasons why the proceedings in Libya may not be considered as complementary to the prosecution of the ICC under the Rome Statute. The first is that Libya is not a state party to the Rome Statute and therefore its national criminal laws do not reflect the international crimes proscribed therein. It may be argued that since the situation in Libya was referred by the United Nations Security Council, Libya should not be obligated to incorporate the Rome Statute crimes.

It is submitted however, that the fact of its referral to the ICC makes Libya bound by the Rome Statute because the ICC can only function by its enabling Statute. The question of whether the United Nations is empowered to impose treaty obligations on non-parties has been addressed by other scholars.[106] Granted that arguments in favour of domestic prosecution based on ordinary crimes have been put forward, it is suggested that for the purposes of the complementarity of the Rome Statute, such prosecution may not accord with the Rome Statute because ordinary domestic crimes are not the same as international crimes.

3.1.1 The Differences between International and Domestic Crimes

Both the high threshold set for the act and the mental element required for proof of international crimes such as genocide and crimes against humanity remove them from the

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[105] Robinson (n 99).

[106] Akanbi, D. (2012) The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC. Journal of International Criminal Justice, 10, 299-324; Öberg, M. D. (2005) The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ. European Journal of International Law, 16(5), 879-906.

realm of ordinary crimes.[107] Since the crimes for which Siaf Al-Islam Gaddafi and Abdullah Al-Senussi are indicted before the ICC are the crimes against humanity of murder and persecution, an analysis of crimes against humanity is made in this section in order to demonstrate that prosecuting them as the ordinary domestic crimes of murder, does not serve the interest that the complementarity regime of the Rome Statute protects.

The crime of murder is known to virtually all criminal justice system and thus it is known to Libyan Criminal Code, however, the ordinary crime of murder in domestic legislation is not the same as the crime against humanity of murder. Also, the *actus reus* of the crime of persecution entails that the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights and targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.[108] Additionally, such targeting must be based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law.[109] Significantly, the crime of persecution is not known to Libyan Criminal Code,[110] and its proceedings based on ordinary crime, although meets accountability measures at the domestic level, may not satisfy complementarity.

The delineation of crimes against humanity requires the intent to commit the crime together with the knowledge that the crime is being committed within the context of a widespread or systematic attack.[111] For an act to constitute a crime against humanity, the specific element requiring that such acts be committed in the context of a widespread or systematic attack must be present. In analysing the underlying acts constituting murder as a crime against humanity, the OTP observed that the *actus reus* requires that the perpetrator killed one or more persons and that the conduct was committed as part of a widespread or systematic attack directed against a civilian population.[112]

The condition of a 'widespread or systematic attack' distinguishes crimes against humanity from ordinary crime. The threshold of 'widespread' was defined by the ICTR as denoting a substantial number of victims, with massive, frequent and large-scale action carried out collectively against a multiplicity of victims.[113] Also, 'systematic' comprises a thoroughly organised and following a regular pattern on the basis of a common policy involving considerable public or private resources.[114] Thus, prosecuting crimes against humanity as ordinary crimes makes light of the gamut of international crimes.

Furthermore, the contextual elements of crimes against humanity include; first that the attack must be targeted against a civilian population;[115] second the attack must involve a state

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[107] Brandon, B. & Du Plessis, M. (2005) *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth.* Commonwealth Secretariat Marlborough House United Kingdom, 35.

[108] See Report of the OTP, (2013) 'Situation in Nigeria Article 5 Report' 5 August 2013. (Article 5 Report of 5 August 2013 on Nigeria) Available at<http://www.icc-cpi.int/iccdocs/PIDS/docs/SAS%20-%20NGA%20-%20Public%20version%20Article%205%20Report%20-%2005%20August%202013.PDF> (Accessed 29 November 2013) para 96. See also Elements of Crimes, art 7(1)(h).

[109] Ibid. paras 97-100.

[110] Article 27 and 28 Libyan Code of Criminal Procedure relating to sentencing.

[111] See article 7 Rome Statute.

[112] See Article 5 Report 5 August 2013 on Nigeria Ibid, para 91.

[113] *Prosecutor v. Akayesu Judgment* No ICTR-96-4-T 2 September 1998. Available at <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> paras 579-581.

[114] There must be an element or evidence of organisational policy; see Hans-Peter Kaul dissenting opinion in the Kenyan *Muthaura et al* case.

[115] Article 5 Report on Nigeria 5 August 2013, (above n 108) para 79.

or organisational policy;[116] third, it must be of a widespread or systematic nature;[117] and fourth, there must be an established nexus between the individual act and the attack and the accused must have knowledge of the attack.[118] Thus an accused must know that the attack is directed against a civilian population and that his criminal act comprises part of that attack or at least risks being part of that attack.[119]

3.1.2 The Transfer of Cases from the ICTR to Rwandan National Courts

In addition to the fact that international crimes are not the same with ordinary domestic crimes, the jurisprudence of the ICTR in the transfer of cases to Rwandan national courts under Rule 11*bis* provide a good illustration for the complementarity regime. Rwanda is not a party to the Rome Statute. However, points of interaction between the ICTR and Rwandan national courts in the transfer of cases from the former to the latter make the analysis relevant. The purpose of the analysis is to derive lessons from the example, to the effect that the legal framework of states and their institutional preparedness in conformity with the Rome Statute is critical to their exercise of jurisdictional primacy to investigate and prosecute international crimes.

In pursuit of justice and reconciliation in post-genocide Rwanda, three transitional justice processes were instituted. The first was the ICTR, the second was the National Genocide Trials and the third was the *gacaca* proceedings.[120] While the three institutions each aimed at ensuring accountability for those responsible for the genocide, there were significant differences in the methods they employed. However, it is not within the scope of this article to analyse the prosecutions by these institutions but only to highlight the points of interaction between the ICTR and Rwandan national courts.

Rule 11*bis* of the Rules of Procedure and Evidence (RPE) of the ICTR[121] and the completion strategy formed the basis for the transfer of cases from the ICTR to Rwandan courts.[122] Through the completion strategy, the ICTR was mandated by the Security Council to transfer intermediate and lower-level accused persons to national courts. This was to ensure that the Tribunal focused on those who bore the greatest responsibility for the crimes in order to finish its work within the time designated by the Security Council.

Rule 11*bis* allows a trial chamber to refer a case to a state in whose territory the crime was committed and in which the accused is arrested provided that the state is willing and adequately prepared to accept the case. In assessing whether a state is competent according to Rule 11*bis* to accept a case from the tribunal, the designated trial chamber must consider

[116] Ibid, paras 82-89.
[117] Ibid, paras 80 & 81.
[118] Ibid, para 35. See also Situation in the Republic of Cote D'Ivoire, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire' 3 October 2011 (notified on 15 November 2011), ICC-02/11-14-Corr, para 29.
[119] See *Prosecutor* v *Kunarac et al.* (IT-96-23 & 23/1) 'Foca' Appeals Chamber Judgement of 12 June 2002.
[120] Apuuli, K. P. (2009) Procedural Due Process and the Prosecution of Genocide Suspects in Rwanda. Journal of Genocide Research, 11(1), 11-30.
[121] RPE Rule 11*bis* (A). (Rule 11*bis* was first introduced into the ICTR RPE in 2002 during the twelfth plenary session of judges (ICTR 12th Plenary Session of 5-6 July 2002 Amendments Adopted at the Plenary Session of Judges Rules of Procedure and Evidence). Rule 11*bis*: Suspension of Indictment in case of Proceedings before National Courts Available at <http://ictr-archive09.library.cornell.edu/ENGLISH/rules/050702/amend12.html> (Accessed 9 June 2012).
[122] See Completion Strategy for the ICTR, United Nations Security Council Resolution 1503 of 2003; Judge Vagn Joensen, 'Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as at 10 May 2013)' S/2013/310 <http://www.unictr.org/Portals/0/English/FactSheets/Completion_St/S-2013-310e.pdf>

whether the state has a legal framework that criminalises the alleged conduct of the accused and provides an adequate penalty structure.[123]

However, the Rwandan government was not able to secure the transfer of any cases until June 2011. Prior to transfer, the Rwandan authorities had to ensure that the parliament enacted a Transfer Law (Organic Law No. 11/2007) to comply with the legislative requirements of Rule 11*bis*.[124] Even after the enactment of the Organic Law, Rwanda lacked

facilities and had to embark on the building of prisons[125] and the training of lawyers before it was found ready to handle the cases.[126] Consequently, the Rwandan national courts began to receive cases from the ICTR only several years after the enactment of the law. It is proposed that the complementarity-based theory will ensure, not only the legal framework, but also the institutional preparedness of states to assert their criminal jurisdiction over international crimes.

Thus, the *Bosco Uwinkindi*[127] case was the first time the Appeals Chamber of the ICTR judged in favour of transferring a case to Rwandan courts for prosecution. Hitherto, in the *Kanyarukiga*,[128] the *Hategikimana*[129] and the *Munyakazi*[130] cases the Appeals Chamber decided against the transfer to Rwandan national courts because Rwandan laws and fair trial guarantees failed to meet the requirements of Rule 11*bis*.[131] In these cases, the trial chambers looked beyond the relevant legislation to the practices of Rwandan courts, thereby coming to perceive the legislation as cosmetic.[132] Another problem, the legal ambiguity between the law

[123] Rule 11*bis*(A).
[124] Organic Law No 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda (ICTR) and from Other States. Available at <http://www.refworld.org/docid/476644652.html> (accessed 26 August 2013).
[125] 'Mpanga, A Stronghold for the UN in Rwanda' *International Justice Tribune* 5 May 2008. Available at <http://www.rnw.nl/international-justice/article/mpanga-stronghold-un-rwanda> (The Rwandan government built the Mpanga Prison near Nyanza in South-Western Rwanda and with financial support from The Netherlands embarked on its reconstruction in February 2008. It contained a 'UN block' designated to meet standards equivalent to the UN Detention Facility in Arusha).
[126] Palmer, N. (2012) Transfer or Transformation: A Review of the Rule 11bis Decision of the International Criminal Tribunal for Rwanda. African Journal of International & Comparative Law, 20, 1-21, 13-14
[127] *The Prosecutor v Jean-Bosco Uwinkindi* ICTR-2001-75-R11*bis* T Ch (Decision on the Prosecutor's Request for Referral to the Republic of Rwanda) 28 June 2011<http://www.unhcr.org/refworld/pdfid/4e5602ca2.pdf> (Accessed 28 June 2012).
[128] *The Prosecutor v. Gasper Kanyarukiga* Case No. ICTR-2002-78-R11*bis* (Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11*bis*) 30 October 2008.
[129] *The Prosecutor v. Ildephonse Hategekimana* ICTR-00-55-R11*bis* AC (Decision on the Prosecutor's Appeal against the Decision on the Transfer under Rule 11*bis*) 4 December 2008.
[130] *The Prosecutor v. Yusuf Munyakazi* (Judgement and Sentence) ICTR-97-36A-T ICTR 5 July 2010. Available at <http://www/unhcr.org/refworld/docid/4c722d350.html> (Accessed 22 October 2012).
[131] Other cases include *The Prosecutor v Yusuf Munyakazi* ICTR-97-36-R11*bis*AC (Decision on the Prosecutor's Appeal against Decision on Transfer under Rule 11*bis*) 8 October 2008; *The Prosecutor v Jean-Baptiste Gatete* ICTR-2000-61-1 TCI (Decision on the Prosecutor's Request for transfer to the Republic of Rwanda 17 November 2008. (The transfer of Jean-Baptiste Gatete was also refused but was not appealed).
[132] Palmer, (Ibid n 126) 10. See also Melman, J. (2011) The Possibility of Transfer?: A Comprehensive Approach to the International Criminal Tribunal for Rwanda's Rule 11bis to Permit Transfer to Rwandan Domestic Courts. Fordham Law Review, 1271, 188-1289.

and the imposition of the death penalty,[133] was addressed through an amendment establishing life imprisonment as the maximum sentence for transferred cases.[134]

The lack of an appropriate legal framework in Rwanda effectively militated against the transfer of cases to Rwandan national courts. This is instructive for the complementarity regime because domestic prosecution could only be considered complementarity-based when the state carrying out such prosecution has laws criminalising genocide, crimes against humanity and war crimes as defined in the Rome Statute. It may be argued that the complementarity regime accepts domestic prosecutorial efforts that are far from comprehensive as against the primacy of the *ad hoc* tribunals.[135] Nevertheless, it is submitted that if the ICC and states parties are to draw on the jurisprudence of the *ad hoc* tribunals,[136] then it is necessary to avoid their pitfalls and establish a pragmatic approach to the domestic prosecution of international crimes.

Conclusion

The proceedings in Libya regarding Saif Al-Islam and Abdullah Al-Senussi are different. While in the latter the Libyan authority demonstrated identifiable, concrete and progressive investigative steps, this was not the case with respect to Saif Al-Islam. Although the cases emanated from the same situation and the same territory, the fact that Saif Al-Islam was not within the Libyan authority's detention facility at the time and there were no concrete steps to ensure his transfer, as well as that the crimes that Libya proposed to charge him with did not fully accord with those the ICC had charged him with, made the case admissible before the ICC. Arguably, these were the differences in the cases that gave rise to the different and ostensibly conflicting decisions of the PTCI in the admissibility challenges.

Nevertheless, it has been argued in this article that 'unwillingness' in Article 17(1)(a) of the Rome Statute may arise from the lack of implementing legislation at the domestic level. Although the PTCI did not address the unwillingness of Libya in the cases, it could be deduced from the conclusion reached by the Chamber in the Saif Al-Islam case that for Libya to pass the 'same conduct' limb of the 'same person, same conduct' test, would have required that its domestic proceedings featured the precise categorisation of the crimes as they were in the Arrest Warrant and in the Rome Statute. Consequently, it is argued that incorporating the Rome Statute crimes into domestic criminal law and prosecuting on the basis of international crimes, rather than on ordinary domestic crimes, is necessary to classify any domestic prosecution as complementarity-based.

This is because complementarity cannot be based on two distinct bodies of law. If ordinary domestic crimes were sufficient to deal with the mass criminality of atrocious crimes, then the Rome Statute and the complementarity regime would not have been necessary. It is proposed that a holistic complementarity-based theory will be better for states to ensure that they do not only pass the 'same person, same conduct' test, but that they are also able to demonstrate capacity to investigate and prosecute international crimes effectively.

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[133]Organic Law, No. 31/2007of 25 July 2007 Relating to the Abolition of the Death Penalty (Official Gazette of the Republic of Rwanda. Year 46, no. special, 25 July 2007).

[134]Rwanda's Organic Law No. 66/2008of 21 November 2008 which modified Organic Law No. 31/2007 of 25 July 2007relating to the Abolition of the Death Penalty.

[135] Nouwen, (n 77) 1146.

[136] Betts, A. (2005) Should Approaches to Post-conflict Justice and Reconciliation be Determined Globally, Nationally or Locally? The European Journal of Development Research, 17(4), 735-752, 741. (Noting that 'the ICTR has formed a substantial body of case law and… a solid foundation for the work of the ICC').

Furthermore, it is argued that following the jurisprudence of the ICC to prosecute those who bear the greatest responsibility in line with the gravity threshold, the ICC is the best forum for the prosecution of Saif Al-Islam and Abdullah Senussi. Certainly, the position and leadership roles of Saif Al-Islam and Abdullah Al-Senussi in the overall plan to quell demonstrators that led to the killing of thousands of civilians in Libya; make them fall into the category of those who bear the greatest responsibility. For this reason, it is proposed that the ICC, and not the Libyan authorities, should prosecute the cases. It must be noted that complementarity which means primacy of national jurisdiction does not mean exclusivity. Therefore, complementarity does not mean that all cases must be resolved in favour of domestic prosecution.[137] In addition, there are due process and security concerns in Libya that militates against effective domestic proceedings in the cases. Nevertheless, it is admitted that the practicality of ensuring their arrest and surrender to the ICC, procuring evidence and witnesses in the cases are major challenges for the ICC.

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[137] Appeals Chamber decision in the *Saif Al-Islam Gaddafi* case 21 May 2014 (above n 4) para 78.See also *Ruto* Admissibility Judgement 30 August 2011, para 44.

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