The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya

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1. Introduction

Despite the initial perception that the parameters of the complementarity regime of the International Criminal Court (ICC) were well defined in Rome, the ICC's interaction with domestic jurisdictions in the last decade has uncovered a number of statutory and policy shortages. The interplay of determining the jurisdictional parameters of the ICC versus domestic courts has unveiled significant statutory limitations within articles 17 and 19. These loopholes became vivid when the ICC faced new complex situations that were not initially envisaged by the drafters of the Statute. For instance, the first engagement of the ICC in a situation witnessing transition - such as Libya - showed at best inadequacy of articles 17 and 19 to capture the drafters' envisaged relationship between the Court and domestic systems. According to the objective and purpose of the Statute,[1] articles 17 and 19 seem - at best –

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unable to deal with a rapidly evolving Libyan transitional situation that is facing complex challenges. On the practical side, the recent Libyan situation showed further setbacks and shortages in the policy(ies) adopted by the ICC (if one can consider the ICC as one institution).[2] The first of that is the apparent lack of a coherent strategy on positive complementarity as invoked by (some) organs of the Court. The second aspect is the Court's adoption of a restrictive interpretation of the parameters of the complementarity regime, making it extremely difficult even for some willing and able states to exercise their primary duty to prosecute core international crimes. This interpretation has made the challenge of admissibility a cumbersome task for states.

This article will discuss some limitations in law and policy regarding Article 17 that were revealed by the ICC's engagement in Libya. Then, it will reflect critically on the ICC's interpretation of the main limbs of Article 17. The article will assess further whether the ICC has managed to elaborate a coherent strategy on positive complementarity or not. It will try to detect whether something has been learned from the latest developments in the Gaddafi and Al-Senussi cases or not. Has the ICC managed to develop a consistent strategy in its interaction with domestic courts or has this interaction varied from one ICC organ to another? Lastly, the article will propose some suggestions to bring the Court to reconcile itself with its cornerstone complementary nature, and to be more sensitive to its envisaged impact on the direct and indirect enforcement mechanisms of international criminal justice. This section

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[1] Preambular paragraph four delineates that ' **…** the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,'. See also Preambular paragraphs Five and Six, Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9.

[2] Dov Jacobs highlights the need to harmonize the current practice(s) of the ICC on complementarity. See Dov Jacobs, ' The ICC and Complementarity: A Tale of false promises and Mixed up Chameleons' (11 December 2014), Post Conflict justice Conference, Grotius Center for international legal Studies Website, http://postconflictjustice.com/the-icc-and-complementarity-a-tale-of-false-promises-and-mixed-up-chameleons

will call on the ICC to adopt a clearer strategy on engaging (or refraining from engaging) with *sui generis* modalities of domestic justice in countries in transition.

2. Gaps in the Complementarity Regime: A blessing or a curse?

The complementarity regime subsumes the implicit tension of two – sometimes - contrasting notions in international law: state sovereignty (the primary jurisdiction of states), and the international duty to end impunity for international crimes. The complementarity mechanism came as a compromise between those two notions.[3] Therefore, the Statute recognizes the primary responsibility of states to prosecute international crimes;[4] and the ICC may only exercise jurisdiction when national legal systems fail to do so, including cases where they are inactive, unwilling or unable genuinely to carry out proceedings. The principle of complementarity is based on two basic pillars: the respect for the primary jurisdiction of states, and considerations of efficiency and effectiveness. This is a reflection of states generally having the best access to evidence and witnesses, along with the resources to carry out proceedings.

The principle of complementarity is stipulated in the Preamble and Article 17 of the Rome Statute. The language of Article 17 implies that state parties maintain primary jurisdiction while the ICC's jurisdiction is the exception. The ICC is a court that 'complements and supplements national jurisdictions to prosecute international crimes.[5] It acts on a subsidiary

[3] Jann K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (2008) Oxford University Press, at 3.
[4] Preambler paragraphs Six, Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9.,
[5] Enrique C. Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice"?' (December 2005) 18 *Leiden Journal of International Law*, 04, 829, at 832-833.

basis to domestic jurisdictions.[6] The negative language of the article supports such a stand. It is only when domestic courts refrain from taking any action, or are unwilling or unable to conduct investigations and prosecutions, that the ICC will declare the situation admissible.[7]

2.1. The Dilemma of 'unavailability' under Article 17(3)

The drafters of the Rome Statute have differentiated between three pre-requisites for inability. These are scenarios of total collapse or substantial collapse or unavailability of the domestic judicial system.[8] The latter scenario (unavailability) is not meant to be synonymous to total collapse.

However, assessing 'unavailability' is more complex and subjective as the term is open-ended and could have multiple interpretations, which has opened the door for subjectivity.[9]

For some scholars, domestic systems will most probably be considered 'unavailable' simply because the judicial system is non-existent.[10] For instance, states that have no criminal judicial system will cause the judicial system to be considered 'unavailable'. This is straight

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[6] J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', (1995) 89 AJIL 404, at 414–15; M. M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *Michigan Journal of International Law* 869, at 896; M. El Zeidy, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice (2008) Martinus Nijhoff Publishers, The Hague, 157–158.

[7] Article 17, Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9; The International Criminal Court, Office of the Prosecutor. 2003. *Paper on Some Policy Issues before the Office of the Prosecutor*. ICC-OTP 2003, 1-9, at 4-5.

[8] John T. Holmes, 'Complementarity: National Courts versus the International Criminal Court', (2002). In Antonio Cassese, Paula Gaeta and John R.W.D.Jones (eds) The ICC Statute of The International Criminal Court: A Commentary. Oxford: Oxford University Press, volume I, 677.

[9] See Situation in Libya in the Case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, public redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, Pre-Trial Chamber I, The International Criminal Court, 31 May 2013.

[10] Cárdenas, Claudia, 'The Admissibility Test Before The International Criminal Court Under Special Consideration Of Amnesties And Truth Commissions', (June 25-26, 2004) In Kleffner, Jann and Kor, Gerben (ed) (May 2006) 'Complementary Views on Complementarity Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam 25-26 June 2006', Cambridge University Press, at 8.

forward, but probably will rarely occur, and it is very difficult to differentiate it from total collapse. Therefore, the above definition alone is not convincing. If one is to consider that non-existing judicial systems are 'unavailable', then what differentiate them from total collapse? Probably, the only scenario where both criteria can be different from each other is when a newly political system has been established with no judicial system in place yet. In modern times where new states are essentially succeeding previous political entities, this scenario will hardly materialize. On the other side, it is unlikely that the drafters incorporated the term 'unavailability' as another synonym for 'total collapse', nor did they include it to grant the ICC an open-ended discretionary power in determining inability. In fact, all negotiations during the Rome Conference confirm that states were keen on the opposite.[11]

The term 'unavailable' was brought from an earlier ICC Draft Statute that stipulated in its preamble that 'such a court is intended to be complementary to national criminal justice systems in cases where such a trial procedures may not be available or may be ineffective'.[12] The term was not defined, and thus remained vague and open to multiple interpretations. However, the alternative conjunction reflected the closeness of 'unavailability' to 'ineffective'. Furthermore, the 1994 International Law Commission's report stated that the Court is intended to operate in cases where there is no prospect of [persons accused of crimes of significant international concern] being duly tried in national courts'.[13] Clearly, this means that 'unavailability', as inserted then, meant rendering the judicial system incapable of

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[11] Bassiouni, M. Cherif (July 1, 2006) 'The ICC- Quo Vadis', *Journal of International Criminal Justice*, vol. 3, 421, at 423.

[12] Report of the Preparatory Committee on the International Criminal Court. UN GAOR, 51st session, sup. No. 22, at 5, UN Doc. A/51/22 (1996).

[13] Commentary to the Preamble, Draft statute for an international criminal court. Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), A/49/10, 27. In the Yearbook of the International Law Commission (1994) Volume II, http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1994_v2_p2_e.pdf

exercising its functions. The logical function of a judicial system is to investigate and prosecute the perpetrators of crimes.[14] The plain linguistic meaning of 'unavailable', according to the Oxford advanced Dictionary, is 'cannot be obtained'.[15] This leads to the conclusion that a judicial system can only be rendered 'unavailable' when it *cannot be obtained to reach the purpose of the Rome Statute*; that is to prosecute international crimes. Contrary to the expansive interpretation invoked by the Informal Expert Paper,[16] a system cannot be rendered 'unavailable' simply for suffering from minor gaps that can affect due process that do not affect the capability of the judicial system to prosecute and punish perpetrators of international crimes.[17] This pivotal requirement implies that not any 'lack of access'[18] or any 'lack of substantive or judicial penal legislation'[19] or 'any obstruction by uncontrolled element'[20] would render the system unavailable. It will only have such an effect when it makes it impossible for the judicial system to achieve the purpose of prosecuting the international crime(s) over which there is a jurisdictional conflict with the ICC. This latter requirement has to be *combined* with one of the other requirements; either the inability ' to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'[21].

Hence, the most logical and accurate interpretation for 'unavailability' is when read in conjunction with the objectives of the Rome Statute. The judicial system can be rendered

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[14] See Daniel J. Brown, 'The International criminal court and Trial in Absentia' (1999) 24 Brooklyn Journal of International Law, at 763.
[15] Oxford Dictionaries, Oxford University Press, UK. www.oxforddictionaries.com/definition/learner/unavailable
[16] Informal Expert Paper: The Principle of Complementarity in Practice. ICC-OTP 2003, 1 -38, at 15,
[17] In the Informal Expert Paper, the Office of the Prosecutor (OTP) seeked the opinion of experts to flesh out the textual meaning of the constituencies of Article 17 - including 'unavailability'. *Ibid*, at 14.
[18] *Ibid*, at 31.
[19] *Ibid*.
[20] *Ibid.*
[21] Art 17(3) of the ICC Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9.

'unavailable' when simply it is not eventually capable of prosecuting the core crimes of the Statute according to Articles 17 and 20. The benchmark to determine whether the domestic judicial system is 'unavailable' or not, is through detecting if the judicial system is (capable of) investigating and prosecuting the case of relevance to the ICC to establish guilt or innocence. The proposed interpretation above can decrease the margin of discretion and prevent the ICC from falling into ambiguous and patchy interpretations regarding when and where the domestic judicial system can be considered unavailable. Here, contrary to the approach of the Informal Expert paper, it can be rendered 'unavailable' only when its failure to act has led to the materialization of impunity.[22] This seems more logical and in conformity with the purpose and objectives of the Statute that impose an obligation on state parties to prevent impunity for perpetrators of international core crimes.[23]

There are various interpretations that are being currently invoked by the Court which all seem unconvincing if compared to the drafting history of the Rome statute in general and Article 17 in particular.[24] As will be shown *infra*, the ICC in practice used the term 'unavailable' in the case of Saif Al-Islam Gaddafi expansively.[25] The unfortunate flexible interpretation of 'unavailability' by the ICC has led to inaccurate interpretations of the complementarity mechanism. The conclusion reached *supra* is crucial to prevent allowing such a vague term to

[22] Criticisms against some arguments raised by the Informal Expert Paper can be noted. For instance, see Angela Walker, 'The ICC Versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process', 18 *UCLA Journal of International Law and Foreign Affairs* (2014) 303, at 331.
[23] Preambler paragraph five, Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9; See also Sharon A. Williams, 'Article 17: Admissibility', in Otto Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court (1999), at 386.
[24] Report of the Preparatory Committee on the International Criminal Court. UN GAOR, 51st session, sup. No. 22, at 5, UN Doc. A/51/22 (1996).
[25] Public redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, *supra* note 9, para. 215.

become a catch-all net for the ICC or any other party to use it to render cases admissible despite domestic systems being able and willing.

2.2. Article 17 and Due Process

To many experts in international law and human rights, the ICC Statute is a model in procedural guarantees for the rights of the suspects, the accused, and even victims. Article 21(3) requires mainstreaming of human rights in the application of all sources of law by the ICC. Pursuant to this article, the application and interpretation of the Statute must be consistent with internationally recognized human rights. This relates to the application of the Statute before the ICC. The relation of complementarity and fair trial guarantees, at the domestic level, has been fleshed out by numerous scholars and jurists since the early days of the entry into force of the ICC Statute. For one scholar,[26] most scholarly writings in English have accepted that non-respect for the rights of the defendants before domestic courts would render the case admissible before the ICC.[27]

Due process considerations could indeed be possibly read into the expressions found in Article 17: 'having regard to the principles of due process recognized by international law', and 'proceedings were not or are not being conducted independently or impartially'.

The obscure phrasing of these paragraphs and the *travaux préparatoires* of the Article have helped in dividing the scholarly community between those who consider that sole due process

[26] Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process (2006) 17 *Criminal Law Forum*, Springer, 255, at 258.
[27] See Kleffner, *supra* note 4, at 131; M. Cherif Bassiouni, ' Introduction to International Criminal Law', (2003) Brill/Nijhoff, 518; Mark S. Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15 *Florida Journal of International Law*, 215, at 241; Oscar Solera, 'Complementary Jurisdiction and International Criminal Justice', (2002) 84 International review of the Red Cross,145, 166; Carsten Stahn, 'Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', (2005)3 Journal of International Criminal justice, Oxford University Press, 695, at 713.

violations are of relevance to rendering cases admissible before the ICC,[28] and those who simply considered that this is statutorily inaccurate.[29] The argument that will be raised *infra* will agree with the latter findings, but to reach a different conclusion.

According to the second opinion; 'the due process thesis' is incorrect.[30] It rightly argues that the independence or impartiality requirements under article 17(2)(c) are not stand-alone requirements, but rather are necessary to ensure that the proceedings are 'being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'. They are two conjunctive requirements.[31] However, the ambiguity remains within the meaning of the phrase 'to bring the person concerned to justice', since the Statute did not define the term, nor do the *travaux préparatoires* shed any light.

Two different interpretations for the phrase have emerged among the scholarly community; one considers that the phrase means the determination of the criminal responsibility of someone, while the other interpretation stand for bringing the person concerned before a judge to face trial.[32] The difference between the two is major, since the former portrays the process as one of a result-oriented, while the latter understands it as a process-oriented.[33] If the aim 'to bring the person to justice' is that of a result – to establish conviction – then due process guarantees on independence or impartiality may not be relevant. While if 'bringing the person to justice' is a process – to be tried – then the due process guarantees on independence and impartiality in particular are relevant to such a process, yet within the

[28] *Ibid*, at 713.
[29] See Heller, *supra* note 26, at 255; Frederic Megret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11 *Journal of International Criminal Justice*, at 571.
[30] See Heller, *supra* note 26, at 262.
[31] *Ibid*, at 261.
[32] See Rojo, *supra* note 5, at 835.
[33] *Ibid*, at 836.

frame of the intention 'to bring the person to justice'.[34] Determining the right interpretation is not easy. Nonetheless, the significant issue here is that the reading of Article 17 should also be correlated to the object and purpose of the ICC Statute. The Preamble of the Statute leaves little ambiguity regarding the goal of the Statute; that is to end impunity for the core international crimes, be it through domestic courts or by the ICC when the former are unwilling or unable.[35]

Nevertheless, in both scenarios, one cannot claim that the drafters intended to allow the ICC to render admissible cases on the sole basis of violations for due process.[36] For instance, the final report of the Ad Hoc Committee in 1995 showed that states were reluctant to empower the ICC with a capacity to rule on the impartiality or independence of domestic courts.[37] Furthermore, the discussion within the Preparatory Committee reflected different opinions, but most were opposed to a proposal of France to grant the ICC a wider role to exercise jurisdiction whenever the latter found it necessary in cases where there is *de jure or de facto* 'denial of justice'.[38] The famous Italian proposal[39], which mandated the ICC to assess whether

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[34] *Ibid*, at 826
[35] Preamble of the ICC Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9.
[36] See Walker, *supra* note 22, at 315.
[37] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 Sept. 1995, UN GAOR, 50th session, Supp. No. 22, UN Doc. A/50/22 (1995), paras. 41, 43, 45, 162, 177 and 180.
[38] Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53, UN Doc.A/AC.244/1/Add.2, at 21. For further discussion see Rojo, *supra* note 5, at 829.
[39] The relevant paragraph of the Italian preproposal read:
2. In deciding on issues of admissibility under this article, the Court shall consider whether:
. . .
(ii) the said investigations or proceedings have been, or are impartial or independent, or were or are designed to shield the accused from international criminal responsibility, *or were or are conducted with full respect for the fundamental rights of the accused*;. . .
Draft Proposal by Italy on Article 35, 44, UN Doc. A/AC.249/1997/WG.3/IP.4 (Aug. 5, 1997)

the fundamental rights of the accused were respected or not, did not make it to the final draft Article 35 (later Article 17) of the proposed Statute.[40]

The other side of the coin is reflected in the British proposal within the Preparatory Committee. This proposal ruled out allowing the Court to consider aspects of fairness in the domestic proceedings. Its significance was reflected then in an apparent emerging consensus on ' limiting the role of the ICC only to cases where national authorities were carrying out or had carried out 'sham' proceedings' intended to shield criminals from accountability.[41] This is clear evidence that there was no agreement for the idea of granting the ICC jurisdiction to look into stand-alone due process violations during the drafting of the ICC Statute.

If one accepts the argument that due process guarantees are not a determining factor in admissibility, the question remains of why phrases such as 'internationally recognized norms and standards for the independent and impartial prosecution'[42] and 'principles of due process recognized in international law' were inserted in Article 17? This ambiguity allowed each of the two interpretative camps to pick and choose what supports their understanding of the purpose and aim of Article 17.

However, the correct and logical interpretation of Article 17 is the textual analysis of the article according to the ordinary meaning of the terms. It is only in case of ambiguity that the *travaux préparatoire*s is invoked to detect the true meaning of the text in line with the object

[40] See Rojo, *supra* note 5, at 845.
[41] See Walker, *supra* note 22, at 324; See Rojo, *supra* note 5, at 840.
[42] Rule 51, Rule of Procedure and Evidence, The International Criminal Court. www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf

and purpose of the treaty.[43] The purpose of the Statute leaves no doubt that the ICC's role is not to monitor the fairness of the domestic proceedings.[44] The correlation of the Preamble to Article 17 and Article 19 confirms such an interpretation. If we consider that the rift between scholars on the meaning of 'due process' within Article 17 is due to ambiguity in the language, then the reading of this clause in light of the purpose and object of the Statute can, to a large extent, clarify things. Thus, again the object and purpose of the Statute can give us a better sense of how to settle the apparent contradiction in the language of Article 17 and rule 51. As mentioned *supra*, it is indisputable that the objective of establishing an International Criminal Court complementary to domestic systems is to end impunity. Ending impunity is about accountability for the crimes, and this is translated in investigating and prosecuting the concerned person(s) regarding the alleged conduct. Article 17 renders genuine investigations, which may not necessary lead to conviction, inadmissible.[45] ICC is not a human rights court and its function is not to detect violations of human rights.[46] The cchallenge of admissibility under Article 19 did not include fair trial guarantees as a ground for inadmissibility.[47] The Statute also denied the accused the right to challenge the admissibility of his or her (domestic) case before the ICC.[48] The then Coordinator of the Working Group on Complementarity at the Rome Conference John Holmes highlighted that many delegations believed that procedural fairness should not be a ground for the purpose of defining complementarity.[49]

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[43] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations — Treaty Series, Registered ex officio on 27 January 1980, 18232, https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf
[44] Marta Bo, 'The Situation in Libya and The ICC's Understanding of Complementarity in The Context of UNSC-Referred Cases' (2014) 25 *Criminal Law Forum*, Springer, 505, at 533.
[45] ICC Statute, Article 17(1)(b).
[46] Informal Expert Paper: The Principle of Complementarity in Practice, *supra* note 17, at 15.
[47] See Bo, *supra* note 44, at 533.
[48] Article 19, The ICC Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9.
[49] See Holmes, *supra* note 8, at 50.

Furthermore, Kevin Heller's proposed 'modified due process thesis' [50] cannot be accepted as a ground for interpreting Article 17 of the Statute. The 'modified due process thesis' proposes a test of relativity that compares the domestic adjudicative steps taken in the relevant case vis-à-vis the local applicable standards. This is an erroneous interpretation of the articles of the Statute and will lead to undesired consequences. First, such a method of interpretation has support neither in the Statute nor in its drafting history. It has no grounds in international treaty law or in human rights law. Second, if the due process violations will become a comparative criterion to domestic benchmarks in order to determine admissibility, this will create numerous complexities and erroneous outcomes. The domestic fair trial guarantees vary from one state to another, and therefore this will differ from one national system to another. A comparative test within a highly respected judicial system, such as the Scandinavian countries for example, will largely differ from that conducted in less institutionally developed countries. We will have cases of similar standards being admissible for Sudan while rendered inadmissible for Sweden. Bearing in mind that states enjoy different modalities of criminal jurisdiction, the same case may face different result if prosecuted, for instance, before the territorial state rather than the state of nationality. That defeats the principle of equality before the law and before the ICC itself. It creates bizarre scenarios.

Based on the above, this article simply suggests going back to the ordinary sources of interpretation of treaty law to detect precisely the meaning of these clauses and their legal weight in determining admissibility. The opinion and writings of jurists and scholars cannot

[50] Kevin Jon Heller, Why the failure to Provide Saif with Due Process is Relevant to admissibility Challenge. August 2, 2012, Opinio Juris Blog, available at: http://opiniojuris.org/2012/08/02/why-the-failure-to-provide-saif-with-due-process-is-relevant-to-libyas-admissibility-challenge/

supersede the ordinary meaning of the articles of the Statute (the treaty) in their context and in light of its object and purpose.

In a textual analysis of the term 'having regard to the principles of due process in international law', this brings in some fundamental international human rights guarantees for fair trial as incorporated in Articles 9 and 14 of the International Covenant for Civil and Political Rights (ICCPR).[51] Will *all* these rights be assessed under the admissibility test? As mentioned earlier in this article, the answer depends on the interpretation for the clause ' to bring the person to justice'. If you adopt the process-oriented approach, then the answer is yes, while it is the opposite for the result-oriented approach. Each one of the two interpretations has its sound reasons, but there is also a third interpretation that seems more in conformity with the language of the Statute and its preparatory work, which recognizes a role for the above process-oriented approach but limited to detecting the presence of a *male fide* intention not 'to bring the person to justice', i.e. 'to investigate with the aim to establish accountability'. Indeed, if Article 17 were solely aimed towards conviction, then why would Article 17(1)(b) consider that a domestic investigation without further trial or conviction is a sufficient reason for inadmissibility before the ICC? Interestingly, the equally authentic Arabic version of the ICC Statute talks about 'presenting' [taqdeem] the person to justice,[52] which is a legal term commonly used in Arabic to describe when the person is being investigated to establish accountability.[53] The implication of such an interpretation is a

[51] Articles 9 and 14, International Covenant on Civil and Political Rights (1996), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976., United Nations — Treaty Series, https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf.

[52] Article 17, The Statute of the International Criminal Court [Arabic], U.N. Doc. A/CONF.183/9, https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/284265/RomeStatuteAra.pdf.

[53] For example, the documents below are samples in which the term' Taqdeem' to justice is invoked to mean being investigated to establish accountability; See Amer Ali Aldoulaimy, Salahiyat Almuddaai

limited role to the due process guarantees; restricting the criteria of independence or impartiality to detect whether there is a *male fide* intention for not investigating or prosecuting[54]the relevant conduct(s).

In that context, the relevant due process guarantees should be invoked in the determination of what serves the 'intention' to 'bring the person to justice'.[55]

One may wonder what are the fair trial guarantees to ensure independence or impartiality of the domestic authority but restrictively for the purpose of detecting the existence of the 'intention of bringing the person to justice'? The drafters neither defined the terms 'independence' nor 'impartiality'. Yet, if we are to determine impartiality or independence by 'having regard to the principles of due process in international law', we will be probably selecting the due process guarantees that can help us in detecting impartiality or lack of independence that reflect an *intention* to prevent bringing the person concerned to justice. This translates itself in ensuring that the judicial authorities need not be under external influence or interference or prejudiced to favour the accused or suspect reflecting a *male fide* intention not to bring the person concerned to justice.

However, there is one crucial point which has been widely overlooked by jurists and scholars; in the three times mentioned, the phrase ' to bring the person concerned to justice'

Ala'am Alqannunia lada Almahakem Aljina'ia Aldawliya Almua'qta wa Aldayema [The legal powers of the Prosecutor of permanent and ad hoc international criminal courts] Dar Ghaida Lill Nashr Wal Tawzeaa, Amman, Jordan, 2013, 134; Bringing Terrorists to Justice: Challenges in prosecutions related to foreign terrorist fighters [Arabic], at http://www.un.org/en/sc/ctc/docs/2015/S_2015_123_AR.pdf ; Amnesty international Arabic statement on Iraq, The [daman Taqdeem Murtakibi Intihakat Huquq El-Insan lil-Muhakamah], at https://www.amnesty.org/download/Documents/108000/mde140802003ar.pdf.

[54] The obligation to prosecute or extradite for the core international crimes is to a large extent a settled customary norm in international law. See M. Cherif Bassiouni and Edward M. Wise, Aut Dedare Aut Judicare: The Duty to Extradite or Prosecute in International Law (1995) Martinus Nijhoff Publishers, Dordrecht/Boston/ London.

[55] See Heller, *supra* note 26, at 260-261.

has been preceded by the term 'an intent' to bring the person to justice, meaning clearly that this is a test of *intention and will* more than being one of result and outcome. By other words, enlisting the term within the *provisio* that determines 'unwillingness' fits well with this argument. Some principles of due process in international law are invoked as objective criteria to determine if there is lack of impartiality or independence in the proceeding *for the purpose of not prosecuting the defined crime(s).*[56] The language of Article 17(2) is explicit and clear, and it does not require delving into secondary sources. The intention to 'bring the person concerned to justice' in English means the will to do so.[57] This interpretation becomes more convincing as the terms themselves were enlisted as elements of determining unwillingness or as an exception to *ne bis in idem* when state are conducting sham trials. Article 20(3) cannot be about inability, as inability by default does not allow conducting proceedings or trials.

This proposed interpretation leads to outcomes that are different from what the ICC judges have invoked some time ago in Libya,[58] and different from many scholarly interpretations on due process and admissibility.[59] Based on the above, the due process benchmark should not be exaggerated, and by no means it can make the ICC a court that is responsible for mainstreaming national systems to do justice according to international human rights standards or according to its understanding, but rather a court that invokes some of these objective standards to determine that the state has *bona* (or *male*) *fida* intention to investigate and prosecute these crimes. According to this writer, this is an objective test of intention that will be deduced from actions of the domestic system along the above mentioned parameters.

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[56] See Rojo, *supra* note 5, at 853.
[57] The Law Dictionary, Black's Law Dictionary Free Online Legal Dictionary, 2nd edition, http://thelawdictionary.org/intent/
[58] ICC Pre-Trial Chambers' decisions on the cases within the Libyan situation will be discussed *infra*.
[59] See *supra* note 27.

This test is not one of relativity nor of specific result, but rather of intention, and the latter can be deduced through objective benchmarks.

As a result, Heller's interpretation that due process violations that make convictions more difficult than at the ICC will be rendered admissible before the Court[60] has neither statutory ground nor is convincing. One must not forget that paragraphs (c) and (b) of Article 17(2) are for determining unwillingness (to prosecute). If willing (and able) states want to challenge admissibility before or at the commencement of the ICC trial, it makes no sense to raise the burden to the level of proving that their system (with some of its violations) has reached or should reach convictions easier than the ICC. What is required from the domestic system is to prove that it is (*bona fide*) investigating and prosecuting the conduct that is subject to the challenge regardless of the outcome of the judicial process. If there exist a factor that affects negatively the impartiality and independence of the judiciary, while at the same time the intention to investigate and prosecute is genuine (reflected in concrete adjudicative steps), then Article 17(2)(c) cannot be invoked as a ground for admissibility.

This can be viewed by some human rights activists as unfortunate, but the language of the Article is clear. The language of the Statute on this is explicit, clear, and supported by the line of discussions by the drafters during the travaux *preparatoires*.[61] The available remedy to rectify such shortages is statutory amendments for coming review conferences, but until then, *lex lata* cannot be confused by *lex ferenda,* and what we wish cannot replace what the law is.

[60] See Heller, *supra* note 26, at 262.
[61] See Holmes, *supra* note 8, at 50; See also in Rojo, *supra* note 5, at 847.

2.2.1. The ICC's assessment of the impact of due process on admissibility in the Libyan situation

The issue of due process and its impact on the admissibility assessment is one of the contentious issues that were addressed by some of the ICC chambers in the Libyan situation. This was in particular with respect to the absence of legal representation at certain stages of the judicial proceedings and the absence of witness and victim protection programs. The various organs of the ICC showed considerable lack of orientation with respect to these two procedural issues in particular, and due process in general. The fragmentation in ICC practice has been clearly reflected in discrepancies among ICC judges vis-à-vis some identical cases.[62] This was clearly noticed in the Pre-Trial Chamber's (PTC) contrasting approach(es) in the Gaddafi case versus Al-Senussi case.

In the Gaddafi case, the PTC did not approach the issue of the absence of legal representation for Gaddafi from a fair trial perspective, but rather as a hurdle that may abort future trial proceedings[63] since Libyan law does not allow a trial to progress without legal representation for the accused. This finding contains the fruit of its own contradiction, prior even to discussing its discrepancy with the PTC's (different) finding on the absence of legal representation for Al-Senussi. While the PTC - and all ICC chambers- have always insisted that the admissibility of a case must be determined in light of the circumstances that existed at the time of the admissibility proceedings,[64] it delved into predicting the impact of such

[62] See Bo, *supra* note 44, at 537.
[63] The International Criminal Court and Libya: Complementarity in Conflict, International Law Programme Meeting Summary, Chatham House, The Royal institute of International Affairs, 22 September 2014, at 5.
[64] See for example, *inter alia*, The Situation in the Democratic Republic of Congo, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui , Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-

absence on the conduct of the Gaddafi trial itself. In the Al-Senussi case, the Pre-Trial Chamber indicated that

> …it is of the view that the problem of legal representation, while not compelling at the present time, holds the potential to become a fatal obstacle to the progress of the case… The Chamber must therefore determine whether the current circumstances are such that a concrete impediment to the future appointment of counsel can be identified.[65]

Practically, the PTC has led itself to analyse possible future developments based on its analysis of the current situation. Something that is contradictory with earlier claims. In the Gaddafi case, the PTC took a similar stand but to reach a different conclusion.[66] It indicated that:

> However, the Chamber is concerned that this important difficulty appears to be an impediment to the progress of proceedings against Mr Gaddafi. *If* this impediment is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system...[67]

This approach contradicts the ICC's rigid stand on the temporal frame of the substance of admissibility challenges, which the Court has adopted in all situations. For instance, in Kenya's challenge of admissibility, the judges were strict on not accepting filed documents

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01/04-01/07 OA 8, The Appeals Chamber, the International Criminal Court, 25 September 2009, para. 56.

[65] Situation in Libya in the Case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, public redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, ICC-01/11-01/11, Pre-Trial Chamber I, The International Criminal Court, 11 October 2013, para 307.

[66] See Bo, *supra* note 44, at 537.

[67] Public redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, *supra* note 9, para. 214.

that covered subsequent investigative steps taken shortly after filing the challenge. Despite reflecting subsequent developments to the date of filling of the challenge, the judges refused to take these developments into consideration although they were timely to the debate before the Appeals Chamber (AC).[68] PTC I took the same position in relation to Côte d'Ivoire's challenge to admissibility in the case of Simone Gbagbo.[69]

There does not seem to be any understandable reason for such an inconsistent approach. This highlights the need for the ICC jurisprudence to adopt a consistent policy on challenges to admissibility that is in conformity with the Preamble of the Statute and the spirit of Article 17. The delving of the judges into the uncharted waters of domestic law practices without deep knowledge of the local legal and political dynamics is a two-edged sword. ICC judges, who are well versed in international law and international criminal law, are not well equipped or knowledgeable in the various legal traditions and domestic practices. For instance in relation to Libya, the PTC rashly ruled that if there is no lawyer at the investigative phase, then a trial cannot take place for Gaddafi. However, it is well known to any person with good knowledge of the Libyan situation that despite the rapidly evolving circumstances, the different factions of Libya remain in agreement that Libya has the will to try Gaddafi and not to shield him. The issue of appointing a counsel is not the main issue here, and the Appeals Chamber in the case of Al-Senussi admitted that this is only relevant to the extent that a trial

[68] Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Judgment on the appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-01/11 OA, The Appeals Chamber, the International Criminal Court, 30 August 2011, para. 83.

[69] Situation in the Republic of Cote D'Ivoire in the Case of the Prosecutor V. Simone Gbagbo, Decision of Pre-Trial Chamber I on Côte d'Ivoire's Challenge to the Admissibility of the case against Simone Gbagbo Situation, ICC-02/11-01/12, 11 December 2014, para. 35.

can still occur to bring the accused to justice.[70] Hence, the Libyan Court will appoint a counsel for Gaddafi when he becomes in the custody of the central authority. The PTC erred when it went into the analysis of the prospective and chances of having a lawyer for Gaddafi or for Al- Sennussi. This is simply because if the Judges assessed willingness first, they would have easily realized that Libya will try all the senior leaders of the former regime. Libya, despite all hurdles, has been consistent in its judicial efforts to prosecute the senior commanders of the former regime. Notwithstanding the difficult security situation,[71] the Libyan authorities have continued their efforts to try the senior leaders of the former regime, including Al-Senussi and Gaddafi. The recent ongoing judicial proceedings in Tripoli confirm that.[72] On 28 December 2014, Al-Senussi and 31 senior leaders of the former regimes have attended one of the trial sessions in Libya in the presence of defence lawyers. According to local media, the trial included the presence and the cross examination of a number of witnesses.[73] Needless to say that Gaddafi – who is under the custody of the Zintan rebels –attended previously one of the trial sessions via video conferencing.[74] On 28 July 2015, Tripoli Appeal Court sentenced, among others, Al-Senussi and Gaddafi to death, while it acquitted the former minister of foreign affairs Abdulah Alubeidy.[75] The sentence was delivered for Gaddafi *in absentia* due to the failure of his transfer from the custody of the

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[70] Situation in Libya in the Case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", CC-OI/II-OI/IIOA6, The Appeals Chamber, The International Criminal Court, 24 July 2014, para. 190.

[71] This discussion is related to the Libyan situation during the period of Challenge of Admissibility. The recent major deterioration in the security situation that witnessed the fragmentation of the central government is beyond the scope of this article.

[72] Bawabat Alwasat [Arabic] 28 December 2014. www.alwasat.ly/ar/news/libya/54089/

[73] Middle East Online [Arabic]. www.middle-east-online.com/?id=191099

[74] *Ibid*

[75] See Alaraby Aljadeed [Arabic] 28 July 2015. http://www.alaraby.co.uk/politics/2015/7/28/%D8%A7%D9%84%D8%AD%D9%83%D9%85-%D8%A8%D8%A5%D8%B9%D8%AF%D8%A7%D9%85-%D8%B3%D9%8A%D9%81-%D8%A7%D9%84%D8%A5%D8%B3%D9%84%D8%A7%D9%85-%D8%A7%D9%84%D9%82%D8%B0%D8%A7%D9%81%D9%8A

Zintan rebels to the central authorities in Tripoli. Aside from the criticism of imposing the death sentence in the case, the progress of the case and the issuance of the sentence contrast with the earlier finding of the ICC that the Gaddafi case would not progress due to lack of appointment of a lawyer. In fact, despite a number of due process shortages, the 31 senior leaders of the previous regime had defence counsel, and Gaddafi himself attended via video link another session of his trial on 24 April 2015.[76]

After all this flounder, the ICC Appeals Chamber in the Al-Senussi case tried to correct the path, by rightly indicating 'that, in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated. Rather, what is at issue is whether the State is willing genuinely to investigate or prosecute'.[77] However, the Appeals Chamber suggested that it is only when 'the failure to provide a lawyer constitutes a violation of Mr Al-Senussi's rights which is so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused so that they should be deemed [...] to be 'inconsistent with an intent to bring [Mr Al-Senussi] to justice'.'[78] The AC added that even if 'the lack of access to a lawyer during the investigation stage of the proceedings violated Mr Al-Senussi's right to a fair trial and provisions of Libyan law (and

[76]Alyoum 7[Arabic] 25 July 2015.
http://www.youm7.com/story/2015/7/25/%D8%A7%D9%84%D8%AD%D9%83%D9%85-%D8%B9%D9%84%D9%89-%D8%B3%D9%8A%D9%81-%D8%A7%D9%84%D8%A5%D8%B3%D9%84%D8%A7%D9%85-%D8%A7%D9%84%D9%82%D8%B0%D8%A7%D9%81%D9%89-%D9%88%D8%B9%D9%86%D8%A7%D8%B5%D8%B1-%D8%A7%D9%84%D9%86%D8%B8%D8%A7%D9%85-%D8%A7%D9%84%D9%84%D9%8A%D8%A8%D9%89-%D8%A7%D9%84%D8%B3%D8%A7%D8%A8%D9%82-%D8%A7%D9%84/2276988#.VdDb1rffrIU

[77] Judgment on the appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", *supra* note 70, para. 190.

[78] *Ibid.*

may therefore give rise to remedies under both international and national law…) such violations would not reach the high threshold for finding that Libya is unwilling genuinely to investigate or prosecute Mr Al-Senussi'.[79]

The Appeals Chamber rightly limited the role of due process violations in determining the admissibility of a case. This confirms the discussions of the drafters who were concerned mostly with sham trials or ineffective proceedings, and not human rights fair trial violations at the domestic level.[80] However, in assessing admissibility, the AC struck a balance that discards human rights violations that do not affect doing justice genuinely from those violations that can prevent genuine forms of justice for the accused to take place. The AC considered that latter violations are the one relevant to the ICC's admissibility test and not the former. This is an important point to end the argument on the impact of due process violations on the complementarity test, but at the same time, it does not provide tangible criteria regarding when a due process violation become so egregious as to prevent providing a genuine form of justice. The terms themselves are relative, and jurists have struggled to find clear definitions for such terms.

The Appeals Chamber did not explore further, and in the absence of specific definition of the terms, the judges are left with wide discretionary powers which carry the risk of inconsistent interpretations, as noted above For instance, the PTC findings in the Gaddafi case neither comprehended the frame of these terms, nor understood properly the rationale behind Article 17 and the complementarity mechanism. In the view of the present writer, the PTC's (incorrect) finding on the importance of the presence of the accused legal counsel at the

[79] *Ibid*, para 191.
[80] For more details read Kevin Jon Heller, OTP Responds to Libya's Admissibility Challenge. Opinion Juris, http://opiniojuris.org/2012/06/07/otp-responds-to-libyas-admissibility-challenge/

investigative stage, and its impact on the occurrence of the trial within the Libyan context, supports such a conclusion. Moreover, the judges mistakenly delved further in the admissibility test to check if there is a witness protection system in Libya or not.[81] While this is a must for proceedings before the ICC, most of the respected legal systems of developing countries lack the presence of such a programme. This seemed a luxury to ask from a judicial system that is trying to restore and strengthen its role after years of tyrannical marginalization and political interference. This is at best unrealistic and cumbersome, and from the other side it is a due process issue that can hardly fulfil the 'higher' threshold set by the Appeals Chamber in the case of Al-Sennussi. The domestic trial sessions of Al-Sennussi and 31 accused from the old regime support the latter conclusion. For instance, despite the absence of domestic witness protection programs, many of the witnesses have attended the trial session of 28 December 2014 and were cross examined by the prosecution and the defence.[82] Some of those witnesses are of simultaneous relevance to the Gaddafi, Al-Sennussi and other cases respectively. In other words, this applies to both cases before the ICC, and this fact refutes the concerns raised at that time by the PTC in the Gaddafi case, where the local judicial system was found 'unable'.

3. Critique of the ICC Policy on Complementarity

3.1. Narrow interpretation of the parameters of Article 17

3.1.1. High threshold for domestic systems to prove the existence of an investigation

In practice, Chambers have demanded extensive details about all aspects of the investigation regarding the same person/same conduct test. Challenging states have been asked to substantiate all aspects of their actions and investigations. The ICC recognized that even relevant (genuine) actions, yet that fall short of providing the Court with intelligible overview of the factual investigated allegations, will not be sufficient. In other words, ICC judges have decided that the burden of proof rests with the national system. This is to the extent that if a genuinely investigating state does not provide all the necessary information and evidence that convinces the ICC that the former is investigating the particular conduct and person in a comprehensive manner fully understandable to the Court, it will never pass the ICC admissibility test.

The below example illustrates how high the threshold required from a challenging state is:

> …'the challenging State is required to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case'. [Footnote Omitted] Indeed, '[t]he principle of complementarity … 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'.[83]

The PTC imposed a high burden on Libya to ensure that the Chamber understand the context and scope of its activities. The PTC was not even satisfied with Libya providing documents on concrete investigative steps, but, in fact, requested a *dossier* that allowed the PTC to understand all the aspects of the domestic investigation. It seems that even the PTC's role to

[83] Public redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, *supra* note 65, para. 27.

understand the Libyan context and investigative actions – based on the tangible provided documents – has been delegated to the challenging state.[84]

Moreover, PTC I, in the Simone Gbagbo case, raised the threshold further to consider that even if a state is broadly investigating the same case, it will fall short of meeting the admissibility requirement if the investigative activities undertaken are sparse and disparate. The PTC I set an additional requirement on the challenging state; that is to provide sufficient information that proves that the investigation is tangible, concrete and progressive.[85] This is overly cumbersome on willing and able states. By that, the ICC is not only asking states to investigate the same person(s) for the same conduct, but to adopt the same ICC investigative strategies. This is nowhere stipulated in the Statute, and it is hardly imaginable that states in Rome accepted such a further restriction to allow the ICC to dictate how domestic authorities should prosecute international crimes.

3.1.2. ICC's Erroneous/Narrow interpretation of inability in the Gaddafi case: It is a law enforcement issue rather than judicial inability

Pre-Trial Chamber I found that the national justice system was 'unavailable' in the Saif Al-Islam Gaddafi Case.[86] The finding of the PTC was regarding the circumstances as they

[84] *Ibid*, para. 87.
[85] Decision of Pre-Trial Chamber I on Côte d'Ivoire's Challenge to the Admissibility of the case against Simone Gbagbo Situation, *supra* note 69, para. 65.
[86] Public redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, Pre-Trial Chamber I, *supra* note 9, para. 215.

strictly existed at the time of challenge of admissibility.[87] In this Decision, the PTC indicated that

> … Libya continues to face 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'...[88]

The PTC does not explain the approach it adopted in finding that one requirement of the first limb of inability – that is unavailability – was fulfilled. This term seems to be used by the Court as catch-all clause. The PTC above indicates that since the national system is not applicable fully in certain areas (such as Zintan), therefore, the national system is unavailable.

This finding seems to lack basic legal grounds. It jumps to the second limb of Article 17(3) to conclude that Libya is unable to obtain the accused, unable to obtain the necessary testimony, and otherwise unable to carry its proceedings due to the lack of appointment of the defence counsel. Based on this patchy selection, the Chamber jumps backward to 'find' that the judicial system of Libya at that time was unavailable with respect to the Gaddafi case.It is regrettable that the Chamber refrained from providing any possible frame to what an 'unavailable judicial system' may entails – at least with respect to the current case. Such an approach can have serious repercussions on the relation of the Court with national systems,

[87] *Ibid*, para. 220.
[88] *Ibid*, para. 205.

because the ICC will always find something 'unavailable' in the judicial proceedings regarding a certain case in many judicial systems –especially in developing countries or countries in transition.

If compared to the Rome Statute and states' discussions in Rome, the 'inability' finding of the PTC in this case can be heavily criticized on a number of levels. First, state parties applied a stringent test on the ICC when determining 'inability'. The drafters refused to allow 'partial' collapse to fulfil the first limb requirement of inability.[89] If the 'finding' of this Chamber is juxtaposed with the finding of the ICC that Libya is able and willing to try Al-Senussi in Tripoli,[90] and with a close view of the alleged crimes to Al-Senussi and Al-Gaddafi it won't be difficult for any observer to realize that there is an overlap in the crimes, evidences and probably the witnesses of the two cases. The former Libyan regime's structure entailed that if any influence the son of the Libyan president would have on the security forces to orchestrate the crimes alleged of, it would had been mainly through the head of intelligence Al-Sennussi. Furthermore, the alleged crimes to Saif Al-Islam have occurred mainly in Benghazi, Tripoli and other areas on the Libyan soil, not in Zintan. The documents provided by Libya show that the local authority have investigated and managed to take certain formal investigative steps. They have gathered credible evidences that can be used in trial. The information provided by Libya, and recognized by the PTC, shows that in Tripoli – and some other places - the judicial system was, to some extent, functioning and available - at least with respect to the ICC cases, albeit with some expected deficiencies due to the difficulties of transition. Moreover, the investigative and judicial steps taken against Gaddafi have been conducted

[89] See Holmes, *supra* note 9, at 53-54. See also Nidal Nabil Jurdi, The International Criminal Court and National Courts: A Contentious Relationship (2011) Aldershot, Ashgate, at 51.
[90] Public redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, *supra* note 65.

from Tripoli. The documents provided to the ICC reflect those realities. The ICC chose to overlook that. However, where does that stand from Article 17(3)? In this writer's opinion, the Libyan judicial system at that time was in a state of partial collapse combined with weak law enforcement capabilities. Yet, this has raised a second question of whether this fulfils Article 17(3) of the Statute. The answer, as will be elaborated *infra*, is in the negative.

For Article 17(3) to be fulfilled in the Gaddafi case, the judicial system should *first* be either fully, or substantially or unavailable for this case and *second*, to be unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry its proceedings. The PTC Chamber jumped directly to the second limb of Article 17(3) to use the failure of the Libyan system '… to obtain the accused' and 'the necessary testimony' and 'otherwise unable to carry out [the] proceedings' in the case against Saif Al-Islam Gaddafi to reach the conclusion that the system is unavailable, and thus unable. This approach is flawed and inconclusive, because the first limb was not fulfilled in what the drafters intended to from its insertion in Article 17 – that is to render the judicial system incapable from prosecuting the alleged perpetrators.[91] As indicated *supra*, the term 'unavailability' has not been defined in the Rome Conference, and thus left to the jurisprudence of the Court and the writings of the jurists to elaborate on that. With the silence of the ICC Judges on that, one can turn to what the OTP has invoked informally to understand how some ICC organs have approached this requirement; the 'Informal Expert Paper on the Principle of Complementarity' of 2003. In this document the Experts included a list of criteria to determine the first limb of inability, although without determining in particular what could constitute 'unavailability'. The Paper enlisted the following to be of relevance to determine total or substantial collapse or unavailability;

[91] See the *supra* discussion on the Gaps in the Complementarity Regime.

- lack of necessary personnel, judges, investigators, prosecutor;
- lack of judicial infrastructure;
- lack of substantive or procedural penal legislation rendering system 'unavailable';
- lack of access rendering system 'unavailable';
- obstruction by uncontrolled elements rendering system 'unavailable'; and
- amnesties, immunities rendering system 'unavailable'.[92]

The rulings of the ICC are not judgements on the whole domestic judicial system, but on the relevant factor(s) to the investigated case under consideration. In the case of the Gaddafi, the prosecutor herself confessed that Libya has assembled a group of qualified attorneys and investigators which have already taken relevant specific investigative steps to prosecute Gaddafi. These steps included, among others, gathering testimonies and phone intercepts. The Prosecution further confirmed that the Libyan Criminal Code penalizes the underlying allegations of the Article 58 Decision.[93] In comparing the OTP's findings with the above criteria, obviously the domestic judicial system seemed by then available for the case of Gaddafi. It is true that the Libyan judicial system at that time was facing numerous challenges for a country in transition, but it managed to take a number of steps in a relatively short time – faster than some ICC investigations that have taken years. However, Libya remained unable to have effective control on the detention centre where Gaddafi was detained. While the latter is a point of agreement between this writer, the OTP and the ICC judges, this fact on its own has to do with the second limb of inability, but not the first one. It is a reality that Gaddafi is under the control of the Zintan militia, which is not under the full control of the

[92] Informal Expert Paper: The Principle of Complementarity in Practice, *supra* note 17, at 31.
[93] Prosecution Response to ":Libyan Government further Submission on Issues related to the admissibility of the case against Saif Al-Islam Gaddafi, Office of the Prosecutor, Pre-Trial Chamber I, The International Criminal Court, 12 February 2013, ICC-01/11-01/11, para. 41.

then central government. This means that he has been arrested in an area that is outside the control of the Libyan government. This is probably because the embryonic security forces are not able to take control over all the regions in Libya. This is what differentiates this case from Al-Senussi who is detained in Tripoli. The PTC delivered two contrasting decisions in the Gaddafi and Al-Sennussi cases respectively, although the two cases have been before the same judicial body, and the same investigative and prosecutorial teams,[94] but not the same detaining forces. The latter confirms that the core issue for the ICC was custody.

The above raises a very important issue with respect to 'inability' under the admissibility test. Can the ICC render a judicial system unable if the functioning and willing judicial system has taken all judicial steps, but the law enforcement bodies have failed to arrest the suspect/ accused? In a strict reading of Article 17 (3), this scenario does not fulfil the requirements of inability under Article 17, as the first limb of inability is not fulfilled. One can argue that if states wanted to render 'inability to obtain the accused' as stand-alone inability requirement, they wouldn't have insisted on the first condition of substantial or total collapse or unavailability as a pre-requisite that needs to juxtapose with 'inability to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'.

It is a case of law enforcement more than being a situation of inability of the domestic judicial system. If one is to accept a different interpretation, then every willing and able judicial system will be rendered unable with respect to those suspects or accused who remain

[94] The submissions of Libya in the Case of Al-Sennussi confirmed the strong nexus. For instance at least three of the witness statements were of main relevance to the two cases. This highlights that the two cases - to a large extent - mirror similar facts. See Public redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, *supra* note 65, paras. 107, 110, and 111.

at large when the police fail to arrest them.[95] The national systems of most countries of the world are faced with cases of failure of domestic police in arresting certain suspects or accused. Many of those remain at large for many years or decades. This may happen in all countries including those that have strong and functioning judicial systems. Can we consider the judicial systems of all these countries in a state of inability?

This situation can become even more complex with the possibility– mainly in continental systems - for the willing and able judicial system to conduct domestic trials in absentia. This is relevant in The Gaddafi case, as the Tripoli court delivered its sentence in absentia on the 28 July 2015.[96]

Furthermore, if these countries are not able to arrest due to law enforcement shortages –not due to unwillingness or inability of their judicial system – then, how the ICC itself – as a Court that lacks direct law enforcement powers - can? The answer is obviously in the negative. For a Court that depends on state cooperation, if the latter states are not able to arrest, then the ICC *mutates mutandi* is unable.[97] This is the conundrum. This is the ultimate paradox of the Rome Statute. The recent arrest of Dominic Ongwen, one of the Lord Resistant Army leaders, by US forces in the Central African Republic (CAR) materializes this paradox. Uganda referred its situation to the ICC because it was not able to arrest the LRA leaders.[98] Nevertheless, after the arrest, Ugandan forces visited Ongwen in his former place of arrest in CAR, and initially Uganda showed interest in requesting his extradition

[95] See Nidal Nabil Jurdi, ' The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?' (2010) 10 *International Criminal Law Review*, at 73–96.
[96] See *supra* note 76.
[97] See Bo, *supra* note 44, at 531.
[98] *See* Jurdi, *supra* note 95.

from CAR to Uganda.[99] Uganda is now fully capable to prosecute Ongwen if CAR had extradited him to Uganda, or if the ICC sends him back to Uganda for trial. If the ICC truly endorses positive complementarity, there is no reason not to send Ongwen back to Uganda. The initial failure of Uganda to prosecute Ongwen is a law enforcement limitation –as he was hiding outside Uganda, but not due to judicial inability. If one is to accept the ICC logic, then what will the ICC do when the central authorities in Libya manages to gain custody over Gaddafi? Such 'inability' will seize to exist making the ICC's finding a dead letter on arrival.

4. Conclusion

Despite the developing jurisprudence of the ICC on complementarity and article17, the ICC has continued to assess admissibility while ignoring or overlooking - at best - the purpose and objective of the Statute, which delineates the primary duty of states to prosecute, while being complemented by the ICC when they are unwilling or unable.

In terms of jurisprudence, the ICC practice has shown a patchy approach that lacks a consistent and clear vision toward the relation with domestic jurisdictions. This has been practically left to judicial creativity of the judges of each chamber without clear benchmarks. The ICC practice on complementarity shows vividly that the various organs of the Court – including the judges – lack in-depth understanding of the rationale behind the complementarity principle. The current writer is not suggesting to eradicate any judicial discretion, but rather to restructure it in the direction that serves the object and purpose of the Statute. This purpose is to end impunity through primarily encouraging domestic systems to

[99] BBC, 'LRA rebel Dominic Ongwen surrenders to US forces in CAR', 7 January 2015, http://www.bbc.com/news/world-africa-30705649

play it pivotal role in prosecuting international crimes, while the ICC remains a court of last resort that ensures that these objectives are achieved.

Initially, the drafters rejected to allow 'partial' collapse to fulfil the first limb requirement of inability.[100] If the 'finding' of this Chamber is combined with the findings of the same Chamber in the Al-Sennussi case - rendering Libya at that period able and willing to try Al-Senussi in Tripoli[101] - then the case is then a one of partial collapse, not a total or substantive one. The PTC chamber overlooked the first limb of Article 17(3) and focused on the failure of the Libyan system '… to obtain the accused' and 'the necessary testimony' and 'otherwise unable to carry out [the] proceedings' to render the system unavailable, and thus unable. This approach is flawed and inconclusive, because the Chamber did not satisfy the first limb. This is a law enforcement problem more than being a situation of inability of a domestic system. If one is to accept a different interpretation, then every willing and able judicial system will be rendered unable with respect to those suspects or accused who remain at large when the police fail to arrest them. Moreover, if those systems are not able to arrest due to law enforcement shortages, then, *mutates mutandi* the ICC itself – as a Court that lacks direct law enforcement powers- cannot. The present writer concludes that the PTC judges' erroneous approach imposed a heavier burden on a willing and relatively able state –at that time - than what was primarily envisaged by the drafters of the Statute.

Furthermore, this article concurs with the finding of the Appeals Chamber in the Al-Sennussi case[102] and the opinion of some jurists[103] that due process' benchmark should not be

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[100] See Holmes, *supra* note 8, at 51.

[101] Public redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, *supra* note 65.

[102] Judgment on the appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", *supra* note 70, para. 190.

[103] Such as Kevin Jon Heller, *supra* note 26, at 255; See Megret and Samson, *supra* note 29, at 571.

exaggerated, but to reach a different conclusion. It agrees with the AC finding that the Court is not to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated or not. However, the AC drew a balance between discarding human rights violations that do not affect doing justice genuinely from the admissibility criteria, and those 'relevant' grave violations that can prevent genuine form of justice to take place. The introduced balance can help in clarifying the ambiguous 'role' of due process in the admissibility mechanism, but it failed to provide any benchmark to decide when a due process violation is so grave to prevent doing justice 'genuinely'. This conclusion fails to provide tangible criteria regarding when a due process violation is grave to prevent doing justice genuinely and when not. In the absence of a clear judicial vision vis-à-vis the relation with national systems, the AC *supra* decision adds more ambiguity than provide guidance to future ICC practice. The terms themselves are relative.

The ICC is not responsible for mainstreaming national systems to do justice according to international human rights standards or according to its understanding, but rather to invoke some of these objective standards to determine that the state is conducting proceedings with the *bona fide* intention to investigate and prosecute these crimes. In the opinion of the present writer, this is an objective test of intention that will be deduced from actions of the domestic system along the above mentioned parameters. This test is neither one of relativity nor of specific results, but rather of intention, which can be deduced through objective benchmarks. The complementarity mechanism is a very delicate system that requires the judges of the ICC to look into legal, political, and many times local developments. While the judges' knowledge of international law and international criminal law is not disputed, the practice showed that they lack sufficient knowledge of the complexities of local situations. This becomes more acute within the context of societies in transition, where the rapidly evolving situation could be further unpredictable. Contrary to what its organs claim, the ICC is not only a Court, but

also an international organization with non-judicial roles. The ICC complementarity mechanism is not a purely jurisdictional system, and the ICC is not only a criminal court. It is an international organization that seeks to end impunity not only through its judicial activities, but more importantly through the domestic judicial systems and the judges of the affected community. The ICC and its judges in The Hague should not deviate from this reality. It is always tempting to have more show trials for big fish, but such an ego will never have the lasting effect of supporting a willing national system to set the historical record of accountability by the affected community itself.