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

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Abstract

The interplay between the International Criminal Court (ICC) and domestic jurisdictions under the complementarity regime has unveiled statutory and policy limitations. These loopholes became vivid when the ICC faced new complex situations that were not initially envisaged by the drafters of the Rome Statute. On the practical side, the Libyan situation revealed setbacks and shortages in the policy(ies) adopted by the ICC. The first of these setbacks 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 constituencies 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.

The unfortunate loose interpretation of 'unavailability' that the ICC has developed has led to inaccurate interpretations of the complementarity mechanism in certain situations, such as Libya. Furthermore, the fair trial standards within the admissibility regime should not be exaggerated, but rather invoked to determine whether the state has a bona fide intention to investigate and prosecute these crimes. Contrary to some writers' interpretation, this is an objective test of intention, not one of relativity or specific result.

The ICC practice has shown a patchy approach that lacks a consistent and clear vision of its relation with domestic jurisdictions. While the ICC has not missed every opportunity to hail its commitment to positive complementarity, the reality is that the Court seems keen on understanding its success through conducting more international prosecutions.

Keywords

admissibility; complementarity; domestic jurisdictions; due process; unavailability

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I. INTRODUCTION

Despite the initial perception that the parameters of the complementarity regime of the International Criminal Court (ICC or the Court) were well defined by the Rome Statute of the International Criminal Court (Rome Statute or the Statute), the ICC's interaction with domestic jurisdictions in the last decade has uncovered a number of statutory and policy shortages. The process 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 the 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, 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 these setbacks 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 for 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 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.

¹ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, Preamble, paras. 5, 6. 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'.

² Dov Jacobs highlights the need to harmonize the current practice(s) of the ICC on complementarity. See D. Jacobs, 'The ICC and Complementarity: A Tale of false promises and Mixed up Chameleons', 11 December 2014, *Post-Conflict Justice Conference*, available at www.postconflictjustice.com/the-icc-and-complementarity-a-tale-of-false-promises-and-mixed-up-chameleons.

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 Rome 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 states 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 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 prerequisites for inactivity. 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 with total collapse.

However, assessing 'unavailability' is more complex and subjective. The term is open-ended and could have multiple interpretations, which has opened the door for subjectivity.⁹ According to some scholars, domestic systems will most probably be

³ J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 3.

⁴ Rome Statute, *supra* note 1, Preamble para. 6.

⁵ E.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"?' (2005) 18 LJIL 829, at 832–3.

⁶ J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', (1995) 89 AJIL 404, at 414–15; 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), 157–8.

⁷ Rome Statute, *supra* note 1, Art. 17; The International Criminal Court, Office of the Prosecutor, *Paper on Some Policy Issues before the Office of the Prosecutor* (2003) ICC-OTP 2003, 1–9, at 4–5.

⁸ J.T. Holmes, 'Complementarity: National Courts versus the International Criminal Court', in A. Cassese, P. Gaeta and J.D. Jones (eds.), *The ICC Statute of The International Criminal Court: A Commentary*, Vol I, (2002), 677.

⁹ See *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-01/11-01/11-344-Red, Pre-Trial Chamber I, 31 May 2013.

considered ‘unavailable’ when the judicial system is non-existent.¹⁰ For instance, for states that have no criminal judicial system, the judicial system will be considered ‘unavailable’. This is straight forward, but this scenario will probably 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 differentiates them from total collapse? Probably, the only scenario where these 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 a synonym for ‘total collapse’, or that they included 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 doing 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 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 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, but that do not affect the capability of the judicial system to prosecute and punish perpetrators of international crimes.¹⁷ This pivotal

¹⁰ C. Cárdenas, ‘The Admissibility Test Before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions’, in Kleffner et al. (eds.), *Complementary Views on Complementarity Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court* (2006), 8.

¹¹ C. Bassiouni, ‘The ICC - Quo Vadis’, (2006) 3 *Journal of International Criminal Justice* 421, at 423.

¹² Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II, UN Doc. A/51/22 (1996), UN GAOR, 51st Session, Supp. No. 22, at 1 [‘Preparatory Committee Report’].

¹³ ILC, Draft Statute for an International Criminal Court: Commentary to the Preamble, 1994 YILC, Vol. II (Part Two), at 27.

¹⁴ See D.J. Brown, ‘The International Criminal Court and Trial *In Absentia*’, (1999) 24 *Brooklyn Journal of International Law* 763.

¹⁵ Oxford Dictionaries, available at 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) sought the opinion of experts to flesh out the textual meaning of the constituencies of Article 17 – including ‘unavailability’; *ibid.*, at 14.

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: the inability ‘to obtain the accused or the necessary evidence and testimony’ or otherwise the inability ‘to carry out [the] proceedings’.²¹

Hence, the most logical and accurate interpretation for ‘unavailability’ is when it is read in conjunction with the objectives of the Rome Statute. The judicial system can be rendered ‘unavailable’ when it is simply not capable of prosecuting the core crimes of the Statute according to Articles 17 and 20. The benchmark for determining 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 above proposed interpretation 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 states parties to prevent impunity for perpetrators of core international 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 of Article 17 in particular.²⁴ As will be demonstrated below, the ICC has used the term ‘unavailable’ in the case against 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 above is crucial to prevent such a vague term becoming a catch-all net for the ICC or any other party using 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 Rome Statute is a model in procedural guarantees for the rights of the suspects, the accused, and even victims.

¹⁸ *Ibid.*, at 31.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Rome Statute, *supra* note 1, Art. 17(3).

²² Criticisms against some arguments raised by the Informal Expert Paper can be noted. For instance, see A. Walker, ‘The ICC Versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process’, (2014) 18 *UCLA Journal of International Law and Foreign Affairs* 303, at 331.

²³ Rome Statute, *supra* note 1, Preamble, para. 5; see also S.A. Williams, ‘Article 17: Admissibility’, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court* (1999), 386.

²⁴ Preparatory Committee Report, *supra* note 12.

²⁵ Public Redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, *supra* note 9, para. 215.

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 Rome Statute must be consistent with internationally recognized human rights. This relates to the application of the Statute before the ICC. The relationship between 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 Rome Statute. According to 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 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 Article 17 have contributed to dividing the scholarly community between those who consider that sole due process violations are of relevance to rendering cases admissible before the ICC,²⁸ and those who simply consider that this is statutorily inaccurate.²⁹ The argument that will be raised subsequently 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 does not define the term and the *travaux préparatoires* do not 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 stands 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 result-oriented, while the latter understands it as process-oriented.³³ If the aim ‘to bring the person to justice’ is that of a result – to establish conviction – then due process guarantees of independence

²⁶ K.J. Heller, ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’, (2006) 17 *Criminal Law Forum* 255, at 258.

²⁷ See Kleffner, *supra* note 3, at 131; C. Bassiouni, *Introduction to International Criminal Law*, (2003), 518; M.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; O. Solera, ‘Complementary Jurisdiction and International Criminal Justice’, (2002) 84 *International Review of the Red Cross* 145, at 166; C. Stahn, ‘Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’, (2005) 3 *Journal of International Criminal Justice* 695, at 713.

²⁸ *Ibid.*, at 713.

²⁹ See Heller, *supra* note 26, at 255; F. Mégret and M. Giles Samson, ‘Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials’, (2013) 11 *Journal of International Criminal Justice* 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.

or impartiality may not be relevant. If ‘bringing the person to justice’ is a process – to be tried – then the due process guarantees of independence and impartiality in particular are relevant to such a process, but within the 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 Rome Statute. The Preamble to 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 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 cases admissible 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 was *de jure* or *de facto* ‘denial of justice’.³⁸ The famous Italian proposal,³⁹ which mandated the ICC to assess whether 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 Rome Statute.

If one accepts the argument that due process guarantees are not a determining factor in admissibility, the question remains: why were phrases such as ‘internationally recognized norms and standards for the independent and impartial prosecution’⁴² and ‘principles of due process recognized in international law’ inserted in Article 17? This ambiguity allowed each of the two interpretative camps to

³⁴ *Ibid.*, at 826.

³⁵ Rome Statute, *supra* note 1, Preamble.

³⁶ See Walker, *supra* note 22, at 315.

³⁷ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 September 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 proposal 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 (5 August 1997).

⁴⁰ See Rojo, *supra* note 5, at 845.

⁴¹ See Walker, *supra* note 22, at 324; see Rojo, *supra* note 5, at 840.

⁴² ICC Rules of Procedure and Evidence, ICC-ASP/1/3 (A) (2000), Rule 51.

pick and choose what supported 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 préparatoires* is invoked to detect the true meaning of the text in line with the object 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 object and purpose 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 earlier, 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 necessarily lead to conviction, inadmissible.⁴⁵ The ICC is not a human rights court and its function is not to detect violations of human rights.⁴⁶ The challenge 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 John Holmes, the then Co-ordinator of the Working Group on Complementarity at the Rome Conference, highlighted that many delegations believed that procedural fairness should not be a factor for the purpose of defining complementarity.⁴⁹

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 with 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 does not have support either in the Statute or in its drafting history. It has no grounds in international treaty law or in human rights law. Second, if the due process violations were to become a comparative criterion to domestic benchmarks in order to determine admissibility,

⁴³ 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

⁴⁴ M. Bo, 'The Situation in Libya and The ICC's Understanding of Complementarity in The Context of UNSC- Referred Cases', (2014) 25 *Criminal Law Forum* 505, at 533.

⁴⁵ Rome Statute, *supra* note 1, Art. 17(1)(b).

⁴⁶ Informal Expert Paper, *supra* note 16, at 15.

⁴⁷ See Bo, *supra* note 44, at 533.

⁴⁸ Rome Statute, *supra* note 1, Art. 19.

⁴⁹ See Holmes, *supra* note 8, at 50.

⁵⁰ K.J. Heller, 'Why the failure to Provide Saif with Due Process is Relevant to Libya's Admissibility Challenge', 2 August 2012, *Opinio Juris*, available at www.opiniojuris.org/2012/08/02/why-the-failure-to-provide-saif-with-due-process-is-relevant-to-libyas-admissibility-challenge/.

it would 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, for example, 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 results 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 supersede the ordinary meaning of the articles of the Statute (the treaty) in their context and in light of its object and purpose.

A textual analysis of the phrase ‘having regard to the principles of due process in international law’ brings in some fundamental international human rights guarantees for fair trial as incorporated in Articles 9 and 14 of the International Covenant on 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 of the clause ‘to bring the person to justice’. If one adopts the process-oriented approach, then the answer is yes; if one adopts the result-oriented approach, the answer is no. 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 *mala fide* intention not ‘to bring the person to justice’, i.e., ‘to investigate with the aim to establish accountability’. Indeed, if Article 17 was solely aimed towards conviction, then why would Article 17(1)(b) consider that a domestic investigation without further trial or conviction is sufficient reason for inadmissibility before the ICC? Interestingly, the equally authentic Arabic version of the Rome Statute talks about ‘presenting [taqdeem] the person to justice’,⁵² which is a legal term commonly used in Arabic to describe the situation when a person is being investigated in order to establish accountability.⁵³ The implication of such an interpretation is that there is

⁵¹ 1966 International Covenant on Civil and Political Rights 999 UNTS 171, Arts. 9, 14.

⁵² Rome Statute, *supra* note 1, Art. 17 (Arabic version), available at 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 Ala’am Alqanuniah 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], available at www.un.org/en/sc/ctc/docs/2015/S_2015_123_AR.pdf; Amnesty International Arabic statement on Iraq, ‘The [daman Taqdeem Murtakibi Intihakak Huquq El-Insan lil-Muhakamah]’, available at www.amnesty.org/download/Documents/108000/mde140802003ar.pdf.

a limited role for due process guarantees – restricting the criteria of independence or impartiality to detect whether there is a *mala fide* intention not to investigate or prosecute⁵⁴ 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 defined neither the term ‘independence’ nor the term ‘impartiality’. Yet, if we are to determine impartiality or independence by ‘having regard to the principles of due process in international law’, we will probably be 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 to ensuring that the judicial authorities are not under external influence or interference or prejudiced to favour the accused or suspect reflecting a *mala 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. The thrice-mentioned phrase ‘to bring the person concerned to justice’ is 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 one of result and outcome. In other words, the fact that the term is used 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 a lack of impartiality or independence in the proceedings *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 considering that the terms themselves were listed as elements for determining unwillingness, or as an exception to *ne bis in idem* when states 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 the Libya cases,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 can it 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. Rather, some of these objective standards should be invoked to determine whether

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 C. Bassiouni and E.M. Wise, *Aut Dedare Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).

⁵⁵ See Heller, *supra* note 26, at 260–1.

⁵⁶ See Rojo, *supra* note 5, at 853.

⁵⁷ *The Law Dictionary*, available at, www.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.

the state has *bona* (or *mala*) *fide* intention to investigate and prosecute the 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. This test is not one of relativity or specific result, but rather one 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 Court⁶⁰ neither has statutory ground, nor is it 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 exists a factor that affects negatively the impartiality and independence of the judiciary, while 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 of the drafters during the *travaux préparatoires*.⁶¹ The available remedy for rectifying such shortages is statutory amendments at coming review conferences, but until then, *lex lata* cannot be confused with *lex ferenda*, and what we wish cannot replace what the law is.

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 assessment of admissibility is one of the contentious issues that were addressed by the ICC in the Libyan situation. In particular, this was with respect to the absence of legal representation at certain stages of the judicial proceedings, as well as the absence of witness and victim protection programs. The organs of the Court 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 the 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 the *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

⁶⁰ See Heller, *supra* note 26, at 262.

⁶¹ See Holmes, *supra* note 8, at 50; see also Rojo, *supra* note 5, at 847.

⁶² See Bo, *supra* note 44, at 537.

⁶³ International Law Programme Meeting Summary, 'The International Criminal Court and Libya: Complementarity in Conflict', *Chatham House, The Royal Institute of International Affairs*, 22 September 2014, at 5.

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. Though 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 the PTC delved into predicting the impact of such absence on the conduct of the *Gaddafi* trial itself. In the *Al-Senussi* case, the PTC stated 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

This indicates that the PTC has led itself to analyze possible future developments based on its analysis of the current situation, thereby contradicting its earlier claims. In the *Gaddafi* case, the PTC took a similar stand, but reached a different conclusion.⁶⁶ It stated 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 admissibility challenge, the judges did not accept filed documents that covered subsequent investigative steps taken shortly after filing the challenge. Despite reflecting subsequent developments to the date of filing 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 admissibility challenge in the case against Simone Gbagbo.⁶⁹

⁶⁴ See for example, *inter alia*, *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-01/04-01/07-1497 OA 8, Appeals Chamber, 25 September 2009, para. 56.

⁶⁵ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public Redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, Pre-Trial Chamber I, 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, *supra* note 9, para. 214.

⁶⁸ *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-01/09-01/11-307 OA, Appeals Chamber, 30 August 2011, para. 83.

⁶⁹ *Prosecutor v. Simone Gbagbo*, Public redacted version of Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo, ICC-02/11-01/12-47-Red, Pre-Trial Chamber I, 11 December 2014, para. 35.

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 to the Statute and the spirit of Article 17. The delving of judges into the uncharted waters of domestic law practices without deep knowledge of 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 various legal traditions and domestic practices. For instance, in relation to Libya, the PTC rashly ruled that in the absence of a lawyer at the investigative phase, 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. In the case against Al-Senussi, the AC admitted that this is only relevant to the extent that a trial can still occur to bring the accused to justice.⁷⁰ Hence, the Libyan Court will appoint a counsel for Gaddafi when he is placed in the custody of the central authority. The PTC erred when it went into the analysis of the prospective chances of having a lawyer for Gaddafi or for Al-Senussi. This is because, if the judges had 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. This can be confirmed by the ongoing judicial proceedings in Tripoli.⁷² On 28 December 2014, Al-Senussi and 31 senior leaders of the former regimes attended one of the trial sessions in Libya in the presence of defence lawyers. According to the local media, the trial included the presence as well as the cross examination of a number of witnesses.⁷³ Needless to say, Gaddafi – who is under the custody of the Zintan rebels – had previously attended one of the trial sessions via video conferencing.⁷⁴ On 28 July 2015, Tripoli Appeals Court sentenced, among others, Al-Senussi and Gaddafi to death, while acquitting Abdulah Alubeidy, the former Minister of Foreign Affairs.⁷⁵ The sentence was delivered for Gaddafi *in absentia* due to the failure of his transfer from the custody of the Zintan rebels to the central authorities in Tripoli. Aside from the criticism of imposing the death sentence in the case, the progress of the

⁷⁰ *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', ICC-01/11-01/11-565 OA6, Appeals Chamber, 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, available at www.alwasat.ly/ar/news/libya/54089/.

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

⁷⁴ *Ibid.*

⁷⁵ See *Alaraby Aljadeed* [Arabic], 28 July 2015, available at 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%Bo%D8%A7%D9%81%D9%8A

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 another session of his trial on 24 April 2015 via video link.⁷⁶

After all this floundering, in the *Al-Senussi* case the AC tried to correct the approach, by rightly stating 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 AC 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 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 AC 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 and distinguished human rights violations that did not affect the genuine nature of the justice process from those violations that prevented genuine forms of justice for the accused to take place. The AC considered that the latter violations are relevant to the ICC's admissibility test, and not the former. While this is an important point to put an end to the argument on the impact of due process violations on the complementarity test, it does not provide tangible criteria regarding when a due process violation becomes so egregious as to prevent providing a genuine form

⁷⁶ *Alyoum* 7 [Arabic], 25 July 2015, available at 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.*

⁷⁹ *Ibid.*, para 191.

⁸⁰ For more details, read K.J. Heller, 'OTP Responds to Libya's Admissibility Challenge', *Opinio Juris*, available at www.opiniojuris.org/2012/06/07/otp-responds-to-libyas-admissibility-challenge/.

of justice. The terms themselves are relative, and jurists have struggled to find clear definitions for such terms.

The AC 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's findings in the *Gaddafi* case indicate that the PTC failed to not only comprehend the frame of these terms, but also understand the rationale behind Article 17 and the complementarity mechanism. According to this author, the PTC's (incorrect) finding on the importance of the presence of the accused's legal counsel at the 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 into the admissibility test to check if there is a witness protection system in Libya or not.⁸¹ While this is mandatory for proceedings before the ICC, most of the respected legal systems of developing countries lack the presence of such a programme. Therefore, this seems like 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 AC in the case against Al-Senussi. The domestic trial sessions of Al-Senussi and 31 other accused from the old regime support the latter conclusion. For instance, despite the absence of domestic witness protection programmes, many of the witnesses attended the trial session on 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-Senussi* and other cases. 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, the ICC chambers have demanded extensive details about all aspects of 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 that fall short of providing the Court with an intelligible overview of the factual investigated allegations will not be sufficient. In other words, the ICC judges have decided that the burden of proof rests with the national system. If a genuinely investigating state does not provide all the necessary information and evidence that convinces the ICC that it is investigating the particular conduct and person in a comprehensive manner, fully understandable to the Court, it will never pass the ICC admissibility test.

⁸¹ Public redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, Pre-Trial Chamber I, *supra* note 65, para. 27.

⁸² *Ibid.*

The below example illustrates how high is the threshold that a challenging state has to meet:

... 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 understands the context and scope of its activities. The PTC was not even satisfied with Libya providing documents on concrete investigative steps, but 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 understand the Libyan context and investigative actions – based on the tangible documents provided – 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. 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 also to adopt the same ICC investigative strategies. This is nowhere stipulated in the Rome Statute, and it is hardly imaginable that states in Rome accepted such a restriction allowing 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

In the *Saif Al-Islam Gaddafi* case, PTC I found that the national justice system was 'unavailable'.⁸⁶ The PTC's findings considered circumstances as they strictly existed at the time of the admissibility challenge.⁸⁷ In its decision, the PTC stated 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

⁸³ Ibid.

⁸⁴ Ibid., para. 87.

⁸⁵ Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, *supra* note 69, para. 65.

⁸⁶ Public Redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, *supra* note 9, para. 215.

⁸⁷ Ibid., para. 220.

⁸⁸ Ibid., para. 205.

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 a catch-all clause. The PTC implies that the national system is unavailable, since it is not applicable fully in certain areas (such as Zintan).

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 as to what an ‘unavailable judicial system’ may entail – at least with respect to the current case. Such an approach can have serious repercussions on the ICC’s relationship with national systems, because the ICC will always find something ‘unavailable’ in judicial proceedings in many national judicial systems – especially in developing countries or countries in transition.

When 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 of Al-Senussi and Gaddafi, it will not be difficult for any observer to realize that there is an overlap in the crimes, evidence, and probably the witnesses of the two cases. The former Libyan regime’s structure entailed that any influence the son of the Libyan president may have had on the security forces to orchestrate the crimes would have been mainly through the head of intelligence, Al-Senussi. Furthermore, the alleged crimes of Saif Al-Islam have occurred mainly in Benghazi, Tripoli and other areas on the Libyan soil, and not in Zintan. The documents provided by Libya show that the local authority conducted investigations and took certain formal investigative steps. They gathered credible evidence 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 from Tripoli. The documents provided to the ICC reflect these realities, which the ICC chose to overlook. However, where does that stand for Article 17(3)? In this author’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

⁸⁹ See Holmes, *supra* note 8, at 53–4; see also N.N. Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (2011), 51.

⁹⁰ Public Redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, *supra* note 65.

whether this fulfils Article 17(3) of the Statute. The answer, which will be elaborated below 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 unavailable for this case, and *second*, be unable to obtain the accused or the necessary evidence and testimony, or otherwise unable to carry its proceedings. The PTC jumped directly to the second limb of Article 17(3). It considered 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, and reached the conclusion that the system is unavailable, and thus unable. This approach is flawed and inconclusive, because the first limb was not fulfilled in the manner that the drafters had intended from their insertion in Article 17 – that is to render the judicial system incapable from prosecuting the alleged perpetrators.⁹¹ As indicated earlier, the term ‘unavailability’ has not been defined in the Rome Conference, and is thus left to elaboration by the Court and the writings of the jurists. Since the ICC judges have remained silent on the definition of the term, one can turn to what the Office of the Prosecutor (OTP) has invoked informally in the Informal Expert Paper on the Principle of Complementarity (2003) in order to understand how some ICC organs have approached this requirement. 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 listed the following factors to be of relevance to determine total or substantial collapse or unavailability:

- 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 factor(s) relevant to the investigated case under consideration. In the case of Gaddafi, the prosecutor herself confessed that Libya has assembled a group of qualified attorneys and investigators who 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

⁹¹ See the discussion in [Section 2](#) on the Gaps in the Complementarity Regime.

⁹² Informal Expert Paper, *supra* note 16, at 31.

Decision.⁹³ A comparison of the OTP's findings with the above criteria indicates that the domestic judicial system seemed available by then for handling the case against 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 was 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 relates to the second limb of inability, and 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, 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 that of Al-Senussi, who is detained in Tripoli. The PTC delivered two contrasting decisions in the *Gaddafi* and *Al-Senussi* cases respectively, although the two cases have appeared 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 discussion 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? On 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 a stand-alone inability requirement, they would not have insisted on the first condition of substantial or total collapse or unavailability as a prerequisite that needs to be juxtaposed 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 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 persons who remain 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 persons, many of whom remain at large for several years or decades. This may happen in all countries including those

⁹³ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution Response to 'Libyan Government's Further Submission on Issues related to the Admissibility of the Case against Saif Al-Islam Gaddafi', Office of the Prosecutor, Case no. ICC-01/11-01/11, 12 February 2013, para. 41.

⁹⁴ The submissions of Libya in the case of Al-Senussi 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, *supra* note 65, paras. 107, 110, and 111.

⁹⁵ See N.N. Jurdi, 'The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?', (2010) 10 *International Criminal Law Review* 73–96.

that have strong and functioning judicial systems. Can we consider the judicial systems of all these countries to be in a state of inability?

This situation can become even more complex with the possibility – mainly in continental systems – of 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 28 July 2015.⁹⁶

Furthermore, if these countries are not able to arrest individuals mainly due to law enforcement shortages – not due to unwillingness or inability of their judicial system – then, as a court that lacks direct law enforcement powers, how can the ICC do so? The answer is obviously in the negative. For a court that depends on state co-operation, if the latter states are not able to arrest, then the ICC *mutates mutandi* is unable to arrest as well.⁹⁷ This is the conundrum – the ultimate paradox of the Rome Statute. The recent arrest of Dominic Ongwen, one of the Lord's Resistance 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 from CAR to Uganda.⁹⁹ Uganda would have now been fully capable of prosecuting Ongwen if CAR had extradited him to Uganda, or if the ICC had sent 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 – and not one of judicial inability. If one is to accept the ICC logic, then what will the ICC do when the central authorities in Libya manage to gain custody over Gaddafi? Such 'inability' will cease to exist, thereby making the ICC's finding a dead letter on arrival.

4. CONCLUSION

Despite the developing jurisprudence of the ICC on complementarity and Article 17, the Court has continued to assess admissibility while ignoring or overlooking – at best – the purpose and objective of the Rome 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, ICC practice has shown a patchy approach that lacks a consistent and clear vision with respect to its relationship with domestic jurisdictions. This has been practically left to the 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 author

⁹⁶ See *supra* note 76.

⁹⁷ See Bo, *supra* note 44, at 531.

⁹⁸ See Jurdi, *supra* note 95.

⁹⁹ 'LRA Rebel Dominic Ongwen Surrenders to US forces in CAR', *BBC*, 7 January 2015, available at www.bbc.com/news/world-africa-30705649.

is not suggesting the eradication of any judicial discretion, but rather to restructure it in the direction that serves the object and purpose of the Rome Statute. This purpose is to end impunity by encouraging domestic systems to play a 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 allowing ‘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-Senussi* case – rendering Libya at that period able and willing to try Al-Senussi in Tripoli¹⁰¹ – then the case is one of partial collapse, not a total or substantive one. The PTC 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, rather than 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 individuals 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. This author 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 Rome Statute.

Furthermore, while this article concurs with the finding of the AC in the *Al-Senussi* case¹⁰² and the opinion of some jurists¹⁰³ that due process benchmarks should not be exaggerated, it ultimately reaches 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 struck a balance by distinguishing human rights violations that do not affect the genuine character of the justice process from those ‘relevant’ grave violations that can prevent genuine forms of justice to take place. The introduced balance can help clarify the ambiguous ‘role’ of due process in the admissibility mechanism, but fails to provide any benchmark to decide when a due process violation is so grave as to prevent dispensing justice ‘genuinely’. This conclusion fails to provide tangible criteria regarding when a due process violation is grave enough to prevent delivering justice genuinely and when not. In the absence of a clear judicial vision vis-à-vis the relation with national systems, the AC’s decision adds more ambiguity than providing guidance to future ICC practice. The terms themselves are relative.

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

¹⁰¹ Public Redacted Decision on the Admissibility of the Case against Abdullah Al-Senussi, *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 See Heller, *supra* note 26, at 255; see also Mégret and Samson, *supra* note 29, at 571.

The ICC is not responsible for mainstreaming national systems to dispense 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 this author's opinion, 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, practice shows 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 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's complementarity mechanism is not a purely jurisdictional system, and the ICC is not merely 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 communities. 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 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.