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The Principle of Complementarity and Libya Challenge to the Admissibility before the International Criminal Court

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Abbreviations

ICC	International Criminal Court
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
NTC	National Transitional Council
ICTY	International Criminal Court for Former Yugoslavia
ICTR	International Criminal Court for Rwanda
VCLT	Vienna Convention on the Law of Treaties
CAR	Central African Republic
DRC	Democratic Republic of Congo
ICCPR	International Convention on Civil and Political Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Convention on Human Rights
AfCHPR	African Convention on Human and People's Rights
OAS	Organization of American States
PTC	Pre Trial Chamber
OTP	Office of the Prosecutor
OPCD	Office of Public Council for Defence
RoPE	Rules of Procedure and Evidence
GNC	General National Congress
UNSMIL	United Nations Support Mission in Libya
OHCHR	Office of the United Nations High Commissioner for Human Rights
UNODC	United Nations Office of Drugs and Crimes
NGO	Non-Governmental Organization
HRC	Human Rights Council

1 Introduction

The last referral of a case to the International Criminal Court (ICC) by the United Nations Security Council (UNSC) was made concerning Libya situation¹. UNSC resolution number 1970 referred the Libya situation to the ICC². However, the ICC has a very special system by which it may declare a case admissible. The principle is called “complementarity” with its own unique functionality. It is designed to complete national judicial system in pursuing to “put an end to the impunity”³ where the State is “unwilling” or “unable” to carry out an investigation.⁴ Not so many cases have been referred to the ICC but Libya case is an unprecedented one both in international criminal justice system and in the history of the ICC. As to the triggering mechanism⁵, it is similar to the Sudan case⁶; both of them are referred to the ICC by the UNSC. Nevertheless, the Libya case is different from other cases in many respects. First, Libya is undergoing political reconstruction from a dictatorship resulting from the collapse of the State following a civil war as well as an international intervention. Second, Libya has challenged the ICC jurisdiction based on the active investigation of the case and of the suspects. Controversial point regarding the case is that the major suspect, Saif Al-Islam Qaddafi is not being held under the effective control of the Libyan Authorities. Instead, since the time of his arrest by the Militants the Libyan Authorities has failed to obtain him. Third, the Libya case does not just interact with Libya “unwillingness” or “inability”⁷ but in a multifaceted way it deals with various aspects of the “complementary principle”⁸; thus, any decision in this regard would help to improve the ambiguities of the complementary principle. Forth and more specifically, it deals with the “shadow side”⁹ of complementary principle mainly because

¹ United Nations Security Council Resolution no. 1970, 26 February 2011. Available at: www.icc-cpi.int/NR/rdonlyres/081A9013.../0/1970Eng.pdf

² Ibid

³ Preamble of the Rome Statute, Para 5 and 10.

⁴ Even though that there are 4 grounds in defined in article 17 as criteria of admissibility, for the aim of the present study the focus will be on article 17 (1)(a)

⁵ There are three triggering mechanisms devised in the Rome Statute article 15 which, can be enumerated as 1- Self referral by a State party to the Rome Statute, 2- when the United Nations Security Council refer a case to the ICC acting under its chapter VII of the United Nations Charter and 3- where the prosecutor initiate an investigation *proprio muto*

⁶ There have only been two cases referred to the ICC by the UNSC Resolutions so far. The first one is Sudan called as “Darfur” case referred to the ICC by the UNSCR No. 1593, 2005 available at: <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> and the second one was Libya.

⁷ According to article 17 which is the heart of the complementarity principle, a case becomes admissible before the Court where the State is “unwilling” or “unable” to carry out a prosecution or an investigation genuinely. The whole function of the article 17 will be explained in the next sub-headings.

⁸ The most fundamental principle of the Rome Statute is the complementarity principle. It will be discussed thoroughly in the first chapter of this paper.

⁹ Kevin John Heller, “The Shadow Side of Complementarity: The effect of Article 17 of the Rome Statute on the Principle of Due Process,” *Criminal Law Forum* (2006), 5. It concerns the thesis of “due process” and the violation of the human rights of the accused. It will be analyzed in 1.2.2.5.1, “due process in international law”.

this matter has not been addressed before; it, in particular, deals with the question of admissibility regarding the violation of the rights of the accused and admissibility of a case before the ICC.

The Court shall deal with every aspect of the case, hence, whatever is the Court's decision, it will be considered historical and breaks new grounds in the international criminal justice hemisphere. In addition, it reveals the ICC quiddity as a strictly legal or justice manager institution.

The present study aims at applying the complementarity principle to the case of Libya, Saif Al-Islam Qaddafi. To this end, the main objective of this study is to address the following research question: concerning the Libya challenges to the admissibility before the ICC, what will be the possible outcome of the application of the complementarity regime in Libya case? In searching the potential answer to this question, owing to the complementarity principle nature, three main questions are required to be answered beforehand. Questions such as, whether Libya is actively investigating Saif Al-Islam, whether Libya is "willing" to investigate Saif Al-Islam and finally 'whether Libya is "able" to investigate Saif Al-Islam Qaddafi.

To answer the above-mentioned questions, it is necessary to first portray an overview of the relevant parts of the complementarity regime, article 17, in a chronicle order, though, for the purpose of providing an understanding of the principle, its other irrelevant parts to this thesis will shortly be introduced. It is purported that the Rome Statute carries ambiguities within article 17 wordings, thus in order to gain clarity in each relevant part, the interpretation of the principle given by various scholars will be taken into account first, while we will also consider the general rules of interpretation. Second, the ICC jurisprudence, where it exists, will be held as a very reliable source for clarifying ambiguities. Other international law, international human rights law and international criminal law jurisprudence will be drawn upon in order to aid the analysis.

Then by considering the outcome of the first part and relevant issues of the complementarity principle, attempts will be devoted to apply the complementarity principle designed in the Rome Statute to the concrete case of Libya. Libya's challenge to the admissibility will be examined first where the ICC's test—the same person, same conduct—will be applied. Afterwards we will examine the arguments of Libyan authorities, who refused to provide the ICC with compelling evidence on the ground of confidentiality. Then the whole situation of Libya after revolution will be taken into consideration and the relevant part of the complementarity principle will be applied orderly. In doing so, the reports of the international commissions or other international institutions, news of reliable sources and facts presented before the ICC will be used.

1.1- Outline of the research

This thesis consists of three chapters. Chapter I introduces the complementarity regime and admissibility as a whole and sheds some light on its controversial parts, called the “shadow side” of the complementarity regime by Kevin Heller¹⁰. This chapter starts with a description of the ICC jurisdiction before it portrays the relationship between the complementarity and admissibility. After that, the rationale behind complementarity is highlighted prior to examining the yardstick of the said regime, i.e. article 17. Four grounds of admissibility will be discussed considering the existing Court’s ruling on some of its parts; the focus will be on the first ground. In the next sub-headings, the terms of “unwillingness” and “inability” are scrutinized; particular care has been given to the grounds of “unwillingness” and the theory of “due process”. Afterwards, for the sake of a better understanding of the complementarity regime and its procedures, the triggering mechanisms designed in the Rome Statute are briefly introduced and then the most controversial mechanism- the Security Council referral- is discussed.

The second chapter introduces the application of the complementarity regime to the case of Libya currently being processed before the ICC. In order to do so, it provides a background of the current situation in Libya; it will discuss how the Libya case ended up in the ICC and provide the history of the Libya case before the International Criminal Court. Matters of the ICC jurisdiction over Libya, the effect of the Security Council referral, Libya’s obligation to cooperate with the ICC, and legal grounds to indict Saif Al-Islam Qaddafi are provided. The next headings are entirely devoted to the application of the complementarity principle chronically to each aspect of the Libya case according to the grounds stipulated in article 17, discussed in the first part of this thesis. The author will try to answer questions such as “is Libya willing to investigate Saif Al-Islam Qaddafi?” and “is Libya able to prosecute Saif Al-Islam Qaddafi?”

The third chapter will offer the findings regarding the complementarity principle in the light of the ICC practice and its “shadow sides” as well as a final observation of the application of the complementary principle to the case of Libya; at last based on the findings, some conclusions will be presented.

¹⁰ Ibid

Chapter 1: The Complementarity Regime of the ICC and Admissibility

1-ICC Jurisdiction

The Rome Statute has come into force in 2002 to put an end to impunity and prosecute those perpetrators of the gravest crimes against the peace and security of the world¹¹. On the other hand, paragraph 10 of the Statute emphasizes that "...the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Article 1 of the Statute further asserts that the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern [...] and shall be complementary to national criminal jurisdiction." While the Court has been established with an intention to have jurisdiction over the core crimes of international concern, its power is defined and limited to its complementarity regime perceived in the Rome Statute. Perhaps the preamble provides us with the intention of the drafters and the regime based on which the court is going to function. The first resort and emphasis of the preamble after prevention of those core crimes is by taking measures at the national level and enhancing international cooperation¹². It then puts the duty on every State¹³ to exercise jurisdiction over those responsible for international crimes. Therefore, it may be inferred that the Rome Statute's intent is to exercise jurisdiction over those crimes while respecting State sovereignty.

Thus as we can see there are two jurisdictions that might possibly contradict each other: one is the State that has jurisdiction over the suspect(s) and the other is the Court that may claim jurisdiction due to the unwillingness or inability of the State concerned. Unlike other international criminal tribunals such as the International Criminal Tribunal for former Yugoslavia (ICTY), or the International Criminal Tribunal for Rwanda (ICTR), the ICC has a vertical nature. This means that national jurisdiction over the crimes comes first and in the absence of effective prosecution (as it is defined by the Rome Statute to be the unwillingness or inability of States) the ICC jurisdiction comes later. Obviously, this is confined to dealing with certain crimes.

Not all the crimes are of international character and among those that are, only a few certain crimes are within the jurisdiction of the ICC. Most of

¹¹ Preamble of the Rome Statute, Paragraph 5:

"The States Parties to this Statute [...] determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."

¹² Preamble of the Rome Statute, paragraph 4:

"Affirming 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"

¹³ Preamble of the Rome Statute, paragraph 6:

"crimes, Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,"

these are recognized as customary international crimes¹⁴. Nevertheless, there are three plus one crimes within the ICC jurisdiction. Article 5 of the Statute enumerates them as genocide, war crimes, and crimes against humanity and crime of aggression.

If any of these crimes are committed by individuals, the ICC may still not exercise jurisdiction owing to the fact that it is perceived to be the court of the last resort. Since the complementarity principle is embedded into the Rome Statute as the most fundamental principle of the Rome Statute, any action triggered by the ICC may continue only if it passes the Rome Statute requirements contemplated in article 17. In response, a State may recourse to article 19 to challenge the Court's jurisdiction and request the case to be declared inadmissible by the Court. The relationship between the Complementarity regime and the admissibility has been analysed below:

1.2- Complementarity Jurisdiction and Admissibility

The word complementary denotes the quality of completing something else so that two complementary entities complete one another or perfect others' deficiencies¹⁵. In light of the general meaning of the term employed, the ICC, owing to the complementarity regime, is to complete the national criminal jurisdiction where it does not carry out proceedings compatible with the standards of the Court and international law. The complementarity of the ICC jurisdiction was so important to the States willing to ratify¹⁶ that in order to have the conference succeed; it had been agreed upon even before the conference began¹⁷.

The principle is reflected in both the preamble and the body of the Rome Statute. The preamble and article 1 of the Statute contemplate the complementarity as a legal principle. Paragraph 10 reads as "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"

In addition, article 1 asserts that:

"International Criminal Court [...] shall be complementary to national criminal jurisdiction."

¹⁴ Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, EJIL 1999

¹⁵ CF the Oxford English Dictionary: the notion of complementarity has its own origin in atomic physics

¹⁶ The "state willing to ratify" is used instead of the "drafters" due to the fact that the Rome Statute had not drafted by State parties but rather by International Law Commission (hereinafter ILC).

¹⁷ Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Second Edition, Page 154.

Then article 17 and 20(3)¹⁸ transform them into legal rules¹⁹. According to the wording of article 17, every case shall be determined by the court. However, The Rules of Procedure and Evidence states that prior to the issue of admissibility, the court has to determine whether the case is in the Jurisdiction of the ICC²⁰. Any observation relevant to the complementarity principle would require grasping the rationale behind ICC's complementarity jurisdiction by which it primarily prioritizes national jurisdiction. The rationale behind the complementarity regime of the Rome Statute is discussed below.

1.2.1- Rationale of the Complementarity

The Rome Statute is a multilateral treaty. The Vienna Convention on the Law of Treaties (hereinafter VCLT) requires that a treaty to be interpreted in a good faith and in the light of its object and purposes. As the preamble contains, the object of the Rome Statute is “to put an end to the impunity”. The ICC shall be complementary to the national criminal jurisdiction. It was pointed out that the complementarity was tremendously important to the drafters even before that the conference for adoption of the Rome Statute had begun. Therefore, in order to have a better understanding of the Rome Statute complementarity principle and its provisions that forms the principle; it seems pertinent to inquire about the rationale behind the creation of complementarity principle when we interpret the relevant part of the principle.

There are multiple reasons why there should be a complementarity regime of the court, which are relevant to the current study.

The first reason, as the preamble declares, is respect for state sovereignty. Interestingly, the preamble refers to every state's duty to exercise jurisdiction over international crimes, not just state parties²¹, and if a state fails to do so, the ICC would step in and exercise jurisdiction to put an end to the impunity.

¹⁸Rome Statute article 17 and 20 (3)

¹⁹ John K.Kleffner, “Complementarity in the Rome Statute and National Criminal Jurisdiction”, 99. By extraction from R. Dworkin, Taking Rights Seriously, he defines difference between legal principle and legal rules as follow: ‘they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.’ Principles, on the other hand, ‘do not set out legal consequences that follow automatically when the conditions provided are met.’ Rather, they incorporate into the law general goals and values, regularly specifying neither their subjects and their content in detail nor their conditions of application.

²⁰ The ICC Rules of Procedure and Evidence, Rule 58(4): The court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility.

²¹ Preamble paragraph 6:

“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

Secondly, article 5 of the Rome Statute asserts that these crimes are of international concern as a whole²², which infringes universal values. As a result, it appears that the interest of international community competes with state sovereignty concerning the interest of “international community in the effective prosecution of international crimes, the endeavour to put an end to impunity and the deterrence of the future commission of such crimes”²³. Thus, complementarity is “primarily designed to strike a delicate balance between state sovereignty to exercise jurisdiction and the realization that, for the effective prevention of [grave international] crimes and impunity, the international community has to step in to ensure these objectives”²⁴ Both of them may contribute to the fact that they may encourage states to improve the effectiveness of their national justice system compatible with the interest of the international society.

Amongst other reasons, Benzing raises the question whether the Court is an institution entrusted with the protection of human rights of the accused in the national enforcement of the international justice. He primarily affirms that that mandate is expressly provided in the complementarity principle as defined by articles 17 to 19.²⁵ In this respect, article 17 stipulates, in determining whether a state is unwilling to prosecute, the Court shall have regard to the “principles of due process recognized by international law.” He asks, “whether the Court could theoretically step in and declare a case admissible if a state fervently and overzealously prosecutes war criminals with blatant disregard for the fair trial rights of the accused.”²⁶ This question could also be asked in relation to political prisoners in case of a regime change²⁷. If the answer is yes, the ICC can or shall take action; therefore, the principle of complementarity would require the Court to step in where the situation in the state concerned leads to a breach of the human rights of the accused. Should the accused be protected from the victor’s justice? “Could be said yes, he must be protected,” Nserko responds²⁸. Furthermore, Holmes argues that the original purpose behind the inclusion of the factors of lack of

²² Rome Statute Article 5:

“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.”

²³ Markus Benzing, *The Complementarity Regime Of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*, Max Plank Yearbook of United Nations Law, Volume 7, 2003, 597

²⁴ Ibid

²⁵ Benzing, *Supra* note 23, page 597

²⁶ Benzing, *Supra* note 23, page 597

²⁷ This matter will be discussed in the second section of the thesis regarding Saif Al-Islam Qaddafi

²⁸ D.D. Ntanda Nseresko, “The International Criminal Court: Jurisdictional and Related Issues,” *Criminal Law Forum* 10 (1999), 116

independence and impartiality in article 17(2) (C) was to relate procedural fairness and due process²⁹.

In the end, Benzing poses this question, “Were the principle of complementary designed to cover such situations?” He eventually rejects that the court shall step in³⁰. He further elaborates the answer by referring to Fife that the ICC was not created as a human rights court *stricto sensu*.³¹ While article 17(2) refers to the principles of “due process recognized by international law,,” he concludes that this principle has been established to address situations “where a miscarriage of justice and breach of human rights standards works in favor of the accused and he or she profits from the irregularity by evading a just determination of his or her responsibility.”³² As an example to underpin his argument, he had a recourse to the Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) and International Criminal Tribunal for Rwanda (hereinafter ICTR) both of which apply in the same way regarding the *ne bis in idem*³³. He confirms that “where there is an inconsistency of national proceedings with standards of a fair trial exceptionally allows the Tribunals to exercise jurisdiction in a *ne bis in idem* situation only if the defendant benefited from such deviations.”³⁴

In response to the argument that the Court is not designed to protect the rights of the accused, it would be helpful to draw upon the Rome Statute articles that the Court shall apply in the first place according to article 21 (1).³⁵ First, it is entirely at the discretion of the Court to determine a case admissible³⁶. Second, general principles of interpretation, specifically article 31 of VCLT, affirms that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” However, no good faith may be assumed in interpreting the provision not in favor of the accused.

²⁹ J. T Holmes, “complementarity: National Courts versus the ICC, in A. Cassese/ P. Gaeta/ J.R.W.D , The Rome Statute of the International Criminal Court: A Commentary, 2002, Vol. 1, 676

³⁰ Benzing, supra note 23, 598

³¹ R.E. Fife, “The International Criminal Court Whence it Came, Where It Goes,” Nord. J. Int’l L. 69 (2000), 72, Fife also point out that this does not mean that the work of the court may not lead to an increase in human rights protection and that the Court is not obliged to respect human rights when it is operating itself; Benzing, Supra note 23, 598

³² Benzing, Supra note 23, 598, Footnote omitted

³³ Article 10 (2) of ICTY and article 9 (2) of the ICTR:

“A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.”

³⁴ Benzing, Supra note 23, 598; Also see 1.2.2.5.1 “due process in international law”

³⁵ Rome Statute, Article 21 (1)

³⁶ Rome Statute, Article 17 (1)

Moreover, maybe it is possible to claim that the Court per se has not been created as a court of human rights, but the Rome Statute itself asserts that the “interpretation of the articles must be consistent with internationally recognized human rights.”³⁷ That is to say, even when the human rights of the accused is being fervently violated, the Court may rely upon this interpretation, extend its jurisdiction and step in even if it is said that the Court is not a court of human rights. To elaborate more, it should be pointed out that article 17 (2) provides situations, inter alia, that where there is an “unjustified delay” in prosecuting the accused, the case becomes admissible before the Court. This is positively in favor of the Accused³⁸. Regarding other forms of the violation of the human rights of the accused in the hands of the state that has jurisdiction over the case, some authors believe that in such a situation, the Court may either rely upon the “inability” of the state concerned³⁹ or the “unwillingness” of the state, considering both the chapeau of article 17 (2), with “regard to the principles of “due process recognized in international law” and the reference to “lack of independence and impartiality” in article 17 (2) (c).⁴⁰

Therefore, it is possible for the Court to rely upon the above-mentioned interpretation to declare a case admissible where the rights of the accused have been violated even though it was considered not to address human rights violations of the accused.

In conclusion, it may be stated that the principle of complementarity has been adopted to strike a gentle balance between the state sovereignty to exercise jurisdiction and the realization that, for the effective prevention of such crimes and impunity, the international community has to step in to ensure these objectives and retain its credibility in the pursuance of these crimes⁴¹. The principle also brings about and supplements the idea of an “effective decentralized prosecution of international crimes⁴². Also regarding the rights of the accused, and the ICC jurisdiction, there is no clear-cut answer to that since this issue has not been dealt with by the Court. But as we observed, there is this potential legal possibility added to human rights normative values for the Court to render a case admissible even if the intrinsic rights of the accused is being violated, which seems also much

³⁷ Rome Statute, Article 21 (3)

³⁸ See 1.2.2.5.3 “unjustified delay”

³⁹ See Kevin John Heller, “The Shadow Side of Complementarity: The effect of Article 17 of the Rome Statute on the Principle of Due Process,” *Criminal Law Forum* (2006), 5; Article 17(3) provides in full:

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

⁴⁰ Ibid. Also see 1.2.2.5.1 “due process in international law”

⁴¹ See S.A. Williams, “article 17”, in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*: Observers’ notes, Article by Article, 1999, MN 20, Also Benzling, supra note 23, page 600.

⁴² See R. Wolfrum, “The Decentralized Prosecution of International Offences through National Courts” in Benzling, supra note 23 “The ICC Complementarity Regime”, Page 600.

more compatible with article 21 (3) of the Rome Statute. As to the application of the article 21 (3) which certainly plays a significant role in the ICC interpretation of the Rome Statute provisions, it appears that the ICC endorses the application of the human rights norms in interpreting according to this article. The ICC appeals chamber in Lubanga decision affirmed that

“Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.”⁴³

Therefore, there is a confident space for the court in interpretation of the Statute in accordance with internationally recognized human rights.⁴⁴

1.2.2- Admissibility

The preamble of the Rome Statute and article 1 assert that the International Criminal Court shall be complementary to national criminal jurisdiction⁴⁵. It was mentioned above that the complementarity principle was agreed upon before even the conference took place.⁴⁶ Reflection on the assertion of the complementarity principle in the preamble and then the duplicative in article 1 and articles 17 to 19 (operative provisions of the Statute) indicates the fundamental importance that states have attached to it⁴⁷.

As the preamble and article one introduce the complementarity regime, they do not provide any clear legal relationship between national criminal jurisdiction and the ICC; how does this relationship work and when does a case become admissible? Consequently, article 17 was embedded to provide situations according to which a case is inadmissible. This article enumerates four conditions that will be discussed in the next sub-sections.

Article 17(1) asserts:

⁴³ The e Prosecutor v. Thomas Lubanga Dyilo , ICC-01/04-01/06-772, Judgment on the Appeal of Mr. The omas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute, 3 October 2006 (14 December 2006), Para. 37

⁴⁴ This particular matter may refer to the question of the scope of the application of this paragraph in article 21. In fact this research is not seeking to actually examine this question, in spite of the fact that there is a strong nexus between the questions that this research is seeking to respond. The author has found the Court’s assertion in Lubanga decision quite decisive, even though, he still believes that this this matter requires a thorough examination.

⁴⁵ Preamble of the Rome Statute, paragraph 10: Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

⁴⁶ See sub-heading “complementarity jurisdiction and admissibility”

⁴⁷ Kleffner, Supra note 19, page 99

Having regard to paragraph 10 of the preamble and article 1 the Court shall determine a case is **inadmissible** where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

1.2.2.1- The Case Is Being Investigated or Prosecuted Genuinely, Article 17 (1) (a)

A case becomes inadmissible where an investigation or prosecution is being processed. This is the first ground by which the Court shall determine the admissibility of a case. Perhaps this ground is the most important and controversial among these four. The reason could be that the state is processing the investigation or prosecution. Then, the assessment is not over an outcome of the state's act but a process that either has not been started or has been started by default. Another reason might be the fact that acquiring information from the states that are not party to the Rome Statute may be extremely difficult where the State does not have the intention to cooperate with the Court. Sudan is a typical example of this. The state can simply claim that it is investigating the case and assessment of the credibility of this claim, unsurprisingly, seems exhausting and difficult. The article reads as:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

Considering the wording of article 17(1) (a), it applies where an investigation is being initiated but it is proved that the state is unwilling or unable to carry out the proceedings in a good faith. That is to say, as long as the national court is taking appropriate and effective steps then it does not trigger the Court's jurisdiction unless the prosecutor proves otherwise by relying on the state's "unwillingness" or "inability" to carry out the investigation genuinely. There are some considerations regarding the

wording of the article, which are vague. The phrase “the case is being investigated or prosecuted” which is referred in the first part of the article implies that initial steps have been taken.

It should, however, be noted that at the initial stages of an investigation the contour of a case is relatively vague. Often no individual has been identified in this stage. As indicated by the Pre-Trial Chamber I in the case against Thomas Lubanga Dyilo, a “case” is defined by “the specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified individuals.”⁴⁸

In another decision, the ICC asserted that a case is defined “by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-trial Chamber under article 61.”⁴⁹ Article 58 requires that for a warrant of arrest or a summons to appear to be issued, there must be “reasonable grounds” to believe that the person named therein has committed a crime within the jurisdiction of the Court⁵⁰.

Consequently, the Court, by drawing upon the wording of article 17 (1) (c) and 20 (3), concludes that the defining elements of a concrete “case” before the Court are the individual and the alleged conduct. Then it follows that

“[f]or such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”⁵¹

As a result, for the purposes of defining a “case,” national investigations “must cover the same conduct” which requires that those investigations must also cover the same persons subject to the Court's proceedings. However, at the situation stage, the reference to the groups of persons is

⁴⁸ See Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC 01/04-101, Para. 65

⁴⁹ 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, Para 40

⁵⁰ Article 58 (1):

“At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.”

⁵¹ 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, Para 40

mainly to broaden the test, because at the preliminary stage of an investigation into the situation, it is unlikely to have an identified suspect⁵². Thus, it should be kept in mind that the national system must investigate the same conduct and the same person as the ICC in case there is an identified suspect by the ICC. Reverse inference or *contario interpretation* from the above-mentioned definition of a “case” would lead us to the conclusion that if the state is not investigating the same person for the same conduct, then it is not carrying out an investigation or prosecution. Accordingly, the case would be rendered admissible before the ICC.

The second consideration or vagueness of article 17 (1) (a) is the initiation of an investigation or the assessment of the existence of an active investigation by the state that has jurisdiction over the case. First, the word investigation has been defined within the jurisprudence of the Court. In the Kenya decision regarding the admissibility of its challenge to the Court, the Appeals Chamber defined investigation as

“Taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence or carrying out forensic analysis.”⁵³

Furthermore, the mere assertion of the state that has jurisdiction over the case does not satisfy the Court in rendering a case inadmissible. In fact, the Court requires the investigation to be of probative value. In the Kenya decision on the challenge to the admissibility of the Court, in response to Kenya’s claim that it is actively investigating the case, the Court expressed that,

A statement by a Government that it is actively investigating is not [...] determinative. In such a case, the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations. In other words, there must be evidence with probative value.⁵⁴

However, a question might be asked: If a state does not have the same criminal qualification for the conduct and for the same person, should the ICC consider the case admissible? In other word, if the state is investigating the same person for a bundle of ordinary crimes, does that deter the ICC from exercising jurisdiction? In order to answer this question, it should be kept in mind that the ICC may investigate certain crimes, only within their context – particularly crimes against humanity and genocide – with their

⁵² Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-01/11-101, Para 53-53

⁵³ 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-01/09-02/11-307,30 August 2011, par. 1.

⁵⁴ Ibid, Para. 62

specific elements of crime, and taking into consideration all circumstances that are connected with the commission of the said crimes.

Accordingly, it can be inferred that when a committed crime does not meet its statutory elements of crime, it is not within the jurisdiction of the court. For example, the ordinary crime of murder is not within the jurisdiction of the Court. That maybe the reason why the forth ground of article 17 requires a case to be of sufficient gravity to be declared admissible where other elements exist. Conversely, modes of liability envisaged in the Rome Statute are not consistent with those of ordinary crimes. Therefore, if a state criminal code does not contain crimes within the jurisdiction of the ICC, it is simply lacking suppression of the international crimes and consequently the ICC should exercise jurisdiction over those crimes. In this regard, paragraph 2 article 9 of the Statute of the International Criminal Court for Rwanda (hereinafter ICTR) states that,

“A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: (a) The act for which he or she was tried was characterized as an ordinary crime.”⁵⁵

Furthermore, in the Bagaragaza case, the ICTR asserts that

“According to this statutory provision, the Tribunal may still try a person who has been tried before a national court for “acts constituting serious violations of international humanitarian law” if the acts for which he or she was tried were “categorized as an ordinary crime.” Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.”⁵⁶

The practice of the ICC should also be taken into account. In DRC admissibility decision, the PTC I required the Democratic Republic of Congo (DRC) to investigate not only against the same alleged perpetrator in the same region as the Prosecutor, but also the same crimes. Consequently, the court approved the admissibility of the case before the ICC, because the DRC did not investigate Thomas Lubanga for the war crime of conscripting or enlisting children into the national armed forces.⁵⁷

In addition, it is observed that there is different interest between the crimes of an international character and crimes of national character. However,

⁵⁵ ICTR Statute, article 9 (2)

⁵⁶ ICTR, Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal, Aug. 30, 2006. Para 17

⁵⁷ See Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06-8-US-Corr, Paras 37-39; See also Prosecutor’s Submission of Further Information and Materials, ICC-01/04-01/06-39-US-AnxC, Para. 18,

there are still authors who ambivalently assert that solely a lack of specific provision for dealing with crimes of an international character is not enough to render a case admissible before the Court. The Court shall take into consideration other factors too.⁵⁸ Obviously, regular crimes do not bear any interest to international concerns and universal values, and thus it does not meet one of the purposes of the Rome Statute to address crimes of international concerns.

Noticeably, although state parties to the Rome Statute are obligated to enact provisions that criminalize international crimes according to their domestic regulations, this might be the case regarding the non-state parties to the Rome Statute. They do not have such responsibility and therefore, even if they are prosecuting the same person for alternative criminal qualification such as murder, it is not the same conduct as of those crimes within the jurisdiction of the ICC, so this might elevate the ICC jurisdiction. Perhaps, owing to the fact that states may bring admissibility challenges in every stage, it would be an important strategy to reform their criminal code or regulate them in a separate provision.

1.2.2.2- The Case Has Been Investigated or Prosecuted Genuinely, Article 17 (1) (b)

Article 17(1) (b) describes another situation in which a given case becomes admissible. Unlike the first paragraph, which is about a case that is being investigated, article 17(1) (b) takes a step forward and discusses the situation after an investigation. According to this paragraph, a prosecution has been done by a state that has jurisdiction over the crime and decided not to prosecute, [...the state has decided not to prosecute...] unless this decision resulted from the unwillingness or inability of the state to prosecute genuinely. According to the wording of the paragraph, two cumulative conditions are required: First, the case must have been investigated. Second, a decision not to prosecute must have been taken. It should, however, be noted that when a state decides not to prosecute and this decision has resulted from inability, the case becomes admissible, and it falls outside the provision of article 17(1) (b). It rather falls within the scope of article 17 (3). In this regard, in the Bemba decision, where the state of Central African Republic left the prosecution voluntarily, the ICC asserted that this case does not satisfy one of the requirements of article 17(1) (b) in the sense that there has not been a decision not to prosecute the accused person, but the CAR stated that they do not have the ability to endure the investigation⁵⁹. It seems that the CAR itself relinquished its jurisdiction from the case rather than making a decision not to prosecute the person concerned.

⁵⁸ Kleffner, *supra* note 19, 122-123, 156- 157

⁵⁹ Situation in the Central African Republic in the case of the Prosecutor V. John Pierre Bemba Gombo, judgment of 24 June 2010, ICC-01/05-01/08-802, Para 74-75

1.2.2.3- Exception to the Principle Double Jeopardy, Article 17 (1) (c)

In the third place in article 17, the principle of *ne bis in idem* has been made relevant to the third paragraph, which is incorporated in Article 20(3). This principle is recognized widely in international law. It is also recognized as the prohibition of double jeopardy which is defined in article 20 (3) of the Statute as well. However, the Statute provides exceptions by which a person might be tried before the ICC twice, where the proceedings is merely for the purpose of shielding the person for committing crimes within the jurisdiction of the ICC⁶⁰ or where the trial has not been or is not being conducted by an independent or an impartial court in accordance with the norms of due process recognized by international law or were the trial is conducted in a manner which in the circumstances are inconsistent with an intent to bring the person concerned to justice.⁶¹” These two exceptions quite resemble the two conditions of unwillingness defined in article 17(2) (a) and (c). About the first paragraph, it may be inferred from the wording, that the requirement of ‘same person same conduct’ must be met by considering “crimes within the jurisdiction of the ICC,” and that the elements of the crimes must exist just as they are defined in the Statute⁶². Article 20(3) prohibits the ICC from trying the person for the same conduct, which means that the ICC may conduct a trial for crimes other than those that have national proceedings. Here, it is worth noting that lack of the specific provisions of the Rome Statute may result in the admissibility of a case according to article 17(1) (c) and 20(3). Consequently, the case may fall outside the ambit of the prohibition of the principle of double jeopardy.

1.2.2.4-Sufficient Gravity, Article 17(1) (d)

The final ground for the admissibility of a case before the court is the ambiguous, controversial phrase “sufficient gravity.” If a case is not of sufficient gravity, it is inadmissible⁶³. This is controversial because the words “sufficient gravity” has not been defined. In fact, it does not seem possible to be defined. Thus, it entirely falls within the ambit of the Court and the prosecutor to determine a case of sufficient gravity. Qualitative and quantitative elements need to be considered though⁶⁴. According to the trial chamber in the case of Cote de Ivory, several factors concerning sentencing as reflected in rule 145(1) (c)⁶⁵ and (2) (b) (IV)⁶⁶ could provide useful

⁶⁰ The Rome Statute article 20 (3) (a)

⁶¹ Rome Statute article 20(3) (b)

⁶² Kleffner, Supra note 19, page 120

⁶³ The Rome Statute, article 17(1) (d)

⁶⁴ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, Para 56, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, Para. 202-203

⁶⁵ Rules of Procedure and Evidence, Article 145 (1) (c):

“In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall: [...] (c) (c) In addition to the factors mentioned in article 78, paragraph 1, give

guidance in such an examination. These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families⁶⁷.

Four grounds of admissibility have been discussed above; however, even if the respective state does investigate or prosecute the case, it must not be “unwilling or unable genuinely to carry out the investigation or prosecution.” The notions of “unwillingness” and “inability” are the crucial—and most problematic—requirements of Art. 17(1) (a) and (b). These two notions will be analysed below:

1.2.2.5- Unwillingness

As it is referred to in article 17(1), unwillingness is defined further in a separate paragraph in the same article. It provides that:

‘[i]n order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.’

consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person”

⁶⁶ Rules of Procedure and Evidence, Rule 145 (2) (b) (iv):

“Commission of the crime with particular cruelty or where there were multiple victims”

⁶⁷ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, Para 62

The question that should be taken into account in advance is whether the list is exhaustive. In this regard, the Statute itself does not clarify, but owing to the lack of a clarifying phrase such as “inter alia” or “including” or “but not limited to,,” as used in article 90(6) and 90(7), it can be deduced that the list is exhaustive⁶⁸.

Nonetheless, in a practical view, for the court and the purpose of the Statute to put an end to impunity, the list should not be granted as exhaustive. It has been observed that the phrase was introduced to ensure that the court uses objective criteria in its consideration of national proceedings⁶⁹.

The principle of “due process recognized under international law” should be considered by the court in the first place, and then the Court shall assess if one of the criteria has been met. Those criteria are proceedings for “shielding” a person from an “unjustified delay” and the “lack of independence and impartiality” of the judiciary. It, nevertheless, seems that this principle has been conceived as it were in international law and international conventions. In a close examination of the article, it may be said that, even though it was mentioned that the Court is not a human rights court⁷⁰, which it is not, the Statute is greatly concerned about human rights standards of the right to a fair trial. Owing to the fact that the court does not provide a definition of ‘due process,’ applicable rules according to the Statute are importantly relevant. Article 21, set out that the Court shall apply, in the first place, the rules of the Statute; elements of crimes; and rules of procedure and evidence; and in the second place, applicable treaties and principles and rules of international law⁷¹. Therefore, it provides the authority for the court to draw up international human rights conventions in this respect. Furthermore, in the interpretation of law pursuant to article 21(3) must be consistent with internationally recognized human rights⁷². The extent of the application of “due process” in the assessment of unwillingness is of great importance, and it seems that minimum standards of human rights must be taken into account. However, as the Statute provides a list in article 17(2), it is beneficial to have a better understanding from the terms that are used in that article. Each term will be analysed below:

1.2.2.5.1- Due process in international law

We observe that paragraph 2 of article 17 requires the Court to determine the willingness of a State by regarding “due process recognized in international law” in order to assess whether one or more of the provided situations exist.

⁶⁸ Benzing, *Supra* note 23, page 606, footnote omitted

⁶⁹ J. T. Holmes, *Supra* Note 29, page 53-54

⁷⁰ See 1.2.1 “Rationale of complementarity”

⁷¹ Rome Statute, Article 21

⁷² Rome Statute, Article 21 (3)

In the first place, we should know what these principles actually are. Neither the Statute itself, nor *travaux préparatoires* elucidate the intention of drafters when including the notion principles of due process in the article.⁷³ In international law, matter of due process has been dealt with under principles of fair trial⁷⁴. Fair trial is constituted of various rights, rules and principles such as the independence and impartiality of judiciaries, the right to be tried without undue delay, or various rights presumed for the accused. However, the reference in article 17 (2) is not to right to a fair trial but rather to due process and, importantly, those rights shall be understood in the notion of unwillingness.

From the work of the drafters, it has been illustrated that the phrase “due process recognized in international law” was to ensure that the Court uses objective criteria in its consideration of national procedures. First, it was meant to apply to the criteria in article 17 (2) (c), which is the “independence and impartiality of the judiciary,” and later it was agreed to include it in the chapeau of article 17 (2) and apply it to all paragraphs.⁷⁵ The formula of article 17 (2) is unclear and needs to be elucidated.

Prior to the analysis of the grounds of unwillingness, a controversial question should be answered in regard to the due process: Should a case be considered as admissible under article 17 if the court determines that the state claiming jurisdiction over the situation will not provide the defendant with due process and consequently renders a state “unwilling”? This question was considered in examining the rationale of the complementarity of the Rome Statute.

In this regard, Kevin John Heller, in his article where he discusses the effect of article 17 of the Rome Statute on national due process, responds that:

“The overwhelming consensus among international criminal law scholars is that the answer is ‘yes.’ Indeed, I have not found a single scholar writing in English who does not accept the due process thesis.”⁷⁶

He further relies upon Mark Ellis as an emblematic remark in that field:

⁷³ C van den Wyngaert and T Ongena, ‘Ne bis in idem principle, including the issue of amnesty’ in A Cassese, P Gaeta and J Jones (eds), 705–729, 724–726.

⁷⁴ Articles 9–11 of the Universal Declaration of Human Rights (1948); Articles 4, 6, 9, 14, 15 of the ICCPR; Article 7 of the African Charter on Human Peoples’ Rights (adopted on 27 June 1981, entered into force 21 October 1986); Articles 4, 7–9, 27 of the Inter-American Convention on Human Rights (entered into force 18 July 1978); Articles 5–7, 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953)

⁷⁵ J.T. Holmes, “The Principle of Complementarity,” in: R.S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 1999*, 41 et seq, 53- 54

⁷⁶ Kevin Jon Heller, “The Shadow Side Of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, *Criminal Law Forum* (2006), page 3

“The following statement is emblematic: If states desire to retain control over prosecuting nationals charged with crimes under the ICC Statute, they must ensure that their own judicial systems meet international standards. At a minimum, states will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants.”⁷⁷

Some authors also, in explaining the nexus between “due process” and “unwillingness” of a state, focus on the language of “impartiality and independence” of the court. Bossiouni, for example, argues that ‘the Court will determine that the state is unwilling to genuinely investigate or prosecute if... the proceedings are not conducted independently and impartially.’⁷⁸

In addition, other authors refer to the chapeau of article 17 (2) that it requires the Court in determining “unwillingness” of a State to have “regard to the principle of due process recognized in international law.” In this respect Carsten Stahn argues that the reference suggest that even alternative forms of justice must guarantee basic fair trial rights to the accused in the procedure⁷⁹.

Moreover, there are scholars that have argued that a state is ‘unable’ to investigate or prosecute if it does not guarantee the defendant due process⁸⁰. This is similar to the position that the authors of the Informal Expert Papers of the Office of the Prosecutor of the ICC have taken. According to that paper, the Court shall take into account a state’s ‘legal regime of due process standards, rights of accused and procedures when determining whether it is able to investigate and prosecute.’⁸¹

⁷⁷ Mark S. Ellis, “The International Criminal Court and Its Implication for Domestic Law and National Capacity Building,” 15 *FLA, J. INT’L L.* 215, 241 (2002);

⁷⁸ M. Cherif Bassiouni, *Introduction to International Criminal Law* (International and Comparative Law Series, 2003, 518; see also Ellis, *supra* note 77, at 236 (‘A case will fall under the jurisdiction of the ICC because of the unwillingness of a State to prosecute or investigate when it is found that... [t]he proceedings are not independent and impartial.’); Oscar Solera, ‘Complementary Jurisdiction and International Criminal Justice’, 84 *INTL. REV. RED CROSS* 145, 166 (2002) (noting that one type of ‘State conduct that may lead the Court to rule that a State is unwilling to prosecute’ is ‘when the competent domestic court is not independent or impartial’).

⁷⁹ Carsten Stahn, ‘Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’, *Journal of International Criminal Justice*, 2005, 695, 713

⁸⁰ Kevin Jon Heller, *Supra* note 9, page 3. Article 17(3) provides in full: “In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

⁸¹ Informal Expert Paper for the ICC Office of the Prosecutor: The Principle of Complementarity in Practice, at 28; cf. *id.* at 8–9 (‘Of course, although the ICC is not a ‘human rights court’, human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely’).

To support the above mentioned idea, aside from the scholars, the text of Rule 51 of the Rules of Procedure and Evidence is perceptible that may be considered as one of the grounds that the Court may rely on. Rule 51 reads as:

“In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, inter alia, information that the state referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.”

On the other hand, it was argued earlier in discussing the rationality of complementarity that the Court is not a human rights court per se⁸², so it cannot address the human rights violations of the defendant in a given case. This is however one of the criticisms of the due process thesis. Here, it is worth mentioning that it was concluded by the author in the previous chapter that the Court is not a Court of human rights but it does not seem right to turn a blind eye on this particular matter⁸³ owing to the fact that it tremendously impairs the ability and impartiality and independence of the State’s judicial system. Furthermore, any interpretation of the terms, according to paragraph 3, article 21 shall be compatible with the norms of human rights law, to which leaving the defendant at the discretion of national proceedings which breach his/her rights does not seem compatible at all.

While it has been argued that the due process thesis, as it was called by Heller, is supported by scholars, there are also grounds for criticising it. Grounds such as the contradiction of the due process thesis with the text, context and history of article 17 have been enumerated.⁸⁴ As to the practice of the Court, so far, it does not contain clear statements that could let us know where it stands on this particular issue.

In conclusion, a multitude of international criminal law scholars uncritically agrees that the principle of complementarity is applicable to all questions of a due process.⁸⁵ Most of these scholars believe that an unfair process would reflect the unwillingness to investigate genuinely. For this, they focus on two different legal aspects: the notion of “independently or impartially” in

⁸² See 1.2.1 “rationale of complementarity”

⁸³ See 1.2.1 “rationale of complementarity”

⁸⁴ For a thorough examination of arguments for and against the thesis of due process see: Kevin Jon Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, Criminal Law Forum (2006). It is worth noting that in his article while he defends the thesis of due process by relying upon various scholars, propose to revise and amend the principle of complementary to make it both clear and compatible with the principle of due process.

⁸⁵ Kevin John Heller , Supra note 9, 255

Art 17(2) (c) of the ICC Statute;⁸⁶ and the phrase “having regard to principles of due process recognized by international law” in Art 17(2).⁸⁷ Some commentators also believe that a State, which cannot guarantee a due process, is “unable” to investigate. This view is shared, e.g., by the authors of the Informal Expert Paper⁸⁸. This view is highly consistent with the nature of human rights norms and principles. Even though some argue that the Court is not a Court of human rights per se, it still is interconnected with human right principles as mentioned above.

It was asserted that 17 (2) requires the Court to determine the willingness of a state by considering “due process recognized in international law” in order to assess whether one or more of the provided situations exist. Each of those situations will be discussed below.

1.2.2.5.2- Shielding the Person Concerned

The first form of unwillingness spelled out in article 17 (2) is whether the proceedings were or are being undertaken or whether the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred in article 5 of the Rome Statute.⁸⁹ Proof of a purpose of shielding is required. This is a high threshold since the devious intent of the state needs to be proved. There must be causality between the state’s purpose and the inadequate procedural step. In order to determine a “purpose of shielding” provided by article 17 (2) (a), the prosecutor must prove a devious intent on the part of a state in contradiction to its apparent action.⁹⁰ A question may arise: What should be done if the state is investigating the alleged perpetrator solely for the purpose of deterring the ICC jurisdiction. In this regard, it should be mentioned that according to Paragraphs 4, 6 and 10 of the Preamble of the Rome Statute as well as articles 1 and 17, it has been

⁸⁶ M. Cherif Bassiouni , *Introduction to International Criminal Law*, Transnational Publishers Ardsley New York 2003, 518; Oscar Solera , *Complementary Jurisdiction and International Criminal Justice*, *International Review of the Red Cross* 845 (2002), 145 (166)

⁸⁷ Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, *Journal of International Criminal Justice* 3 (2005), 695 (713); Jimmy Gurulé , *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, *Cornell International Law Journal* 35 (2001-2002), 1 (26); Immi Tallgren . Article 20, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observer’s Notes, Article by Article*, Nomos, Baden-Baden, 419 (margin note 29). See also Dawn Yamane Hewett , *Sudan’s Court and Complementarity in the Face of Darfur*, *Yale Journal of International Law* 31 (2006), 276 (278), who cites both alternatives

⁸⁸ Informal Expert Paper, *supra* note 81, at 28; cf. *id.* at 8–9 (‘Of course, although the ICC is not a ‘human rights court’, human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely.’).

⁸⁹ Rome Statute, Article 17 (2) (a)

⁹⁰ Louise Arbour and Morten Bergsmo , *Conspicuous Absence of Jurisdictional Overreach*, in Herman A.M. von Hebel/Johan G. Lammers/Jolien Schukking (eds), *Reflections on the International Criminal Court. Essays in Honour of Adriaan Boos*, T.M.C. Asser Press, The Hague 1999, 129 (131).

desirable that the state take over the Case and exercise jurisdiction over the alleged perpetrators. Therefore, to establish a purpose of shielding, it is not sufficient to find out that the state concerned has exercised jurisdiction and initiated proceedings for the sole purpose of preventing the Court from acting since this is not only permissible but also desirable by the Rome Statute's complementarity regime.⁹¹

What remains important and difficult to prove is the intent of the state, which is an abstract entity. How can the mind-set of an abstract entity, such as a state, be determined? Indeed, the context and the conduct of the state are decisive. In exceptional cases, the purpose of shielding may be established due to express statements or clearly manifested actions such as blanket self-amnesties following initial investigatory steps of the relevant national authorities.⁹² However, in the absence of such direct proof, the 'devious intent on the part of the state, contrary to its apparent actions'⁹³ has to be inferred from objective and circumstantial evidence. In these cases, a question arises as to what indicators may constitute such circumstantial evidence. Rule 51 of the Rules of Procedure and Evidence allows the Court to consider 'inter alia, information that the state referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the state has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.'⁹⁴ It was mentioned earlier that this information can be considered by the Court in general and the court is not confined to doing so in the context of shielding.⁹⁵

In sum, about the first form of unwillingness, shielding, the intent of the state plays a key role, which may be inferred from objective circumstantial evidence or from the devious intent of the state that is contrary to its apparent action. Moreover, the initiation of proceedings for the sole purpose of deterring the ICC jurisdiction does not amount to shielding since this is desirable under the Rome Statute and the complementarity regime.

1.2.2.5.3- Unjustified Delay

Paragraph 2 states one of the situations through which in the light of the due process recognized in international law, one could prove the unwillingness of a State where there is an unjustified delay. A "delay," for the purposes of article 17(2) (b), encompasses proceedings which have taken longer than

⁹¹ Leila Nadya Sadat/S Richard Carden , *The e New International Criminal Court: An Uneasy Revolution*, Georgetown Law Journal 88 (2999), 381 (418).

⁹² Kleffner, *Supra* note 19, Page 136

⁹³ L Arbour and M Bergsmo, *Supra* note 90, 129–140, 131.

⁹⁴ Rules of Procedure and Evidence, Rule 51

⁹⁵ J T Holmes, 'Jurisdiction and Admissibility' in R S Lee (ed), *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publ, New York 2001) 337.

other similar proceedings in the state concerned.⁹⁶ Moreover, this “unjustified delay” must be “inconsistent with the intent to bring the person concerned to justice.” In fact, the paragraph encompasses three requirements. There must be, first, a “delay” in the proceedings, and second, such a delay has to be “unjustified,” and that unjustified delay, third, has to be “inconsistent with an intent to bring the person concerned to justice.” Unlike “shielding,” for which essential existence of causality between the intent of the state and shielding the alleged perpetrator was required to be proved by the prosecution, here the mere presence of inconsistency with a *bona fide* investigation or prosecution is enough.⁹⁷ Therefore, these elements need to be taken into account.

In order to determine that when a delay is unjustified, there are related jurisprudence of human rights bodies that might be helpful: jurisprudence on the right to be tried “without undue delay”⁹⁸ and to a hearing ‘within a reasonable time’⁹⁹ in the determination of criminal charges as well as the right to such a hearing in the determination of one’s civil rights and obligations¹⁰⁰ can be exemplified. As Kleffner rightly put it, these notions are different with the wording of article 17 (2) (b) and “human rights provisions cannot be simply transplanted” in the Rome Statute. Nevertheless, he further asserts that “notwithstanding the differences in wording to article 17(2) (b) [...] there is considerable overlap between the notions of an ‘unjustified delay’ and hearings ‘within a reasonable time.’ For, when interpreting these human rights norms, supervisory organs assess whether there have been justifications for a delay in deciding that a delay was ‘undue’ or that a hearing was not held ‘within a reasonable time.’”¹⁰¹ Furthermore, as to the history of the preparatory work the drafters of the

⁹⁶ Jacob Pichon, ‘The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court’, *International Criminal Law Review* 8 (2008) 185–228, 195, footnote omitted

⁹⁷ Benzing, *Supra* note 23, 608

⁹⁸ Articles 14 (3) (c) ICCPR

⁹⁹ Articles 6 (1) ECHR, 8 (1) IACHR, 7 (1) (d) AfCHPR

¹⁰⁰ Articles 6 (1) ECHR, 8 (1) IACHR

¹⁰¹ Kleffner, *Supra* note 19, 140; amongst many others the following cases: Human Rights Committee, *Thomas v Jamaica*, Communication No 614/95 (1999) UN Doc CCPR/C/65/D/614/1995 (25 May 1999) [9.5] [‘The Committee [...] notes with regard to the period of 23 months between the trial and appeal that the State party has conceded that such a delay is undesirable, but that it has not offered any further explanation. In the absence of any circumstances justifying the delay, the Committee finds that with regard to this period there has been a violation of Article 14, paragraph 3 (c), in conjunction with paragraph 5, of the Covenant.’ *Emphasis added*]. European Court of Human Rights, *König v Germany* (App no 6232/73) [1978] ECHR 3 (28 June 1978) [105] [‘In an overall assessment of the various factors, the Court concludes that the delays occasioned by the difficulties in the investigation and by the applicant’s behaviour do not of themselves justify the length of the proceedings. [...] the Court concludes that the “reasonable time” stipulated by Article 6 Para. 1 [...] was exceeded.’ *Emphasis added*]. Inter-American Court of Human Rights, *Genie-Lacayo v Nicaragua* Case (n 158) [78] [‘[...] the matter under consideration is somewhat complex, since the investigations were very extensive and the evidence copious [...]. All of this could justify the fact that the trial, which also involved many incidents and instances, lasted longer than others with different characteristics.’ *Emphasis added*].

Statute replaced the term ‘undue,’ which appeared in earlier drafts of the provision which later became Article 17 (2)(b), with ‘unjustified’ during the Rome Conference because the notion of ‘undue delay’ was seen as being too low a threshold for unwillingness.¹⁰²

It was already noted that an unjustified delay would be, in the circumstances, inconsistent with an intent to bring the person concerned to justice. Here again, as was required in ‘shielding’, the state of mind of the state and the evaluation of the intention of the state come to attention. In this regard, as already noted above, the scholars are of the view that in contrast to ‘shielding,’ the prosecutor has to illustrate that the “unjustified delay” is inconsistency with the intent to bring the person concerned to justice, rather than prove the causality between the intent of the state and shielding the alleged perpetrator¹⁰³.

In addition, the justifiability of every case shall be determined according to the circumstances of every case and it should be decided on a case-by-case basis¹⁰⁴. It should, however, be taken into consideration that a delay shall be illegitimate under the present circumstances. Therefore, the complexity of a case or an investigation may not be considered as unjustified even though that might take longer than a regular investigation and proceedings. Nevertheless, any assessment shall be taken into account according to the circumstances on a case-by-case basis.

Another point is that, where a state purports that it is investigating or prosecuting the person concerned, but it even fails to demonstrate the existence of a proceedings, Hall contends that this might be viewed as a “delay,”¹⁰⁵ if the existence of an investigation is taken for granted of course. It should be noted that this is only the case when national proceedings exist; otherwise, the case is automatically admissible due to national inaction.¹⁰⁶

The last but not least observation regarding article 17 (2) (b) has been well pointed out by Kleffner. He asserts in his final observation of article 17 (2) (b) that this paragraph “is an exception to the general assumption underlying article 17 (2) as a whole.” Noticeably, it “focuses on violations of due

¹⁰² As to the negotiation history of the relevant norms, see S.A. Williams, “Article 17” in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article*, 1999, MN 17

¹⁰³ S A Williams (n 29) 393–394 [‘A State will be determined by the Court to be unwilling where there has been an unjustifiable delay in the proceedings which in the circumstances is seen to be inconsistent with an intent to bring the person concerned to justice.’] Emphasis added

¹⁰⁴ J.T. Holmes, “Complementarity: National Courts versus the ICC,” in A. Cassese/ P. Gaeta/ J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, 2002, Vol. 1, 676

¹⁰⁵ Hall, Christopher K., “Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case,” in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers’ Notes, Article by Article*, Baden-Baden, 1999, 16

¹⁰⁶ See 1.2.2.6 “inability”

process to the *advantage* rather than *disadvantage*” of the alleged perpetrator.¹⁰⁷ He further elaborates and concludes that

“Article 17 (2)(b) seems susceptible to an interpretation that does not only cover situations in which delays in the proceedings are intended to protect the accused from criminal responsibility, as in the case of shielding. Rather, the provision would equally seem to extend to those situations in which unjustified delays work to his or her detriment. Thus a strong argument can be made that delays in the proceedings against persons suspected of having committed core crimes that are left in a limbo for years, without any indication that they will be tried, could fall under Article 17 (2) (b) and thus render cases admissible, because they are unjustified and inconsistent with an intent to bring the person concerned to justice.”¹⁰⁸

Moreover, one may question the measurement of the unjustified delay. It is argued that it must be done with comparison to the usual procedures and time frames in each individual state¹⁰⁹. It also may comply with respect to state sovereignty, which is the core of the complementarity principle. Although some suggested that there should be a regulated time for all states, this does not seem likely due to the diversity of the states, their current resources, and their development status. In order to do a thorough examination of whether the delay is unjustified, the Court may take into account the judicial reputation of the state concerned as well. Moreover, the delay must be illegitimate. As an instance, if the delay is due to compliance with human rights standard, it simply cannot be considered unjustified¹¹⁰.

There has not been a single case in the ICC concerning an unjustified delay and the question of whether it works in favour of the accused or not. However, Kleffner’s interpretation does seem reasonable. The accused cannot be left for an indefinite time in prison or any unfavourable situation in contradiction with his/her rights. Moreover, this has an explicit nexus with the capacity and the capability of a judicial system of a state. Under article 4 of the ICCPR in which non-derogable rights are stipulated, the prohibition of torture, inhuman and degrading treatment can be exemplified. The Human Rights Council considers it a right of all persons deprived of liberty to be treated with humanity (under Article 10(1)). This is supported because of its close connection with the prohibition of torture (Article 7). In the Committee’s opinion, non-derogable category also includes prohibition against taking of hostages, abductions, or unacknowledged detention.¹¹¹

¹⁰⁷ Kleffner, *supra* note 19, 144

¹⁰⁸ Kleffner, *supra* note 19, 144-145

¹⁰⁹ J.T. Holmes, “Complementarity: National Courts versus the ICC,” in A. Cassese/ P. Gaeta/ J.R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, 2002, Vol. 1, 676

¹¹⁰ Benzing, *Supra* note 23, he asserted in his article that he owes this thought to Ms. Tatjana Maikovski

¹¹¹ HRC, General Comment 20, Replaces general comment 7 concerning prohibition

1.2.2.5.4- Independence and Impartiality of the Judiciary

Paragraph 3 of article 17 (2) draws the last form of unwillingness where proceedings were not or are not being conducted independently or impartially, and conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. It should be noted however that articles 20 (3) and 17 (2) (b) contain quite identical wording.¹¹² The main difference between them lies in the fact that the former applies to proceedings prior to the conclusion of a trial and the latter to when a person has already been tried by another court.¹¹³

Both concepts of ‘independence’ and ‘impartiality’ are not defined in the Rome Statute however; they are well-known concepts in human rights law.¹¹⁴ Hence, given the content of article 21 (3) which requires the Court to interpret the terms consistent with internationally recognized human rights, drawing upon the interpretation of the two concepts within the field of human rights would provide significant guidance for interpreting them in the context of article 17 (2).

The two concepts have been defined separately in human rights provisions. Independence on the one hand means independence of the judiciary from the executive and the legislator as well as from the parties¹¹⁵ and protected from outside pressures. General Comments number 13 and some authors assert that in determining whether such independence exists, matters such as the manner of appointment of members of the judiciary and their terms of office, the existence of guarantees against outside pressures, the question of whether the judicial organs display a posture of independence, as well as other objective evidence have to be taken into consideration.¹¹⁶ Instances of

of torture and cruel treatment or punishment, 03/10/1992, Para 11. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument)

¹¹² The main difference is that Article 20 (3)(b) contains a reference to ‘the norms of due process’ which, for Article 17 (2)(c), derives from the chapeau of Article 17 (2) Rome Statute.

Article 17 (2) (c):

“The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

Article 20 (3) (b):

“Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

¹¹³ Kleffner, *Supra* note 19, 145

¹¹⁴ Articles 14 (1) ICCPR, 6 (1) ECHR, 8 (1) IACHR, 7 (1) and 26 AfCHPR

¹¹⁵ Office of the High Commissioner for Human Rights, General Comment No. 13,

“Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)” 04/13/1984, Para 3. Available at:

<http://www.unhchr.ch/tbs/doc.nsf/0/bb722416a295f264c12563ed0049dfbd>.

¹¹⁶ N Jayawickrama, 515–518 and S Trechsel, 53–61, both with further references to relevant case law. See also Human Rights Committee, General Comment 13. On the jurisprudence of the Strasbourg organs, see Harris, O’Boyle and Warbrick 231–234. See

lack of independency could be situations in which the state is encountering instability because of various potential causes such as political transition, natural disaster, lack of resources or lack of central power. The independence should not be deemed just institutional because it also involves the personal independence of judges in a way that they do not fear reprisals; they must act and decide *sine spe ac metu* (without fear and hope).¹¹⁷

On the other hand, impartiality means, “not favouring one party or side more than another;” “unprejudiced, unbiased, fair, just, equitable.”¹¹⁸ In defining the notion of impartiality, the Human Rights Council affirms that “impartiality” “implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”¹¹⁹ In the words of the first Rapporteur on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, Mr Singhvi, it “implies freedom from bias, prejudice and partisanship; it means not favouring one more than another; it connotes objectivity and an absence of affection or ill-will. To be impartial as a judge is to hold the scales even, and to adjudicate without fear or favour in order to do right.”¹²⁰ Examples of lack of impartiality could possibly be victor’s justice in a way that the victor takes over the whole process of adjudication of the alleged perpetrator, and politically motivated statements made by judges or persons responsible in the judiciary.

By analysing the notions of ‘independence’ and ‘impartiality,’ this question will arise: Would the mere lack of independence and impartiality trigger the Court’s jurisdiction, or would it be inconsistent with an intent to bring the person concerned to justice according to the wording of the article? It seems that the mere lack of independence or impartiality is inevitably inconsistent with an intent to bring the person concerned to justice. On the contrary, it is said that the existence of the phrase is not for nothing. In fact, it has been stipulated for further clarification.¹²¹

As we observed, the most important question, regarding “unwillingness” is to what extent it should rely upon the “due process recognised in international law.” This question may not be answered generally for all of the paragraphs. However, regarding “shielding,” it is acceptable that it

also Informal Expert Paper for the ICC Office of the Prosecutor: The Principle of Complementarity in Practice, 29.

¹¹⁷ Joe Stigen, *The Relationship between the International Criminal Court and National Jurisdictions The Principle of Complementarity*, The Raoul Wallenberg Institute Human Rights, Leiden Boston 2008, 302

¹¹⁸ The Oxford English Dictionary

¹¹⁹ Views of the Human Rights Committee under article 5, paragraph 4, 5 November 1992, Para, 7.2.

¹²⁰ ‘Final report on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers by Mr. Singhvi, submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities’ (1985) UN Doc E/CN.4/Sub.2/1985/18 and Add.1–6 [79].

¹²¹ Kleffner, *Supra* note 19, 150

works when it benefits the accused, while “unjustified delay” works where the rights of the accused is being violated. The independence and impartiality of the judiciary, alongside “unjustified delay,” has a close nexus to the capability of the judiciary. It is at the discretion of the Court to interpret the controversial phrases in any part of the Rome Statute, but in this regard, the Court is required by the Rome Statute to interpret the Statute as consistent with internationally recognized human rights standards according to article 21(3). Perhaps, if the Court opts for the “due process” thesis, as most scholars believe that it should, it would be an improvement for the Court and an enhancement of judicial standards in various states. In addition, if the Court refuses to apply the “due process,” the least requirement, perhaps called as non-derogable rights shall not be ignored at any time by the Court in assessment of the existence of “unwillingness.”

After examining grounds of unwillingness which are required to be considered by “having regard to the principle of due process recognised by international law,” it was mentioned that another ground that renders a case admissible before the Court is the “inability” of the state. However, these two grounds shall be seen after considering whether an investigation has existed within the jurisdiction of the state concerned¹²².

1.2.2.6- Inability, Article 17 (3)

There are two grounds for rebutting the inadmissibility of a case vis-a-vis core crimes proceedings before the Court. The first one is unwillingness, which was introduced earlier, and the second one is when the state is “unable.” It should be kept in mind that it is at the discretion of the Court to decide whether the state is unwilling.

Article 17 (3) reads as

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

In order to clarify the word “unable” referred to in chapeau of article 17, paragraph 3 of the mentioned article defines inability: Due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony, or the state is otherwise unable to carry out its proceedings.¹²³ This may also follow from the lack of a central government or judiciary in country, and the voluntarily relinquishment of jurisdiction due to a self-assessment of inability to carry out the proceedings. Potential instances for the former

¹²² See “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire,” ICC-02/11-14, 03-10-2011, Para 193

¹²³ The Rome Statute, article 17(3)

could be Somalia and Rwanda after committing genocide and for the latter the Central African Republic.

In the Bemba decision, the Trial Chamber determined “that the CAR national judicial system is unable to investigate effectively or try the accused leads inevitably to the conclusion that for the purposes of Article 17(3) of the Statute, the national judicial system of the CAR is ‘unavailable,’ because it does not have the capacity to handle these proceedings.”¹²⁴ The article itself provides conditions for inability which are: (1) A state is unable to obtain the accused; (2) A state is unable to obtain necessary evidence and testimony, and (3) finally a catch-all provision which is “the state is otherwise unable to carry out the proceedings.” The last provision attempts to include all other possible scenarios. In all three situations, they should be due to a “total or substantial collapse” or “unavailability of the judicial system” and thus it requires a causal link to be proved. The Rome Statute does not contain further definition of the requirements for the total or substantial collapse of a judicial system. The travaux préparatoires, having considered the adoption of the Rome Statute, tend to indicate that the collapse of a state's national judicial system should be decided based on the presence of the following elements: the extent to which the State was exercising effective control over its territory; the existence of a functioning law enforcement mechanism; the ability of the state to secure the accused or the necessary evidence; and whether the extent and scope of the crimes committed were such that national jurisdiction cannot adequately address them.¹²⁵

After having discussed the admissibility criteria, for the purpose of current thesis, it would be important to shortly introduce the triggering mechanisms of the ICC in order to have better understanding over the whole system of complementarity from the beginning to the end.

1.3- Triggering Mechanisms

According to the Statute, article 13, there are three mechanisms used to refer a case to the court if the committed crimes posit within the jurisdiction of the Court. The first mechanism is when a State party refers a case to the Court (self-referral); the second is when the Security Council refers a case to the prosecutor acting under chapter seven of the United Nations Charter and third, when the prosecutor initiates a case *proprio motu*.¹²⁶ Amongst these

¹²⁴ Situation in the Central African Republic in the case of the Prosecutor V. John Pierre Bemba Gombo, judgment of 24 June 2010, ICC-01/05-01/08-802, Para 246

¹²⁵ See HOLMES (J. T.), “The Principle of Complementarity,” in LEE (R. S.) (ed.). The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations, Results, Kluwer Law International, 1999, pp. 49 and 50.

¹²⁶ The Rome Statute Article 13:

“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to

mechanisms, the most controversial could be the Security Council referral, which is also relevant to the current thesis. Therefore, the legal status of the Security Council referral in respect to the ICC particularly regarding the complementarity regime of the ICC will be addressed as follow.

1.3.1- Principle of Complementarity and the Security Council Referral

Since the current thesis seeks to examine the application of the complementarity principle to the case of Libya and admissibility of the case before the ICC, the effect of the Security Council referral to the ICC and complementarity regime and the ability of the State to challenge the jurisdiction of the court are of great significance. Nevertheless, this matter will be discussed below:

Prior to an assessment, it should be noted that since the crimes within the jurisdiction of the ICC threaten the peace, security and well-being of the international community, there is an overlap between the goal of the United Nations Charter in which the United Nations Security Council is in charge of restoring and of maintenance of international peace and security¹²⁷. In this respect, the president of the ICC asserted that the ICC purposes “which overlap with the goals of the UN. [...] To achieve our collective aims, our institutions must work together. [...] Cooperation is important because the Court and the UN are part of an interdependent system of international law and justice”¹²⁸. In addition, some commentators even go further to support the superiority of the Security Council by stating that:

“The Security Council’s power to conduct international judicial intervention derives from the Charter and is unaffected by the ICC Statute. Legally speaking the Council can establish further ad hoc Tribunals if it is of the view that the efficacy of its judicial intervention so requires. [...]”¹²⁹”

Although one of the triggering mechanisms envisaged in the Rome Statute is the referral of a case to the Court by the United Nations Security Council, there is no transparent mechanism as to the effect of the UNSC resolution on the Court as well as the State. Obviously, as it is embedded into the

have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”

¹²⁷ United Nations Charter, Article 24

¹²⁸ Address to the United Nations General Assembly by Philippe Kirsch, President of the International Criminal Court, 8 November 2005, p. 3 (available at Address to the United Nations General Assembly by Philippe Kirsch, President of the International Criminal Court, 8 November 2005, p. 3 (available at <http://www.icc-cpi.int/presidency/presspeeches.html>). presidency/presspeeches.html), Cited in The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity By Jo Stigen

¹²⁹ Arbour and Bergsmo, supra note 90, 125-126, 139-40.

2008, Cited in: Jo Stigen: The Relationship between the International Criminal Court and National Jurisdictions

article 13(b), the UNSC may refer a case to the court acting under its chapter 7 of the United Nations Charter (hereinafter UN Charter) for the purpose of maintaining world's security. Perhaps this matter had not come to the surface until the UNSC adopted its first referral, in 2005, which was the situation in Darfur, Sudan.

So far, there have been two cases referred by the UNSCRs. The first one, as it was mentioned, was Sudan and the second one was Libya. Technically, both States are bound by Article 25 of the UN Charter¹³⁰ and by UNSC Resolutions to accept the ICC's decisions¹³¹. In both resolutions, both States are bound to cooperate with the Court and not to be forcibly deemed as parties to the Rome Statute. In this regard article 1 of the Rome Statute provides that '[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute'¹³². Besides, the Pre-Trial Chamber in the Al-Bashir warrant of arrest held that investigation and prosecution in the Darfur Situation will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules of Procedure and Evidence as a whole'¹³³.

Another question that may also arise is whether the State that is bound to cooperate with the ICC can make a challenge to the admissibility or whether it ought to confirm the court's jurisdiction anyway.

Since it is not described in the Rome Statute how the Court should deal with such a Situation directly, there is no doubt that the relationship between the UNSC referral, article 13(b) and the complementarity regime, article 17, is unclear¹³⁴. In this regard, while article 18 could be used against the application of the complementarity regime to the UNSC referral, articles 19 and 53 can possibly be used for the application of the complementarity regime to the UNSC referral¹³⁵. According to article 18(1)¹³⁶, when a situation has been referred to the Court according to article 13(a) and (c), the Prosecutor has the duty to notify all the State parties and those States that

¹³⁰ United Nations Charter, Article 25:

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

¹³¹ Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, *Journal of International Criminal Justice* 7 (2009), Page 335

¹³² The Rome Statute, Article 1.

¹³³ Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, Para 45

¹³⁴ Benzing, *Supra* note 23, 625

¹³⁵ Jakob Pichon, *The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court*, Page 189

¹³⁶ The Rome Statute, Article 18 (1):

"When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States."

normally exercise jurisdiction over the crimes concerned with the intention to proceed with an investigation. Only such States may pursuant to article 18(2)¹³⁷, challenge the ICC jurisdiction on the basis that it is investigating or has investigated their nationals or others within their jurisdiction. Security Council referral has not been included in the article. Therefore, it may be inferred that article 18 does not apply to the UNSC referral. On the other hand, unlike article 18, articles 19 and 53 of the Rome Statute expressly involve the UNSC referral¹³⁸. Article 19(2) (b) manifests that every State that has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted the case may challenge the admissibility of a case on the grounds referred to in article 17.

In addition, article 53(2) could probably be the compelling evidence of the application of complementarity to the UNSC referral by considering that it expressly mentions the UNSC referral cases in time of the initiation of an investigation. According to this article, if the Prosecutor, after the initiation of an investigation concludes that “there is not a sufficient basis for a prosecution [...] the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral or the Security Council in a case under article 13, paragraph (b).” Furthermore, the Pre-Trial Chamber may review a decision of the Prosecutor, at the request of the State that made the referral or in case of a referral by the UNSC¹³⁹. Obviously, there is a procedural process for that matter which clearly indicates that the court shall investigate the case according to the Rome Statute. This is also much more compatible with the independence of the Court as a legal body of law. Besides, it was discussed above that one of the rationales of the complementarity regime is to hold the primacy of the national criminal jurisdiction and respect for State sovereignty; therefore, it is also in line with that rationality¹⁴⁰. Furthermore, as the complementarity principle is one of the most fundamental principles of the ICC Statute, the Security Council must respect the primacy of national proceedings even upon referral¹⁴¹. Moreover, the ICC practice

¹³⁷ The Rome Statute, Article 18 (2):

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

¹³⁸ Benzing, *Supra* note 23, 622

¹³⁹ The Rome Statute, Article 53 (3) (a)

¹⁴⁰ See 1.2.1 “rationale of complementarity”

¹⁴¹ Paolo Benvenuti, Complementarity of the International Criminal Court to National Criminal Jurisdictions, in: Flavia Lattanzi/William A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, Il Sirente, Ripa Fagnano Alto, vol. 1 1999, 21 (41); cf. also Xabier Agirre and others, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-OTP 2003, Para. 68, available at: <http://www.icc-pi.int/library/organs/otp/complementarity.pdf>.

supports the same conclusion since the ICC has held a hearing to adjudicate Libya's challenge the admissibility of a case before the Court.¹⁴²

In conclusion, the ICC has rightly preferred to assess the admissibility of a case even in case of a referral of a situation by the Security Council. More specifically, in the referral of the case of Sudan, the ICC prosecutor affirmed that he was required under the Statute to examine the admissibility of the case. He affirmed, "Before starting an investigation, I am required under the Statute to assess factors including crimes and admissibility. I look forward to cooperation from relevant parties to collect this information."¹⁴³ In addition, if States were completely obliged to relinquish jurisdiction without having rights to challenge the Court's jurisdiction in case of a UNSC referral that would have been expressly a violation of the complementarity principle, known as the most fundamental principle of the Rome Statute. Also, one cannot ignore the fact that, having regard to the political nature of the Security Council as well as the inability of its members to deal with every situation equally it is very likely that it deteriorates the Court's credibility and the ICC's impartiality by potentially politically motivated referrals. It furthermore, despite the overlap of the goals of the ICC and the Security Council, endangers the character of the court as an independent legal institution.

Conclusion

Clearly, the complementarity principle is controversial following the reason that it is dealing with the sovereignty of States through a supranational institution. Striking a balance between the jurisdiction of the Court and the jurisdiction of the State is dependent on the circumstances that article 17 provides, by which a case becomes inadmissible rather than admissible. In this respect article 17, which is the yardstick of the complementarity principle, contains ambiguous terms that adds more controversies to the controversiality of the said regime.

Despite the fact that the Court has tried to improve the clarity of article 17 in its jurisprudence, there is still ambiguity in the article. The reason is that it has not been a long time since the Court came to existence and the complementarity regime is unprecedented. For example, the terms "investigation" or "active investigation" have been dealt with in jurisprudence of the Court. The ICC even provided some tests in this regard. As an example "the same person, same conduct test" may be served. Yet, as Heller puts it, there are "shadow sides" within the complementarity regime. The matter he discusses in particular is the thesis of "due process." Even though most of the Scholars are defending the due process thesis, it is still

¹⁴² The ICC Pre-Trial Chamber I, Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi, No.: ICC-01/11-01/11, 14 September 2012

¹⁴³ Security Council refers situation in Darfur to ICC Prosecutor, Press Release, 1 April 2005 (available at <http://www.icc-cpi.int/press/pressreleases/98.html>).

unclear whether the Court will ever opt for it. It seems that it would be a positive improvement for the ICC to consider the minimum standards of human rights in assessment of “unwillingness” or “inability” of a State. It might encourage States to enhance their domestic judicial system as it was intended by the rationality of the principle. Failing to rule on questions such as whether the Court may intervene where the human rights of the accused is being violated has recently posited the ICC in an unwanted situation. This issue has risen during the Libya, Saif Al-Islam Qaddafi situation. This is an opportunity for the Court to declare its position on this matter.

Another point is that the recent practice of the ICC illustrates its attempts to establish itself as a post-conflict effective institution. Thus, that automatically requires the Court to have a steady manner in dealing with similar issues. Every decision will be held as a valid example of how the ICC will carry out that task in future cases. In this respect, the lack of transparency in the complementarity regime will put the ICC in a difficult circumstance each time that a case with similar circumstances is referred to the ICC. The lack of a steady manner may lead to different outcomes for similar cases. That might lead to the impairment of ICC’s credibility. Perhaps, the best suggestion that has been put forward so far is Kavin Heller’s suggestion. He proposed to invite the State parties to amend the ICC Rome Statute in a way that it particularly meets the thesis of “due process.” Perhaps that would resolve many problems concerning the quality of the judiciary as well as the question of the violation of the human rights of the accused. In case of the failure of occurrence of the amendment, it might be recommended that the Court have the legal basis to interpret the Rome Statute in consistency with minimum standards of human rights, as it is required by article 21(3) of the Rome Statute.

Chapter 2: Study case of Libya, Saif Al-Islam Qaddafi

After discussing the complementarity regime of the ICC in the first section of the current thesis, Libya’s challenge to the admissibility of the ICC will be examined in this section. Since the ICC has striven to establish itself as a post-conflict effective institution, this case plays a significant role in the field of international criminal justice and particularly in future cases before the Court for two reasons.

First, it will provide a better understanding complementarity principle in the Rome Statute since the case was challenged by the State while it is dealing with serious difficulties such as security and reformation from a dictatorship to a democratic society. This reformation, however, included the national judicial system. Furthermore, the ability and functionality of this judicial system for dealing with controversial political cases such as Saif Al-Islam Qaddafi was seriously doubted.

Second, whatever the decision of the ICC is, it will be held as an example in future similar cases and it will break new grounds in both international justice system and the ICC practice.

In this chapter, relevant parts of the complementarity principle provided in the first chapter, will be applied to the entire case of Libya. By considering Libya's challenge to admissibility, it will be attempted to answer these questions: "Did Libya actively investigate Saif Al-Islam's case?" "Was Libya willing to investigate Saif Al-Islam's case?" and "Was Libya able to investigate Saif Al-Islam's case?"

Prior to assessment and examination of the Libya case, particularly Saif Al-Islam Qaddafi, a background to the case of Libya and other relevant facts in this regards will be provided.

2.1- Background to the Situation of Libya

In the outbreak of Arab Spring, after Egypt and Tunisia, Libya was one of the countries that were run by authoritarian leaders that started to face uprisings. Mohammad Moammar Qaddafi, the most powerful man in the country, was the head of State, de facto, and his sons were in charge of various substantial divisions of the country. He took over the country by a coup d'état against king Idris (1969). The State of Libya was formally governed by the general people's congress whose secretary general was in theory the head of State. Despite the fact that General Moammar Qaddafi practically had been governing Libya since 1969, he lacked any official title¹⁴⁴. Accordingly, the country had been ruled by fear, intimidation and incentives based on loyalty¹⁴⁵. Lacking a rule of law and judicial independency were also characteristics of the administration of Libya¹⁴⁶.

In February 2011, a series of peaceful demonstration aimed at achieving reforms in the governing of the State and seeking to see the regime evolve into a democratic form, had shortly turned into a nasty bloodshed in which thousands of people were massacred. The first demonstration took place in 16 February 2011. Nevertheless, it was followed by the arrest of Mr Fathi Terbil, a well-known lawyer and a human rights defender, by the internal security forces. This prompted mass protests in Benghazi. The day after, the protest spread to Al-Badaya, Al-Quba, Darna, Tobruk, and Tripoli on the 17th. The security forces of Libya applied various measures such as batons and tear-gas to disperse demonstrators; substantial numbers of casualties

¹⁴⁴ Administrative Reform in the Mediterranean Region, Summary of Libya, centre for administrative innovation in the Euro-Mediterranean region, available at www.unpan1.un.org/intradoc/groups/public/.../caimed/unpan019339.pdf

¹⁴⁵ United Nations Human Rights Council, Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, 1 Jun 2011, Page 3

¹⁴⁶ Ibid

were reported too. As the protests were permeating all over the region, the security forces opened fire with live ammunition in several locations¹⁴⁷. When the news spread, the protest proliferated all over the country. It was reported that a large number of people were injured by government forces in Benghazi, the biggest city in Libya, Ajdabia, and Al-Baraq Airport in Al-Bayda on 18 February and in Mesrata on the 19th.

Gradually, the protest was turning more offensive to the extent that the protestors took over Benghazi Airport on 20 February. The protest transformed into a civil war whereby the protestors and government forces exchanged fire and the protestors started to attack government buildings. For instance, on 21 February, on Libyan national television, Saif Al-Islam Qaddafi asserted, “we will fight to the last man and woman and bullet.”¹⁴⁸ This was also followed by Colonel Qaddafi’s announcement on 22 February that he would lead “millions to purge Libya inch by inch, house by house, household by household, alley by alley and individual by individual, until [he] purif[ies] this land.”¹⁴⁹ He also called protestors “rats” who needed to be executed and blamed foreigners for the bloodshed¹⁵⁰. The days after were followed by escalated clashes in Tripoli, and as a result, the media reported that the Government forces utilized fighter jets and live ammunition against protestors in the capital, even though government sources rejected the reports and asserted that they were released on remote areas and not areas populated with civilians.

While the armed opposition had gained control over some areas of Libya, government forces were also trying to retake control of various cities. By late February, an armed conflict had begun between the armed opposition and government forces. On 2 March, in Benghazi, a political faction called the National Transitional Council (hereinafter NTC), led by Mustafa Abdul Jalil (the former minister of justice), was established. They announced themselves representing Libya. It had promptly been recognized by France, Gambia, Jordan, Kuwait, Maldives and Qatar. Consequently, on 26 February, the United Nations Security Council adopted resolution 1973 authorizing a no fly zone over Libya and the taking of “all necessary measures” to protect civilians from the government forces of Libya.¹⁵¹ Consequently, air strikes began on 19 March under the initial leadership of the United Kingdom, France and the United States. Accordingly, NATO took control of the military operation on 31 March.

¹⁴⁷ Ibid, page 24

¹⁴⁸ Greater Surbiton News Service, available at: <http://greatersurbiton.wordpress.com/2011/02/21/saif-al-islam-muammar-al-gaddafi-and-the-london-school-of-economics/>

¹⁴⁹ Report of the High Commissioner under Human Rights Council resolution S-15/1, Human Rights Council, A/HRC/17/45, 7 June 2011, Para 5

¹⁵⁰ Ibid

¹⁵¹ United Nations Security Council Resolution no. 1973, 26 February 2011. Available at: www.icc-cpi.int/NR/rdonlyres/081A9013.../0/1970Eng.pdf

2.1.1- Current situation after Revolution in Libya

After the uprising had started in Libya and turned into a civil war, a political entity named the National Transitional Council (NTC) was leading the opposing power during the civil war. The de facto governance of the NTC continued for almost 10 months after the end of the war where the Libya Arab Jamahiriya was overthrown by Libyan people in cooperation with the international forces. On 5 March 2011, the council issued a statement in which it declared itself the “only legitimate body representing the people of Libya and the Libyan State”¹⁵² Subsequently, after that period, they held an election to a General National Congress on 7 July 2012 and handed the power to the newly elected assembly on 8 August 2012. It is, furthermore, noticeable that in this election, secularist parties had won most of the seats that were reserved for parties (39 seats out of 80) and a large number of independent candidates won other seats (200 in total).¹⁵³ Despite the fact that secular parties gained most of the seats, the overall orientation that the assembly would have was unclear owing to the fact that 120 seats of the assembly were occupied by independent candidates.¹⁵⁴ Therefore, the result seemed to be vastly dependent on their allegiances with political parties. It was hard to predict how these people were going to find common ground to form a cohesive government capable of projecting consistent policies.¹⁵⁵ More importantly, it seemed that the GNC had so far not shown much improvement concerning the reformation and decision making in Libya and particularly in the new judicial reformation of the State.

Moreover, various reports and human rights organizations asserted that there has been serious concern regarding human rights abuses in Libya. In this respect, the Supreme Judicial Council of Libya stated its commitment to restructuring the Libyan judicial system to ensure its impartiality and independence¹⁵⁶. The Human Rights Watch has been criticizing Libyan authorities for their treatment and their inability in dealing with former government officials and other detainees in the country’s detention centres. It estimated that there were 8000 detainees in almost 60 detention facilities, mostly run by militia in different parts of the country¹⁵⁷.

¹⁵² Interim Transitional National Council Decree 3, 5 March 2011, can be found at: <http://www.ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>

¹⁵³ BBC News, 18 July 2012, <http://www.bbc.co.uk/news/world-africa-18880908>

¹⁵⁴ Max Plank Institute for Comparative Public Law and International Law, “Constitutional Reform in Arab Countries, Libya”. Available at: http://www.mpil.de/ww/en/pub/research/details/know_transfer/constitutional_reform_in_arab_libyen.cfm

¹⁵⁵ Libya power transition: Who can stop the chaos? , this article can be found at: <http://rt.com/news/libya-transition-power-anarchy-143/>

¹⁵⁶ Libya Herald News, Supreme Judicial Council committed to restructuring Libyan judicial system, 29 November 2012: <http://www.libyaherald.com/2012/11/29/supreme-judicial-council-committed-to-restructuring-libyan-judicial-system/>

¹⁵⁷ Human Rights Watch, “Libya: Lagging Effort to Build Justice System Security Needs Working Courts, Legal Reform,” <http://www.hrw.org/news/2012/01/22/libya-lagging-effort-build-justice-system>

In the most recent report of 17 September 2012, the United Nations Support Mission in Libya (UNSMIL), in its report named “Transnational Justice-Foundation for a New Libya” emphasized “until now, there is no uniform process of national reconciliation in Libya.” It also stated,

“While the National Transitional Council enacted a transitional justice law entitled ‘Laying a Foundation for National Reconciliation and Transitional Justice,’ it is not clear whether the law as currently conceived will allow for a dynamic truth-seeking process. The law was not broadly consulted before it was passed and its goals are unclear. The Fact-Finding and Reconciliation Commission established by the law and composed purely of senior judges, appears to be a quasi-judicial process that may not provide sufficient scope for examining legacies of violations, reflecting on them through public hearings, and creating a space for victims to air their views. Victims are not mentioned in Libya’s law except in relation to compensation. There are other legal challenges to moving forward too. Several amnesties were passed by the NTC and risk promoting impunity. These laws may need to be readdressed with the new General National Congress in place.”¹⁵⁸

It then concluded by advising both the government and national congress to prioritize the establishment of an effective and fair justice system over the next 12 months.¹⁵⁹

2.1.2- Libya Security and Militia Groups

After the events resulted in the collapse of the State through a civil war and an international intervention, it is not surprising to see instability in Libya until the time when the State is governed by a democratic government, a powerful police and an effective judiciary with the power to enforce its decisions. Perhaps, it is crucial to have all the parties settled down through national reconciliation.

Following the October 2011 Libyan Revolution that toppled the regime of Mommar Qaddafi, the security in the State has been precarious.¹⁶⁰ According to BBC reports, up to 1,700 different armed groups have emerged from the disparate Libyan rebel forces, which fought Muammar Gaddafi's regime in 2011, but after the killing of the US ambassador Christopher Stevens in Benghazi on 11 September, the government says it

¹⁵⁸ United Nations Support Mission In Libya, Transnational Justice – Foundation for a New Libya, can be found on this address:

<http://unsmil.unmissions.org/LinkClick.aspx?fileticket=8XrRUO-sXBs%3D&tabid=3543&language=en-US>

¹⁵⁹ Ibid, page 4

¹⁶⁰ Report of the International Commission of Inquiry on Libya, United Nations Human Rights Council, A/HRC/19/68, 2 March 2012

will disarm the militias¹⁶¹. On the same day, the deputy of the prosecutor general was kidnaped; however, he was released consequently¹⁶².

In its recent report regarding Libya Security, the UNSMIL reported the weakness of the national police, and the inability of central authorities to enforce the rule of law in the State. Recently, the improvement of the police in acting swiftly as well as a national judicial system has been reported too. Tarek Mitr, asserted in this respect that progress towards improving Libya's security situation remains "slow, but it is real."¹⁶³

It seems that security has been growing during this time, according to the reports and news, but still serious concerns have remained.

2.2- Jurisdiction of the ICC over the Libya Cases

It was mentioned that there are certain crimes within the jurisdiction of the ICC. Upon the referral by the UNSC of the Libya case to the ICC, after investigating the situation, the Office of the Prosecutor declared,

After thorough consideration of factors [...] and on the basis of the information evaluated and analysed, on 3 March 2011, the Prosecutor determined that the statutory criteria for the opening of an investigation into the situation in Libya since 15 February 2011 has been met.¹⁶⁴

Charges brought before the ICC by the prosecutor are the crimes against humanity of murder and the persecution of civilians within the meaning of article 7(1) (a) and (h)¹⁶⁵. Consequently, the Pre-Trial Chamber concluded that there are reasonable grounds to believe that Moammar Qaddafi, Saif Al-Islam Qaddafi and Abdullah Al-Senussi have been involved in committing those crimes that fall within the jurisdiction of the Court, and should therefore be arrested¹⁶⁶.

¹⁶¹ Disarming Libya's militias, BBC News, can be found at: <http://www.bbc.co.uk/news/world-middle-east-19744533>

¹⁶² Supra note 160, paragraph 38(VI)

¹⁶³ Luke Vargas, "Uncertainty Prevails In Libyan Security Assessment", available at: <http://www.talkradionews.com/news/2013/01/29/uncertainty-prevails-in-libyan-security-assessment.html#.Ua5mB9Jgfmo>

¹⁶⁴ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Qaddafi, Saif Al-Islam Qaddafi and Abdullah Alsenussi, ICC-01/11-01/11-1, 30-06-2011, Para 3

¹⁶⁵ Warrant of arrest for Saif Al-Islam Qaddafi and Senussi, 27 June 2011

¹⁶⁶ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI," ICC-01/11-01/11-1 30-06-2011, Para 93, 96, 100.

2.2.1- Background of the case of Libya and Saif Al-Islam before the ICC

On 26 February, following the suppression of the uprising by the State of Libya, the United Nations Security Council, acting under chapter VII of the United Nations Charter, for the first time in the UN history, unanimously adopted resolution 1970, referring the Libya situation to the ICC prosecutor¹⁶⁷. A week later, on 3 March 2011 following an examination of the situation, the prosecutor announced that according to the information available to him, he had reached the conclusion that an investigation into the situation in Libya was warranted and that he would consequently open an investigation¹⁶⁸. The day after, 4 March 2011, the presidency of the court issued a decision and assigned the situation to the Chamber. Afterwards, on 16 May 2011, the prosecutor, considering the information at hand, according to article 58 requested 3 warrants of arrest for Moammar Qaddafi, Saif Al-Islam Qaddafi and Abdullah Sanussi for their alleged criminal responsibility for the commission of Crimes against humanity of murder and persecution of civilians from 15 February 2011 onwards through Libyan State apparatus and security forces¹⁶⁹. After the prosecutor requested warrants of arrest, the court (pre-trial chamber I) in its decision on 27 June 2011, concluded that there were reasonable grounds to issue warrants of arrest for the persons concerned¹⁷⁰.

Amongst those three, however, Moamar Qaddafi, the former Libya head of state was killed by Misrata militiamen on 20 October 2011 while he was escaping Mesrate¹⁷¹.

The second suspect, Saif Al-Islam Qaddafi, reportedly fled to the town of Bani Valid. According to Human Rights Watch, he was slightly wounded in an October 17 NATO airstrike on his convoy in Wadi Zamzam as he tried to flee towards Sirte. Militia members of the western city of Zintan captured him on November 19 near Libya's southern border¹⁷². The third suspect, Abdullah Sanussi, Qaddafi's intelligence chief, fled to Mauritania. He was captured there and on 17 March 2012 was extradited to Libya.

After Libya confirmed the arrest of Saif Al-Islam Qaddafi, the court pleaded the suspect to be handed over to the ICC custody by means of the implementation his arrest warrant. In response, the NTC announced in 2011

¹⁶⁷ So far, there has been two of the Security Council's referral to the ICC. The first referral made on 31/03/2005, which was regarding Sudan, Darfur Situation. Resolution number 1593 adopted by 11 votes in favor, non against and 4 abstentions (Algeria, Brazil, China, and United States). On the contrary, the referral of the situation in Libya, were adopted unanimously, which was unprecedented in the history of United Nations Security Council regarding referring a case to the ICC prosecutor.

¹⁶⁸ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI, ICC-01/11-01/11-1, 30-06-2011, Para 3

¹⁶⁹ Ibid, paragraph 4

¹⁷⁰ Ibid, Paragraph 5

¹⁷¹ Death of A Dictator, Bloody Vengeance in Sirte, Human Rights Watch, page 23

¹⁷² Human Rights Watch interview with Saif al-Islam Gaddafi, Zintan detention facility, December 18, 2011

that Libya is willing to prosecute the suspect itself and it is willing to challenge the ICC jurisdiction. In May 2012, the NTC submitted an application on behalf of the Libya Government (hereinafter Libya Application), requesting an oral hearing on the admissibility challenge pursuant to article 19 of the Rome Statute. It argued that the cases against the former officials in the government of Muammar Qaddafi should be deemed inadmissible because domestic investigations and prosecutions were underway in Libya¹⁷³. The first hearing took place on 9-10 October 2012 and consequently the Court required further submissions on issues related to the admissibility of the case against Saif Al-Islam Qaddafi from Libyan authorities¹⁷⁴.

The starting point of this process was the UNSC resolution, according to which the case was referred to the ICC, and which obliged Libya to cooperate with the Court. Thus, the effect of the Security Council referral¹⁷⁵ in the current case will be addressed below:

2.2.2- Security Council Referral and Libya Obligation to Cooperate

The ICC jurisdiction over Libya was granted by the UNSC resolution no. 1970, 26 February 2011. As it was provided in the Rome Statute, article 13(b), one of the triggering mechanisms is the UNSC referral acting under chapter VII¹⁷⁶. Resolution 1970 outlined some issues including the referral of the case to the ICC prosecutor, and obliged Libya to cooperate with the court. The UNSCR reads as follow:

4. Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

5. Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

Libya's obligation to cooperate depends on whether it is among the states that are bound to cooperate without challenging the court's jurisdiction.¹⁷⁷ Following the above mentioned discussion, and the lack of transparency of the Rome Statute in this respect, it was concluded by inference from articles

¹⁷³ Motion on behalf of the government of Libya requesting an oral hearing in respect of its admissibility challenge pursuant to article 19 of the ICC Statute, 2 May 2012, ICC-01/11-01/11-132

¹⁷⁴ Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-239, 07-12-2012

¹⁷⁵ See 1.3.1 "Complementarity and the Security Council Referral"

¹⁷⁶ See 1.3 "triggering Mechanisms"

¹⁷⁷ See 1.3.1 "Complementarity and the Security Council Referral"

19 (2) and 53 of the Rome Statute that the State concerned is allowed to challenge the jurisdiction of the court according to the criteria enumerated in articles 17 and 19 of the Statute.

Moreover, it was also discussed that, according to the UNSC Res, the State of Libya is obligated to cooperate with the Court and this obligation is originated from the UN Charter article 25¹⁷⁸. However, this matter, according to the ICC practice, does not indicate that the State is lacking the capacity to put forward a challenge to admissibility. In fact, this matter is further supported by article 16 of the Rome Statute.¹⁷⁹

On 1 May 2012, the NTC challenged the admissibility of the case against Saif Al-Islam Qaddafi and Abdullah Al-Sennusi. Consequently, the court granted permission to postpone their surrender to the ICC, pending a decision by the court's judges on admissibility issues.¹⁸⁰ Therefore, it is clear that the court opted to grant the possibility of challenging the court's jurisdiction even after the Security Council had referred the case to the court.

2.2.3- Legal Ground to Indict Saif Al-Islam

After the referral of the case to the ICC by the UNSC, the ICC issued 3 warrants of arrest for Moammar Qaddafi, Saif Al-Islam Qaddafi and Abdullah Senussi for the commission of the crimes against humanity of murder and prosecution.¹⁸¹ On 3 March 2011, the Office of the Prosecutor formally declared that there were reasonable grounds to believe that Saif Al-Islam Qaddafi, as de facto prime minister of Libya, had been involved in committing those crimes, which fall within the jurisdiction of the Court.¹⁸² Following that announcement, the Pre-Trial Chamber I issued his warrant of arrest, accusing him of committing the crimes against humanity of murder and persecution of civilians within the meaning of articles 7(1) (a) and (h)¹⁸³.

¹⁷⁸ United Nations Charter, Article 25:

“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

¹⁷⁹ Rome Statute, Article 16:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

¹⁸⁰ Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, ICC-01/11-01/11-163, 01-06-2012

¹⁸¹ Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-01/11-3, 30-06-2011

¹⁸² Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Qaddafi, Saif Al-Islam Qaddafi and Abdullah ALSenussi, ICC-01/11-01/11-1, 30-06-2011, Para 3

¹⁸³ Warrant of arrest for Saif Al-Islam Qaddafi and Senussi, 27 June 2011

2.3- Admissibility of Libya cases before the ICC: Complementarity in the case of Libya

On 1 May 2012 through an application pursuant to article 19, the NTC officially challenged the court's jurisdiction. The challenge was made on the ground that Libya's "national judicial system [was] actively investigating Mr Qaddafi for his alleged criminal responsibility for multiple acts of murder and persecution."¹⁸⁴ It then claimed that "the national proceedings concerning these matters [were] consistent with the Libyan government's commitment to post conflict transitional justice and national reconciliation; "[I]t reflects a genuine willingness and ability to bring the person concerned to justice in furtherance of building a new and democratic Libya governed by the rule of law."¹⁸⁵ They moreover believed that "to deny Libyan people this historic opportunity to eradicate the long-standing culture of impunity would be manifestly inconsistent with the object and purpose of the Rome Statute, which accords primacy to national judicial system."¹⁸⁶ They consequently requested the court to declare the case inadmissible and withdraw the surrender request of the two suspects.

Libyan government's challenge is based on article 17(1) (a), by means of which, the case is being investigated or prosecuted by the State which has jurisdiction over the case. However, according to that article if a case is to be rendered inadmissible the State must show that it is willing or able to carry out the investigation and prosecution genuinely¹⁸⁷.

In the next sub-heading, the credibility of Libya's claims by which the NTC has challenged the Court's jurisdiction and its components will be examined and then the related parts of the complementarity regime will be applied to the case of Libya.

In order to assess the credibility of Libya's claim that they were investigating and prosecuting Saif, a few questions need to be taken into account. According to the jurisprudence of the ICC regarding paragraph 17 (1) (a) there are a few things required to be considered. First, as it was shown earlier in examining whether the State is investigating or prosecuting the case, the court has to consider first whether the State is "actively investigating" the case,¹⁸⁸ and then whether that investigation meets the requirements of the "same person, same conduct" test¹⁸⁹ as asserted by the Court. These two matters, the active investigation of Libya and "the same person, same conduct test," will be discussed below:

¹⁸⁴ Libya Application, "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute," No: ICC-01/11-01/11, 1 May 2012, Para. 1

¹⁸⁵ Ibid, Para 2

¹⁸⁶ Ibid

¹⁸⁷ See 1.2.2.1 "the case is being investigated or prosecuted"

¹⁸⁸ Libya Application, "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute," No: ICC-01/11-01/11, 1 May 2012, Para. 2

¹⁸⁹ Ibid

2.3.1- Is Libya Actively Investigating Saif Al-Islam case?

Libya has based its challenge on admissibility mostly on the fact that it is actively investigating the case against Saif Al-Islam.

The first attachment explains that Libya is adopting a new law into its national Penal Code to enable the General-Prosecutor to investigate crimes within the jurisdiction of the ICC and purports that it is a unique opportunity to the national reconciliation process and to provide a trial with the highest international standards while emphasized the primacy of the national jurisdiction against the ICC complementarity regime¹⁹⁰. It also stated that they had put so much effort into reforming the judicial system and that they had cooperated with the ICC Prosecutor to gather evidence¹⁹¹. Amongst other improvements, they claimed to have been cooperating with the international organization to acquire necessary technical assistance, which the prosecutor and the judiciary might require¹⁹². In addition, it was announced that the trial would be held public and open to UN and other international organizations.¹⁹³

In Annex B, the NTC shows its communications with international organizations such as the Office of the United Nations High Commissioner for Human Rights (OHCHR) and it shows the United Nations Office of Drugs and Crimes (UNODC) requested its technical assistance to rebuild Libya¹⁹⁴. In Annex G, the NTC provides a constitutional declaration in which standards of fair trial alongside with other human rights has generally been enshrined¹⁹⁵.

Annex K contained the translation of various phases of the legal proceedings and guarantees for the accused in Libya Penal Rules and Procedure¹⁹⁶. finally, annex J shows a copy of the NTC Decree to introduce core crimes into Libyan Legislation titled as “National Transitional Council Decree Recognizing the Applicability of International Crimes within Libyan Law;”¹⁹⁷ it took the verbatim of article 6, 7, 8, 25 and 77 of the Rome Statute. In addition, Libya argued that the Prosecutor General has been collecting evidence and witnesses on a confidential basis¹⁹⁸; it comprises witness statements, photographs and reports from volunteers,¹⁹⁹ all of them positioned as confidential without any name and date.

¹⁹⁰ Libya Application, “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,” No: ICC-01/11-01/11, 1 May 2012, ICC-01/11-01/11-130-AnxA

¹⁹¹ Ibid

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Ibid- AnxB

¹⁹⁵ Ibid- AnxG

¹⁹⁶ Ibid- AnxK

¹⁹⁷ Ibid- AnxJ

¹⁹⁸ Libya Application, Para 39

¹⁹⁹ Libya Application, Para 45

Primarily, it should be noted that Libya's effort in cooperating with other international organizations and its intention to enhance the rule of law and democracy in Libya seems remarkable. However, these attempts currently need to be understood in the context of the current issue, which is whether these attempts can deter the court's jurisdiction over Libya cases before the ICC and consequently render the case inadmissible as the NTC requested.

Here are some observations regarding Libya's claims:

First, according to the Libya application, its councils repeatedly emphasized the principle of complementarity and the primacy of the National jurisdiction over a case. In this regard, there is no need to say that the ICC is perceived to be the court of the last resort and perhaps the complementarity is the cornerstone of the Rome Statute²⁰⁰. Nevertheless, in fact it shall not outweigh the importance of the overall purpose of the Statute, as reflected in the fifth paragraph of the preamble, namely "to put an end to the Impunity"²⁰¹. As important as State sovereignty is to the principle of complementarity, "[c]onsiderations of state sovereignty should not be allowed to detract the Court from the principle of effective international prosecutions."²⁰² Moreover, as found by the ICC Appeals Chamber, the so called 'presumption in favour of domestic jurisdictions' does not oblige the Court to accord domestic authorities leeway to allow domestic investigations to progress to such a point, where they would trigger the admissibility threshold; this presumption in favour of domestic jurisdictions only applies when there is, or has been, a concrete investigation and prosecution against the defendant²⁰³. According to the Appeals Chamber, one can infer that the Court interprets the Rome Statute in way that meets its purpose over State sovereignty²⁰⁴.

Second, the term investigation has been defined by the Court's jurisprudence as "the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses"²⁰⁵. In addition, the appeal's chamber further provides as to the quality of such an investigation as "they must cover the same "case,"

²⁰⁰ See 1.2.1 "rationale of complementarity regime"

²⁰¹ See 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, 25 September 2009, 01/04-01/07-1497, Para. 83.

²⁰² J. Pichon, 'The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court,' *International Criminal Law Review* 8 (Martinus Nijhoff Publishers, 2008) 185, 201.

²⁰³ 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, Para 44

²⁰⁴ See 1.2.2 "admissibility"

²⁰⁵ See the "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'" (Appeals Chamber), No. ICC-01/09-02/11-274, 30 August 2011, par. 1.

namely the same individual and substantially the same conduct as alleged in the proceedings before the ICC²⁰⁶.

Furthermore, not all the evidence is acceptable but since the burden of proof rests on the State challenging the Court's jurisdiction, the Appeals Chamber asserted that the State's evidence in support of an admissibility challenge must be of a "sufficient degree of specificity and probative value" that describes that the State is indeed investigating the case²⁰⁷.

It should nonetheless be noted that the ICC additionally contented in the Kenya Challenge to the Admissibility Decision that the investigation or prosecution requires that I) the same person is being genuinely investigated by the national jurisdiction and II) national investigations cover substantially the same conduct as alleged in the proceedings before the ICC²⁰⁸. Hence, the application of the test – the same person, same conduct – in the current situation owing to the Libya claim regarding its investigation will play a key role in the Court's assessment of Saif Al-Islam case. This test will be applied below while considering Libya's challenge to admissibility.

2.3.1.1- The Same Person, Same Conduct Test

There are two claims made by Libyan authorities that require examination. First, they indicated that there had been investigation regarding Saif Al-Islam launched into the allegation of financial crimes on November 2011.²⁰⁹ Then, on 17 December 2011, they submitted that another investigation had been carried out in relation to "all crimes committed by Mr Qaddafi during the revolution."²¹⁰

As to the first allegation regarding financial crimes, it should be pointed out that, as article 5 of the Rome Statute enumerates crimes within the jurisdiction of the court and as articles 6,7 and 8 provide details of those crimes, financial crimes, regardless of their graveness, are not within the

²⁰⁶ Ibid, also the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant for arrest for Mathieu Ngudjolo Chui" (Pre-Trial Chamber I), No. ICC-01/04- 02/07-3 and No. ICC-01/04-01/07-262, 6 July 2007, Para. 21 ("it is a *conditio sine qua non* for such finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court"), the "Decision on the Prosecution Application under Article 58(7) of the Statute" (Pre-Trial Chamber I), No. ICC-02/05-01/07-1-Corr, 15 May 2007, Para. 24 and the "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo" (Pre-Trial Chamber I), No. ICC-01/04-01/06-8-Corr, 24 February 2006, Para. 31, p. 20.

²⁰⁷ 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, Para2.

²⁰⁸ Ibid., Para. 39

²⁰⁹ Libya Admissibility Challenge, Para. 42.

²¹⁰ Ibid. Para. 44

court's jurisdiction. Consequently, that does not concern the Court's jurisdiction. However, as to the second assertion, same conduct, the existence of the crimes according to which the accused is being investigated in Libya's penal law is decisive. Since Libya has not enshrined those crimes in its penal law, a determinative element would be whether, as the Court affirmed in the so-called admissibility test, it is substantially the same conduct.

In this regard the International Criminal Court for Rwanda (hereinafter ICTR) in its Statute paragraph 2 article 9 and also Bagaragaza case provides,²¹¹

“According to this statutory provision, the Tribunal may still try a person who has been tried before a national court for “acts constituting serious violations of international humanitarian law” if the acts for which he or she was tried were “categorized as an ordinary crime.” Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.”²¹²

As we observe, there is a difference of interest between the crimes of an international character and crimes of national character. But there are authors who ambivalently assert that solely a lack specific provision for dealing with crimes of an international characters is not enough to render a case admissible before the Court. However, the Court shall take into consideration other factors too.²¹³

As stated by Libyan authorities, they have charged Saif with crimes such as murder, persecution and other charges not included among the ICC charges such as intentional murder, torture, incitement to civil war, indiscriminate killing, misuse of authority against individuals, arresting people without just cause and unjustified personal liberty in accordance with Libyan Penal Act²¹⁴. These are evidently normal crimes and not crimes of an international character by which the court issued arrest of warrants. This has not been characterized by the Court yet to how to assess whether these crimes could be considered as substantially the same. In this regard, it does not seem hard to meet the first part of the test (same person, same conduct) but as to the second part, from a criminal law perspective, these two categories of crimes – crimes by which the ICC is investigating and those of the Libyan investigation – are different by their very nature. The reason is that the contextual element of the crimes against humanity, which need to be perpetrated as “part of a widespread or systematic attack directed against

²¹¹ ICTY Statute, article 9 (2)

²¹² ICTY, Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal, Aug. 30, 2006. Para 17

²¹³ Kleffner, supra note 19, 122-123, 156- 157

²¹⁴ Libya Admissibility Challenge, Para 75

any civilian population, with knowledge of the attack,”²¹⁵ is something additional to the domestic ordinary crimes. In this respect the ICC in Lubanga case DRC admissibility decision, the PTC I required the Democratic Republic of Congo (DRC) to investigate not only against the same alleged perpetrator in the same region as the Prosecutor, but also the same crimes. Consequently, the court approved the admissibility of the case before the ICC, because the DRC did not investigate Thomas Lubanga for the war crime of conscripting or enlisting children into the national armed forces.²¹⁶

Moreover, the mode of liability is also dissimilar from domestic criminal law, and Libyan Penal Act is not an exception. Normally crimes within the jurisdiction of the court are crimes committed by individuals who do not soil their hand in the material element of the crime. For that reason, the Rome Statute provides perpetration through other individuals through another person or group of persons acting with a common purpose as the principal perpetrator²¹⁷. As an instance, in the present case, Saif is being accused of conducting those perpetrations as an indirect co-perpetrator²¹⁸. This is different from the international criminal system, in which such a person might just be recognized as responsible for a second-hand perpetrator under titles such as aiding or abetting in national criminal law, much less grave than those perceived by the Rome Statute.

Moreover, it was already pointed out that crimes within the jurisdiction of the Court are crimes of international characters²¹⁹, which violate universal values. In this respect, it is obvious that regular crimes do not bear any interest to international concerns and universal values and thus they do not meet one of the purposes of the Rome Statute to address crimes of international concerns.

The ordinary meaning of “substantially,” that is an adverb of the adjective “substantial” explains that it means “to a great or a significant extent” and for the most part essentially. Therefore, if one reads it together with the first element of the admissibility test, one might conclude that so long as national authorities are to a great or significant extent investigating the same person for essentially the same conduct, then they may succeed in retrieving their national jurisdiction and rendering a case inadmissible before the Court. In total, the author is of the view that, as reasoned above, it is by no means possible to interpret a collection of ordinary crimes within the national criminal rules to substantially the same conduct as those enumerated in the Rome Statute. The first reason is that national and international crimes serve different purposes. The second reason is that the application of mode of

²¹⁵ Rome Statute, Article 7(1)

²¹⁶ See Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06-8-US-Corr, Paras 37-39; See also Prosecutor’s Submission of Further Information and Materials, ICC-01/04-01/06-39-US-AnxC, Para. 18,

²¹⁷ Rome Statute, Article 25

²¹⁸ Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11, 27 June 2011

²¹⁹ See 1.2.2.1 “The Case is being Investigated or Prosecuted Genuinely, Article 17 (1) (a)”

liability in international crimes is dissimilar to that of national criminal law. Thirdly, the meaning of the word “substantially the same” might indicate that what the court means is slight differences between various criminal qualifications within the Rome Statute, and this must not be interpreted to mean that a bundle of ordinary crimes would tantamount to “substantially the same conduct.” In fact, in the absence of any clarification by the Court in this regard it remains unclear what the Court intends to apply in such a case.

In this regard, Professor William Schabas has argued that there is no benefit in devaluating the admissibility challenges to “a mechanistic comparison of charges in the national and the international jurisdictions, in order to see whether a crime contemplated by the Rome Statute is being prosecuted directly or even indirectly.”²²⁰ Then, he proposed that the better approach would be to make “an assessment of the relative gravity of the offenses tried by the national jurisdiction put alongside those of the international jurisdiction”²²¹.

Perhaps a potentially useful solution for the Libya could be introducing international crimes into the national judicial system to avoid facing confusion. Libyan authorities did so, but it has not been enacted by a legitimate legislator, so the effect of it remains doubtful.

In total, in the present case, having considered that Libya does not have those crimes in its Penal Law, despite the promises that the NTC has made to introduce international crimes into their penal law²²², it cannot meet the same conduct, the second element of the admissibility test, unless the Court considers the gravity approach proposed by Professor Schabas mentioned above. Even though the NTC issued a decree to introduce core crimes into its domestic law, it does not guarantee the legal effect of the decree since it has not been enacted by a legitimate legislative power. At its most eloquent, it might be interpreted as the intention of the NTC to comply with the Rome Statute in case of a referral by the UNSC, which inherently is originated from the UN Charter²²³.

The next important point related to active investigation of Libya is the claim of the NTC regarding the confidentiality of evidence in the investigating phase of the Libya penal law, according to which they have justified the vagueness and lack of specificity of their witnesses and other evidence. Here the credibility of this claim is discussed below:

²²⁰ William A. Schabas, *An Introduction to the International Criminal Court*, 182 (2007), mentioned and cited in Charles Chernor Jollah, “Kenya V. The ICC Prosecutor,” *Harvard International Law Journal*, page 238

²²¹ *Ibid*, also for a discussion on this particular issue see Charles Chernor Jollah “Kenya V. The ICC Prosecutor,” *Harvard International Law Journal*

²²² Libya Application Para. 84, Letter from NTC to Libyan ICC Coordinator regarding draft Decree on international crimes. Annex K.

²²³ United Nations Charter, Article 25:

“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

2.3.1.2- Confidentiality of Evidence

Libya in its defence purported that the provided evidence is confidential according to its domestic rules and cannot be submitted²²⁴. In this regard, the Prosecutor General may solely submit summaries²²⁵. That also seems to bring up a new issue not anticipated by the Statute. If the State does not display the evidence, it surely casts doubt on the question of their on-going investigation before the ICC. The Appeals Chamber demonstrated that it confirmed the decision of Pre-Trial Chamber II in the Kenya case by remarking that the court did not confirm the Chamber's findings **not** because:

“[I]t does not trust Kenya or doubted its intention but rather because Kenya failed to discharge its burden to provide sufficient evidence to establish that it was investigating the three suspects.”²²⁶

Simple reading of the court's statement may guide us to infer the fact that the court widely relies on the evidence at hand rather than the promises or claims or wishes of the States to carry out an investigation²²⁷ in near future or in any confidential manner. Drawing upon the ECHR jurisprudence, in this respect, ECHR in its decision where the requesting State refused to send the copies of the required documents to the Court under the excuse that under their domestic rules they could not disclose the documents held that

“[I]t may reflect negatively on the level of compliance and it is insufficient to justify their conduct.”²²⁸

The Inter American Court of Human Rights (OAS) has also endorsed this opinion by stating that:

“[T]he disclosure of State-held information should play a very important role in a democratic society because it enables civil society to control the actions of the government to which it has entrusted the protection of its interests.”²²⁹

²²⁴ Libya Application, Para39

²²⁵ Libya Application, Para 40

²²⁶ 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, Para 82

²²⁷ See 1.2.2.1 “The Case is being Investigated or Prosecuted Genuinely, Article 17 (1) (a).” According to the decision in Kenya admissibility challenge it was asserted by the Court that the mere statement of the State that is investigating is not determinative but it rather must be based on probative values.

²²⁸ Khadisov and Tsechoyev v. Russia (Application no. 21519/02), 5 February 2009 at Para. 177-179, Also Imakayeva v. Russia, no. 7615/02, § 123, ECHR 2006

²²⁹ Case of Claude-Reyes et al. v. Chile Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, Para. 111. It is also cited in Stoll v. Switzerland, no. 69698/01/, 10/12/07, Grand Chamber

In conclusion, as we observed active investigation and its excuses have been dealt with by the Court so far and in this regard, one may not disregard the Court's jurisprudence. In respect to State sovereignty and its primacy, the Court asserts that it does not oblige the Court to accord leeway to allow domestic investigation to progress to the extent where they would trigger the admissibility threshold²³⁰. It seems that the Court also tied the promptness of an investigation to its assessment of admissibility. However, it should be noted that in the process of assessing whether the State is conducting actual investigation, according to the Court's above-mentioned statement, that might also be considered an unjustified delay and consequently be interpreted as unwillingness of the State.

Regarding the "same conduct, same test" we also observed that unless the Court assesses the Decree issued by the NTC to introduce the Rome Statute crimes into its penal system as credible, it seems unlikely that the Court would declare the case admissible based on the investigation of Libya for a bundle of ordinary crimes. Another approach for the Court could be the gravity approach asserted by Professor Shabbos. In fact, it was mentioned earlier²³¹ that one of the supportive pieces of evidence that Libya attached to its application to challenge the Court's jurisdiction was a decree to introduce the core crimes into their penal system which in itself could be regarded as supportive of the fact that the investigation of ordinary crimes might not possibly satisfy the court to render a case inadmissible in favour of Libyan authorities.

And finally, according to the ICC jurisprudence, if Libyan authorities are about to justify a part of their clarity of evidence by recourse to their domestic provision which asserts the confidentiality of investigation during the investigation, it may reduce the clarity and probative value of the provided evidence before the Court since that is neither contributory to their claim on their active investigation nor approved by other international judicial bodies as an acceptable excuse.

It should be pointed out that the decision of the Court that required the Libyan authorities to put forward further submissions to support their claim²³² represented the lack of probative values of their evidence that they were actively investigating cases in Libya to that date or a rejection of their excuses to keep parts of their investigation confidential. However, there are other criteria that the Court, according to article 17, shall take into consideration to decide whether the State is "unwilling" or "unable" to

²³⁰ 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, Para 44. Also see sub-heading "the case is being investigated or prosecuted"

²³¹ See 1.2.2.1 "The Case is being Investigated or Prosecuted Genuinely, Article 17 (1) (a)"; also 2.3.1 "Is Libya Actively Investigating Saif Al-Islam Case?"; See 2.3.1.1 "The Same Person Same Conduct Test"

²³² Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-239

investigate the case genuinely if it proves that there is actually an investigation going out. In the next two headings, both issues will be analysed:

2.3.2- Is Libya Willing to Investigate Saif Al-Islam's Case Genuinely?

As to the admissibility of a case before the ICC, it was mentioned that article 17 is the yardstick for that particular purpose. The article was described and examined in section one²³³. Additionally, the relevant part of the article in Saif's case and Libya's challenge to admissibility was considered in the previous sub-headings. Those data will be used in this section for the purpose of the current thesis to apply the complementarity principle to the Libya Case, particularly Saif Al-Islam Qaddafi and the question of whether Libya is willing to investigate Saif case genuinely.

The first criterion, as described in article 17, is whether the state, which has jurisdiction over a case, is investigating or prosecuting the persons concerned genuinely. Accordingly, that initiation deters the Court from exercising jurisdiction over the case.²³⁴

In this section, it will be attempted to examine this aspect of the Libya Case by considering the whole picture of the State and other events which might be relevant to assessing whether this claim of Libyan authorities is credible and consequently whether it will render the case inadmissible before the court based on the willingness of Libya to genuinely investigate Saif Al-Islam. However, these grounds of unwillingness shall be considered after ascertaining that there was an investigation as the Court contended in the Katanga decision.²³⁵

As to the question of the willingness of the Libyan authorities in the present case based on article 17 (2), it is required to apply the perceived situations in the article, "shielding the person concerned," "unjustified delay" and "lack of independence and impartiality of the State," to the retained facts from the Libya situation.

²³³ See 1.2.2 "admissibility"

²³⁴ See 1.2.2.1 "The Case is being Investigated or Prosecuted Genuinely, Article 17 (1) (a)"

²³⁵ Appeals Chamber, 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, 25 September 2009, ICC-01/04-01/07-1497, paragraph 78. See also Appeals Chamber, Corrigendum to the Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges," 19 October 2010, ICC-01/05-01/08-962-Corr, paragraphs 107-109.

2.3.2.1- Is Libya Shielding Saif Al-Islam?

The first form of unwillingness has to do with whether the State in the light of the due process recognized in international law is shielding the suspect. Article 17 (2) (a) provides:

“The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article.”

One of the criteria provided in defining unwillingness of the State is whether the investigation is being conducted, in the present case, for shielding Saif Al-Islam from criminal responsibility for crimes within the jurisdiction of the Court. The word “shield” as a verb means protect from a danger, risk or an unpleasant experience²³⁶.

A question may arise: What if the purpose of the investigation is to harm the person concerned intentionally by deterring the ICC jurisdiction where the rights of the accused have been violated fervently and overzealously? Could the court consider that as shielding the person from criminal responsibility?

Here the Libya claim that Saif Al-Islam proceedings is a matter of highest national importance in bringing justice for the Libyan people and also demonstrating the capability of their judicial system and fair trial is noticeable. The reason is that, as they claimed, their attempt to deter the Court’s jurisdiction is for bringing justice for the Libyan people and for demonstrating the rule of law and the capability of the national judicial system in Libya²³⁷. However, criminal responsibility is not revenge; it is punishing the wrongdoer while protecting him from violations of his rights. Although some commentators deferred, this is perhaps the reason to incorporating the “international due process” in the beginning of the article²³⁸. In addition, in a very far-fetched interpretation of the “shielding the person concerned” from criminal responsibility, “shielding” may be interpreted as depriving the perpetrator from his inherent rights.

It was discussed in the relevant chapter that “shielding the person concerned” is an internal condition, which needs the devious intent of the State. It necessitates a causal link between State’s purpose and inadequate procedural steps. In addition, it should be said that it normally works in favour of the accused. To this date in the present case, given the fact that the Zinitani militia is holding Saif and considering the hardships that he has

²³⁶ Oxfords Dictionary

²³⁷ Libya Application, “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,” No: ICC-01/11-01/11, 1 May 2012, ICC-01/11-01/11-130-AnxA

²³⁸ See 1.2.1 “Rationale of the complementarity”; Also see 1.2.2.5.1 “Due process in international law”

been facing in meeting with his lawyers²³⁹ and having the other rights that a normal suspect would have, there is no proof that Libya is taking these Steps in favour of Saif Al-Islam Qaddafi. Libyan authorities asserted that the purpose of challenging the Court's jurisdiction is to bring justice for Libyan people and demonstrating the rule of law. The asserted purpose, as it was pointed out, is not just favourable but also desirable for the Court²⁴⁰. Thus, this statement would not indicate a devious intent.

This devious intent shall be particularly for shielding Saif. Libya claims that it is actively investigating the case contrary to the current situation in which the Court is doubtful that Libya is. Could this prove the "unwillingness" of Libya for the purpose of shielding? The answer should be negative since the "unwillingness" premised on shielding does require a causal link between the devious intent of the State and shielding Saif. Furthermore, it should be noted that the scholars are of the view that shielding must work in favour of the suspect not where his rights have been violated²⁴¹.

It was also asserted that in interpreting the three criteria of unwillingness, some argue that the persistent violation of the suspect's rights should be considered as unwillingness of the State²⁴² but not under the criterion of shielding but rather under other criteria such as "lack of impartiality and independence of the judiciary"²⁴³ or "inability"²⁴⁴ of a State or where it meets the "unjustified delay"²⁴⁵ requirement.

In sum, it does not seem that the NTC is trying to shield Saif from a criminal responsibility but it is rather depriving him from a fair trial given that the judicial system is not well functioning²⁴⁶ and to this date unable to acquire the suspect. Thus, the Court should consider the functionality of the national judicial system of Libya first. This matter has been dealt with in section "Availability of National Judicial System of Libya?"²⁴⁷

²³⁹ M. Vincent, "Melinda Taylor unlikely to be welcome to return to Libya," ABC News. 2 July 2012, available at <http://www.abc.net.au/pm/content/2012/s3537317.htm>; Also News.com.au, "Melinda Taylor says she was jailed because 'doodles' looked like code," 7 July 2012, available at <http://www.news.com.au/breaking-news/freed-lawyer-slams-libyan-justice/story-e6frfkp9-1226419517747>

²⁴⁰ See 1.2.2.5.2 "Shielding the Person Concerned"

²⁴¹ Ibid

²⁴² See 1.2.2.5.1 "Due process in international law"

²⁴³ See 1.2.2.5.4 "Impartiality and Independence of Judiciary"; also see 2.3.2.3 "Is Libya Able to Conduct the Proceeding Independently and impartially?"

²⁴⁴ See 1.2.2.6 "Inability, Article 17 (3)"; also 2.3.2 "Is Libya Willing to Genuinely Investigate the Cases?"

²⁴⁵ See 1.2.2.5.3 "Unjustified Delay"; also 2.3.2.2 "Is it an Unjustified Delay in Saif Al-Islam Proceeding?"

²⁴⁶ See 2-3-3-2 "Availability of National Judicial System of Libya?"

²⁴⁷ See 2-3-3-2 "Availability of National Judicial System of Libya?"

2.3.2.2- Is there an unjustified delay in Saif Al-Islam's proceedings?

Regarding the admissibility of a case and unwillingness, paragraph 2(b) article 17 provides that:

“There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.”

As it was mentioned earlier, due to the lack of any form of measurement in the Rome Statute, the court shall decide by considering various evidence at hand, whether a delay is unjustified. Moreover, delay should not stem from legitimate reasons²⁴⁸.

It was discussed above²⁴⁹ that this paragraph of article 17 (2) requires three conditions. First, there should be a “delay,” and that delay should be “unjustified” and that unjustified delay should be “inconsistent with an intent to bring the person concerned to justice.” The application of these criteria will be followed below. However, it should be kept in mind that unlike the condition of shielding, which required a causal link between the devious intent of the State and the actual act of shielding, in this case, the mere presence of inconsistency with a *bona fide* investigation would suffice²⁵⁰. Another difference is that the shielding condition works in favour of the suspect, while an “unjustified delay” might be invoked even when the rights of the accused have been violated.²⁵¹

It was noted that there is overlap between “unjustified delay” and “trial within a reasonable time.” In addition, for the sake of interpreting that, one cannot disregard the *travaux perpétarioux* in this respect.²⁵² It is said that the notion of “undue delay” is considered too low by which to determine whether a State is unwilling.²⁵³

In order to assess whether, in the present case, there is as an “unjustified delay” to bring Qaddafi to justice, the circumstances of the case are decisive. In the present case, it was indicated that Saif was arrested on 19 November 2011 and since then he has been kept in detention by the Zinitan Militia. At the time of his arrest, the ICC Prosecutor requested Libya to hand him over to the Court²⁵⁴. In return, on 23 January 2012 Libya transmitted a request postponement of surrender of Saif Al-Islam

²⁴⁸ Joe Stigen, *Supra* note 117, page 200

²⁴⁹ See 1.2.2.5.3 “Unjustified Delay”; also 2.3.2.2 “Is it an Unjustified Delay in Saif Al-Islam Proceeding?”

²⁵⁰ See 1.2.2.5.3 “Unjustified Delay”

²⁵¹ See 1.2.2.5.3 “unjustified delay” and 1.2.1 “rationale of complementarity” and 1.2.2 “admissibility”

²⁵² Vienna Convention on the Law of Treaties, Article 31

²⁵³ See 1.2.2.5.3 “Unjustified Delay”; also 2.3.2.2 “Is it an Unjustified Delay in Saif Al-Islam Proceeding?”

²⁵⁴ "Prosecution's Submissions on the Prosecutor's recent trip to Libya" on 25 November 2011, ICC-01/11-01/11-31

Qaddafi²⁵⁵, which was consequently rejected by the PTC²⁵⁶ on 7 March 2012. On 22 March 2012, Libya submitted a second request of postponement in which it notified the Pre-Trial Chamber of its intention to challenge the admissibility of the case against Mr Gaddafi by 30 April 2012 and requested a postponement of the Surrender Request pending a decision on that challenge. On 4 April 2012, the Pre-Trial Chamber rendered its “Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi” in which it rejected the Second Postponement Request too²⁵⁷ based on the reason that there had not been an application to challenge the court’s jurisdiction. Consequently, the NTC made its challenge and refused to surrender Saif Al-Islam to the ICC. Saif was brought to a court in Libya on 17 January 2013 for the first time since his arrest. The Libyan Court postponed the trial until May, as there was no lawyer to represent him. Albeit, the trial was not regarding the ICC accusations but instead in connection with the incident that happened during his visit with his ICC-appointed lawyer, Melinda Taylor, as they were both accused of transmitting information that threatened Libya’s national security²⁵⁸.

Until now, Saif has been detained by the Zinitani militia for 16 months and so far, there has been no indication of concrete steps to an investigation and a prosecution of him. Besides, he has not been given free access to his lawyers, and when he was, he was accused of threatening national security of Libya. In fact, the NTC has not been successful in convincing the Zinitani militia to hand him over to a legal detention centre under the power of the NTC where he can be visited by international organizations such as the ICC and NGOs, which would deny his expedient access to the Court. This may also be associated with the fact that Libya has been experiencing reformation from a collapse and its national judicial system is not functioning well.

Considering the given circumstances regarding Saif, it does not seem strange to consider the delay unjustified. To be justified, it is for the Libyan authorities, who hold the onus to prove that this delay is justified. Libya claimed that it is investigating the case actively and the delay is legitimate.²⁵⁹ Besides, they argued that under the Libyan law, the investigation’s details might not be revealed. It was concluded that their excuse for not revealing the details of the investigation might not be considered acceptable under the jurisprudence of other international judicial bodies.²⁶⁰

²⁵⁵ Annex 1 to “Report of the Registrar on Libya’s observations regarding the arrest of Saif Al-Islam Gaddafi,” ICC-01/11-01/11-44-Anxl-Red.

²⁵⁶ Decision on Libya’s Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-72

²⁵⁷ Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100

²⁵⁸ Saif al-Islam Gaddafi appears in Libya court, BBC News, available at: <http://www.bbc.co.uk/news/world-africa-21066567>

²⁵⁹ Libya application, Para 11

²⁶⁰ See 2.3.1.2 “Confidentiality of Evidence”

The second point in this respect is that this unjustified delay shall be “inconsistent with an intent to bring the person concerned to justice.” It was noted that in considering whether there is an “unjustified delay,” there is no need to prove that the State is having devious intent but rather the mere presence of an inconsistency with a *bona fide* investigation is enough.²⁶¹

As for the evidence which supports the inconsistency with a due process or a *bona fide* investigation, the African Commission on Human and Peoples’ Rights (hereinafter ACHR) with respect to the case of Mr Saif Al-Islam Gaddafi called on Libyan authorities to secure his fundamental rights, as guaranteed by the African Charter on Human and Peoples’ Rights²⁶². It further held that

In view of the alleged length of detention of the Detainee [Mr Gaddafi] without access to a lawyer, family or friends; and with due regard to the Respondent’s alleged failure to respond to the Provisional Measures requested by the Applicant, and the requirements of the principles of justice that require every accused person to be accorded a fair and just trial, the Court decided to order provisional measures *suo motu*; In the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee (emphasis added).²⁶³

The Libyan authorities so far have failed to acquire the suspect, and there has been a lack of clarity in their investigation and its details. In addition, the suspect has been kept in detention for too long without proper access to his lawyers or a judge, and he has been denied his right to communicate with his family and other minimum standards that a normal suspect is supposed to have. Therefore, it may be adduced that there has been an “unjustified delay” in this case, which should render the case admissible before the ICC in the absence of any further justifiable explanation.

All in all, as the old adage says, “justice delayed is justice denied.” The questions of Libya’s collapse and the availability of its national judicial system will be discussed in different sections.

2.3.2.3- Are Saif’s Proceedings Being Conducted Independently and Impartially?

The independence and impartiality of Libya is one relevant factor for the ICC when making its decision regarding admissibility.

²⁶¹ See 1.2.2.5.3 “Unjustified Delay”

²⁶² ‘Order on Provisional Measures’, In the Matter of African Commission on Human and Peoples’ Rights v.

Libya, Application no. 002/2013 at Paras. 15 and 16, Annex A

²⁶³ ‘Order on Provisional Measures’, In the Matter of African Commission on Human and Peoples’ Rights v. Libya, Application no. 002/2013 at Paras. 16 and 17

It was stated that due to the lack of the definition of independence and impartiality of a judiciary system, human rights provisions could be helpful if they are applied to various situations including Libya.²⁶⁴ General comment 13 provides conditions, inter alia, the existence of guarantees against outside pressures and the question of whether the judicial organs display a posture of independence as well as other objective evidence that have to be taken into consideration.²⁶⁵ Moreover, as for impartiality, both institutional and individual impartiality are intended.

In this respect, the characteristic of the former regime's judicial system is relevant. Allegedly, the lack of independence and impartiality were defining features of the Libyan legal system²⁶⁶. By February 2011, with the collapse of the Qaddafi regime, the NTC has primarily declared its intention to improve democracy and the rule of law²⁶⁷. It was followed by the issuance of a Constitutional Decree within which the independence and impartiality of the judiciary as well as fair trial standards were embedded.²⁶⁸ Yet, despite all these positive attempts, there seem to be challenges ahead²⁶⁹. In this regard, Judge Marwan Tashani, the head of the Libyan Judges Organization, stated,

“[T]he continuing detention of many of the members of Gaddafi's brigades and figures of his regime without questioning or according them any due process further illustrates the weakened role of the judiciary in ensuring the supremacy of the rule of law.”²⁷⁰

As for the indicative features of impartiality and independence, outside pressures over the judiciary in Libya are noticeable. As it was pointed out

²⁶⁴ See 1.2.2.5.4 “Impartiality and Independence of Judiciary”

²⁶⁵ N Jayawickrama, 515–518 and S Trechsel, 53–61, both with further references to relevant case law. See also Human Rights Committee, General Comment 13. On the jurisprudence of the Strasbourg organs, see Harris, O'Boyle and Warbrick 231–234. See also Informal Expert Paper for the ICC Office of the Prosecutor: The Principle of Complementarity in Practice, 29. See also “independence and impartiality of the judiciary”

²⁶⁶ UN Human Rights Committee (HRC), Concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya, CCPR/C/79/Add.101, Para. 14, 6 November 1998, available at:

<http://www.unhcr.ch/tbs/doc.nsf/0/de8b82142ebec610802566db00574644?Opendocument>

²⁶⁷ Libya Application, “Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,” No: ICC-01/11-01/11, 1 May 2012, ICC-01/11-01/11-130-AnxA

²⁶⁸ Libya “Constitutional Declaration” of 3 August 2011, article 31 to 33. Available at: <http://www.ntclibya.org/english/libya/>

²⁶⁹ HUMAN RIGHTS COUNCIL, Report of the International Commission of Inquiry on Libya, Nineteenth Session, U.N. Doc. A/HRC/19/68, 2 March 2012.

²⁷⁰ Judge Marwan Tashani, ‘The Revolution is Not Complete without an Independent Judiciary’, Mizaan: The Newsletter from Lawyers for Justice in Libya, April 2012 Issue 1, at: http://www.libyanjustice.org/downloads/Mizaan%20newsletter%203rd%20april%20-%20FINAL.pdf?utm_source=smartmail&utm_medium=email&utm_campaign=Mizaan+-+Issue+1+.

earlier, the militia power is still uncontrollable²⁷¹. Attack on judges and courtrooms have been reported.²⁷² The number of detainees is also indicative of the extent of the power of militias. In this respect, the recent UNSC resolution is relevant. On 14 March 2013 the Security Council expressed deep and grave concern at “the lack of judicial process for conflict-related detainees, many of whom continue to be held outside State authority [...] reports of human rights violations and abuses in detention centres [...] continuing reports of reprisals, arbitrary detentions without access to due process, wrongful imprisonment, mistreatment, torture and extrajudicial executions in Libya”²⁷³. Moreover, militia groups conducted an attack against the ministry of justice in response to the government attempts to take control over the detainees.²⁷⁴ After taking these incidents and other features into account, even before examining the impartiality and independence of the Judiciary, one may consider the ability of the judicial system. A judicial system must first be functional and then it may be independent and impartial.

There is a substantial link between a country’s security and the impartiality and independence of its judicial system. Certainly, if judges and other members of the judicial system do not feel safe and secure, consciously or unconsciously, they would not be able to carry out an investigation in the interest of justice. After taking these incidents and other features into account, even before examining the impartiality and independence of the Judiciary, one may consider the ability of the judicial system. A judicial system must first be functional and then it may be independent and impartial.

The report of the United Nations Commission of Inquiry on 2 March 2012 describes Libya’s judicial system:

“The judicial system is not functioning effectively, and suffers from the legacy of its past, when it was used as a tool of repression. At the time of the uprisings in February 2011, Libya had a parallel judicial system for cases deemed political and was subject to political pressure. Lawyers, judges, activists and other Libyans interlocutors told the Commission that [...] the system [...] lacked any independence and credibility in political cases. It is therefore unsurprising that the judicial system collapsed in the aftermath of the conflict and continues to suffer

²⁷¹ See 2.1.1.1 “Security and Militant Groups”

²⁷² ‘Judges’ Association condemns assault on Benghazi member’, Libya Herald 24 February 2013, <http://www.libyaherald.com/2013/02/24/judges-association-condemns-assault-on-benghazi-member/> ‘Derna

courthouse bombed’ Libya Herald 30 March 2013

<http://www.libyaherald.com/2013/03/30/26541/>

²⁷³ Security Council Resolution 2095, 14 March 2013, available at:

<http://www.un.org/News/Press/docs/2013/sc10939.doc.htm>

²⁷⁴ ‘Libya PM’s chief of staff feared abducted following confrontation between government, militias’ Associated Press 1 April 2013.

from a lack of trust by victims seeking redress and the Libyan public at large.²⁷⁵

Consequently, having considered the present case at hand, it seems the first thing that the court should decide upon is whether Libya is able to carry out the investigation and proceedings genuinely. Given the security in the State and reconstruction of the judicial system as well as the fact that this judicial system does not have any reputation to be assessed by, it seems highly probable that the judicial system is suffering from a fragile independence or impartiality, even if we consider them independent and impartial after Qaddafi, while the power of militia still can threaten individuals or government officials. In such situations, the ICTR has taken into account the “sufficient risk of interference”²⁷⁶ in Youssef Muniyazi case that where there is sufficient or reasonable risk of interference with the judiciary, the Court may find it competent to adjudicate the case.²⁷⁷ In the absence of any relevant decision in the ICC jurisprudence, the Court may find it applicable due to the fact that despite the serious attempt of Libya to reform its judicial system, evidence indicates that there exists “sufficient risk of interference with the judiciary.” This assessment would be underpinned by considering two reasons: first, the lack of sufficient functionality of the Judiciary, and second, the existence of the power of militia groups. Latest reports also confirm the power of militia in Libya to the extent that it requested other States to evacuate their nationals from Libya²⁷⁸. Non-functionality of the judiciary and militia power would lead us to the question of whether the State is actually able to investigate and prosecute. This question is considered below:

2.3.3- Is Libya unable to Prosecute within the Context of Article 17 (3)?

Article 17 (3), reads as follow:

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

²⁷⁵ Report of the International Commission of Inquiry on Libya, 02 June 2012, Para 41, Can be found at:

<http://www.unhcr.org/refworld/country,,UNHRC,,LBY,456d621e2,4ffd19532,0.html>

²⁷⁶ ICTR, The Prosecutor v. Yussuf Muniyazi, Case no. ICTR-97-36-R11BIS, Decision on the Prosecution’s Appeal Against Decision on Referral under Rule 11BIS, 9 October 2008, Para 30

²⁷⁷ Ibid.

²⁷⁸ Uncertainty Prevails In Libyan Security Assessment by Luke Vargas, United Nations World News, can be found at:

<http://www.talkradionews.com/news/2013/01/29/uncertainty-prevails-in-libyan-security-assessment.html>

What seems to be determinative first is whether Libya is encountering a total or substantial collapse, and second, whether Libya's judicial system is unavailable. The two statuses are discussed below, considering the current situation of Libya.

2.3.3.1- Is there a total or substantial collapse?

As it was described above, Libya's revolution was followed by an international humanitarian intervention authorized by the UNSC Res No. 1970. The former government was toppled and the head of the state was killed by the rebels and militias. The United Nations Commission of Inquiry in Libya first used the term "collapsed" in its report concerning Libya's judicial system²⁷⁹.

In defining the status of a collapsed State, it is described as "a failed State with a vacuum of power," and "within which political goods are obtained through private or ad hoc means. Security is equated with the rule of the strong. It is mere geographical expression, a black hole into which a failed polity has fallen."²⁸⁰ The collapsed and failed States are often used interchangeably. A failed State is characterized as when a State has been rendered ineffective and is not able to enforce its laws uniformly because of (variously) high crime rates, extreme political corruption, an impenetrable and ineffective bureaucracy, judicial ineffectiveness, and military interference in politics.

Given the security and political instability of Libya in the aftermath the revolution, it does not seem controversial to regard Libya as a substantially collapsed State. Besides, as expressed above, the power of militia has caused the Libyan authorities to be forced to negotiate with the Zintani militia to acquire Saif. This has been confirmed by the Libyan General Prosecutor.²⁸¹ Moreover, in his last court session Saif was broadcast from Zintan,²⁸² which may also indicate that the Libyan authorities lack the capacity to exercise full power all around Libya territory. In this regard the Security Council resolution expressing deep and grave concern toward "the lack of judicial process for conflict-related detainees, many of whom continue to be held outside State authority [...] reports of human rights violations and abuses in detention centres [...] continuing reports of reprisals, arbitrary detentions without access to due process, wrongful

²⁷⁹ Human Rights Council, Report of the International Commission of Inquiry on Libya, A/HRC/19/68, 2 March 2012, Para 780

²⁸⁰ See Robert I. Rotberg "Failed States, Collapsed States, Weak States: Causes and Indicators," Page 9

²⁸¹ "Pay row puts on hold Gaddafi son's transfer to Tripoli" middle-east-online.com, 28 May 2012 (ICC Press Review, 29 May 2012)

²⁸² BBC News, "Saif al-Islam Gaddafi appears in Libya court," 17 January 2013, available at: <http://www.bbc.co.uk/news/world-africa-21066567>

imprisonment, mistreatment, torture and extrajudicial executions in Libya²⁸³ is relevant.

2.3.3.2- Is Libya Judicial System is Unavailable?

It was mentioned above within the report that “the judicial system is not functioning.”²⁸⁴ Other reports similarly indicate that despite the improvements of Libya in this area, not only is the judicial system not functional but also there is a shortage of trained staff:

“The interim Government is gradually restoring the judiciary by reopening courts and recalling judges, but there still exists a lack of trained staff such as prosecutors, judicial police and forensic investigators [...] Detainees often have limited or no access to families and legal counsel and are unable to challenge the legality of their detention or to lodge complaints about torture and ill-treatment.”²⁸⁵

It shall however be noted that the unavailability of the domestic judicial system in Libya, should be measured by criteria provided in article 17(3) which are 1) to be unable to obtain the accused or 2) the necessary evidence and testimony or 3) to be otherwise unable to carry out its proceedings.

It was already pointed out that Saif was arrested by the Zinitan brigades on February 2011 and since then he has been kept in the custody of the Zinitanis. That has prompted a variety of criticism by questioning if the Libyan judicial system is able to investigate and prosecute the ICC suspects while it has failed to acquire the suspect from the hands of militias. We observed that Libyan authorities have been unsuccessful in gaining control over that process too. However, after the ICC appointed the Office of the Public Council for Defence (hereinafter OPCD) to represent Saif in the case before the ICC, the NTC provided two visits for his council, Ms. Melinda Taylor and her companions. OPCD’s second visit, which was reportedly made available after a longstanding effort of the OPCD, ended up in their custody for 22 days. Libyan authorities argued that they had been transmitting secret information during their visit with Saif. Consequently, they were set free after some negotiations between the ICC, the Zinitan Militia, and the NTC.

Regarding the witnesses and evidence, however, the report of the international commission of inquiry to investigate all alleged violations of

²⁸³ Security Council Resolution 2095, 14 March 2013, available at: <http://www.un.org/News/Press/docs/2013/sc10939.doc.htm>

²⁸⁴ See 2.3.2.3 “Is Saif Proceeding Being Conducted Independently and Impartially?”

²⁸⁵ Human Rights Council, Report of the International Commission of Inquiry on Libya, Nineteenth Session, U.N. Doc. A/HRC/19/68, 2 March 2012, Para 124, available at the following address:

<http://www.0hchr.org/D0cuments/HRB0dies/HRCouncil/RegularSession/Session19/A HRC 19 68 en.doc>.

international law in the Libyan Arab Jamahiriya gave less weight to the NTC reports and evidence than to the NGOs. It asserted that the reports received from non-governmental organizations were “apparently reliable,” while the reports received from the NTC “did not reflect the same evidentiary qualitative standard;” they “mainly contained either general denial or specific allegations not supported by evidence.”²⁸⁶ That may be caused by their unwillingness or the inability of the judicial system.

Although the Libyan authorities (NTC) has been trying to draw the picture that Saif is actually in their custody and he will be transferred to Tripoli as soon as the new facility centre under construction becomes available, there is no indication to support their ability to obtain the suspect.²⁸⁷ Furthermore, Dr. Gehani, the Libyan General Prosecutor, on 28 May 2012, asserted that the Zinitani brigade remained unwilling to transfer Mr Qaddafi to Tripoli²⁸⁸. It may also appear that the State is not in sufficient capacity to implement its judicial orders and safeguard its security. It was concluded in the previous chapter that Libya could be considered as a collapsed State or at least as a State with a weak judicial system.²⁸⁹ Afterwards, on 2 July 2012 the commander of Zinitani brigades confirmed statement of Mr Gehani.²⁹⁰ Hence, there seems lacking this particular feature, which might arguably prove the unavailability of the domestic judicial system. Besides, any difficulties for Mr Qaddafi to have access to his lawyers or legal assistance are a violation of his inherent rights as a suspect.

There seems to be various forms of obstacles to not only Saif Al-Islam Qaddafi but also every politically concerned case, which could simply impede all phases of a trial. The PTC III in the Central African Republic case, whereby the judicial system is not functioning well because of incapacity or unavailability for any reason, asserts that:

“It is self-evident that trials of this kind, if handled in a way that does justice to the parties, involve lengthy live testimony and substantial presentation and consideration of documentary evidence, lasting inevitably many months, and the necessary protective measures for witnesses may prove extremely difficult or impossible to implement by the national authorities [...].²⁹¹”

²⁸⁶ Report of the international commission of inquiry to investigate all alleged violations of international law in the Libyan Arab Jamahiriya, 1 June 2011, A/HRC/17/44, Page 3.

²⁸⁷ Libya application, Para 35

²⁸⁸ “Pay row puts on hold Gaddafi son's transfer to Tripoli” middle-east-online.com, 28 May 2012 (ICC Press Review, 29 May 2012).

²⁸⁹ See 2-3-3-1 “Is Libya Encountering Total or Substantial Collapse?”

²⁹⁰ “International Criminal Court staff freed from Libyan prison after painstaking international negotiations.” The Independent, 2 July 2012,

<http://www.independent.co.uk/news/world/africa/international-criminal-court-staf-freed-from-libyan-prison-afterpainstaking-international-negotiations-7904317.html>

²⁹¹ The Prosecutor v. Jean-Pierre Bemba Gombo, “Decision on the Admissibility and Abuse of Process Challenges,” ICC-01/05.01/08, Para. 246.

In taking into consideration the capability of Libya's national judicial system, the incident of detaining the ICC staff, including Melinda Taylor is also important. Richard Goldstone argued,

“[w]hat is effectively an act of kidnapping also regrettably demonstrates that there is as yet no rule of law in Libya domestically. Ultimately, what has happened has justified the insistence by the ICC that Saif should be tried in The Hague.”²⁹²

Moreover, according to article 17 (3), Libya should be unable to acquire the accused or the necessary evidence and testimony or otherwise unable to carry out the proceedings.

This should be no surprise that, in Libya, there would be anger and hatred, particularly within the joy of the victory for the opposition, towards the former regime's high-ranking officials, as well as those who did not surrender. This atmosphere might potentially render the situation for those witnesses who are in detention fearful and for those who are not in detention intimidating. In this respect, the issuance of the Law 37 on 2 May 2012 is noticeable.²⁹³

According to that law, anyone who praises Moammar Qaddafi and his sons refers to them as reformers, or states anything against the interest of the State or the February revolution could be sentenced to 3 to 15 years in prison.²⁹⁴ Even though that law was overturned one and a half months later by the Libya Supreme Court²⁹⁵ and declared unconstitutional, it might be an indication of the culture of fear against the former regime's officials by those who are in charge. On the contrary, that may indicate the enhancement of the rule of law in Libya too. Furthermore, another incident which may appear to be noticeable for the court and should be taken into account is granting amnesty for any “acts necessary by the 17 February revolution” and for the revolution's “success and protection.”²⁹⁶ Amnesty International, Human Rights Watch along with the ICC prosecutor condemned the amnesty. To this date, no action has been reported from the Supreme Court

²⁹² “ICC's Libyan crisis shows Saif Gaddafi should be tried in The Hague,” Guardian News, 22 June 2012, available at: <http://www.guardian.co.uk/law/2012/jun/22/icc-libya-crisis-saif-gaddafi-hague>

²⁹³ United Nations Support Mission In Libya, Transnational Justice – Foundation for a New Libya, 17/September/2012, 35, can be found on this address: <http://unsmil.unmissions.org/LinkClick.aspx?fileticket=8XrRUO-sXBs%3D&tabid=3543&language=en-US>

²⁹⁴ Amnesty International, LIBYA: NTC Must not Curtail Freedom of Expression in the Name of Protecting ‘Revolution’, available at: <https://www.amnesty.org/en/for-media/press-releases/libya-ntc-must-not-curtail-freedom-expression-name-protecting-revolution-20>

²⁹⁵ Reporters Without Borders, Libyan Supreme Court Strikes Down Law Aimed at Curbing Free Speech, can be found at: <http://en.rsf.org/libya-repressive-new-law-criminalizes-07-05-2012,42581.html>

²⁹⁶ The Epoch Times, “Libya Urged to Deny Amnesty to War Criminals,” can be found at: <http://www.theepochtimes.com/n2/world/libya-urged-to-deny-amnesty-to-war-criminals-312231.html>

to the conformation of unconstitutionality. They requested the UNSC to send a “strong message” to Libyan authorities that they need to cooperate with the ICC,²⁹⁷ and the UNSC eventually did. It issued the resolution number 2095²⁹⁸; expressed concerns over the lack of judicial process for conflict-related detainees and the State’s security in general.

Besides, as it was manifested by the Libyan authorities submitted in their application, some of the witnesses related to the case are either detained or not willing to be interviewed by the ICC prosecutor²⁹⁹. It is unclear and uncertain to what extent these witnesses have been brought under the support of judicial guarantees to be able to testify freely while arbitrary incarceration of former regime official is still an unsolved problem owing to the instability of the security and dearth of an agreement between the NTC and militia groups. Although Libyan authorities have claimed improvement in the rule of law and security, they admitted that there is long way to go.³⁰⁰

As to the incapability of Libyan authorities, the ICC jurisprudence supports the objectivity of their claim. In the Bemba decision, the ICC in this regard contended that “[I]t is not the national courts' determination as to whether or not they are unwilling or unable genuinely to investigate or prosecute” but rather it is for the ICC to do so³⁰¹.

Also in respect to the Saif Al-Islam from the Zinitani Militia, so far there has not been any development since he is still in their control and the NTC has failed to acquire him, considering other factors and situations, it can be concluded that Libya’s judicial system is unavailable and the State is encountering a substantial collapse to the extent that meets the requirement of article 17 (3).

In fact, this could be considered as the requirement of other means of “otherwise unable to carry out” the proceedings at the end of article 17 (3) which due to the causal link between the violation of the suspect’s rights and the unavailability of the judicial system, can be considered one of the features that may render the case admissible before the ICC.

Conclusion

Libya challenged the ICC jurisdiction on the ground that it is actively investigating Saif Al-Islam Qaddafi. However, examination of Libyan authorities’ evidence and claims proves otherwise. It seems that this has

²⁹⁷ Ibid

²⁹⁸ Security Council Resolution 2095, 14 March 2013, available at: <http://www.un.org/News/Press/docs/2013/sc10939.doc.htm>

²⁹⁹ Libya Application Para. 47

³⁰⁰ Tareq Mitri, Special Representative

³⁰¹ Prosecutor v. Bemba, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01/08- 802, 24 June 2010, at Para. 247

originated from the lack of capacity of the Libyan judicial system as well as the inability of the State in dealing with Saif Al-Islam's case.

First, as to the active investigation, Libya might not manage to pass the same person same conduct test provided by the ICC jurisprudence since it does not have the legal provisional basis to carry out an investigation regarding the ICC allegations. The mere issuance of a decree that introduces crimes within the jurisdiction of the Rome Statute by the NTC cannot be considered as legitimate, and a powerful basis for dealing with a highly significant political case. Additionally, referring to the necessity of the confidentiality of evidence according to their domestic rules may not possibly justify the lack of transparency in their investigations.

Second, with regard to Libya's unwillingness, according to article 17(2), Libya may be considered unwilling to carry out Saif's investigation genuinely. Even though the condition of "shielding" might not be held against the Libyan authorities, there is a strong case for the existence of an "unjustified delay" in Saif's proceedings. Furthermore, "independence and impartiality" of Libya's judiciary system is also another ground that is likely to be used severely against the Libyan challenge to admissibility. However, one may not deny its close nexus to the ability of the State to carry out Saif Al-Islam's investigation.

Third, concerning Libya's ability to carry out an investigation subject to article 17 (3), owing to the present condition of Libya, it is highly probable that Libya's judicial system will be considered "unable" to carry out an investigation genuinely. To meet the criteria of inability, following the collapse of Libya of Qaddafi, it should not be able to obtain the accused or the necessary evidence and testimony or it should be otherwise unable to carry out Saif's proceedings. Regarding the accused, Libya has been unable to obtain him from the moment he was detained; to this date, it has been almost 16 months. Although he is in the territory of Libya, he is not under the effective control of the government. Moreover, concerning the evidence and testimony, the evidence related to the credibility of the claim of active investigation suggests that the Libyan judicial system is unable to acquire necessary evidence and testimony. Taking all these factors into consideration – the lack of credibility of active investigation, unjustified delay, lack of independence and impartiality of the judiciary – along with violations of Saif's intrinsic human rights as a detainee would lead us to the conclusion that Libya is otherwise unable to carry out the investigation genuinely.

Other elements would also exacerbate the circumstances of Saif Al-Islam Qaddafi and would raise the "sufficient risk of interference of the judiciary." First, the security of Libya and the power of militia groups is being highlighted everyday by news. Many examples can be found in this respect. Second, if all the elements are to be taken into account, it should be kept in mind that Saif is the most prominent remaining official from the former regime. Any investigation connected to him would be politically and

socially sensitive. Politically, because he was de facto prime minister of Libya, he is quite a “black box” for the NTC or other powers in the State. It is probable that the NTC and the judiciary would compromise in their investigation or dealing with issues related to the suspect in order to gain advantages. Socially, any decision in his regard will arguably have an impact on the public. It again might be taken as politically motivated. Hypothetically, let us imagine he will be exonerated from his accusations that might possibly gain political advantage or disadvantage for the NTC or the judiciary in the absence of compelling reasons as to the absolute independence and impartiality of the Libya judiciary. In the absence of any clear legal basis or standard as to the quality of an investigation in the Rome Statute, perhaps the Court may draw upon the ICTY practice i.e. the “sufficient risk of interference.” According to that test, a case becomes admissible where there is “sufficient risk of interference.”

Therefore, considering all the circumstances, it is highly unlikely that the Court would declare the case inadmissible. There is not much of a chance to win for the Libyan authorities. Moreover, scholars and experts certainly would scrutinize this decision. This reveals the ICC’s manner of dealing with similar cases in the future; hence, this could be an opportunity for the ICC to introduce itself as a strictly legal entity.

Chapter 3: Final Observation

The ICC has been designed to be the Court of last resort and the complementarity regime is perhaps the most fundamental principle of the Rome Statute. There would always be a competition between the jurisdiction of the Court and that of the State concerned where crimes within the jurisdiction of the Court were committed. Therefore, it is for the Court to strike a delicate balance between these two jurisdictions; each of them represents the interest of its originating sources: the interest of the international community and State sovereignty.

Article 17 of the Rome Statute is the yardstick of the Complementarity regime where there are four grounds perceived that render a case inadmissible before the Court based on “unwillingness” and “inability” of the State to genuinely investigate or prosecute the case. Nevertheless, the article is not fully transparent as to the limits of the scope of the regime. So far the Court has not clarified the exact extend of each controversial matter regarding the article and the regime. Thus, it has caused confusion.

In order to clarify, the ambiguities of article 17, the Court in its previous jurisprudence, provided some descriptions. For examples, terms of “investigation” or “active investigation” have been dealt with. In addition, the Court provided a test for the assessment of the existence of an investigation in the State concerned i.e. “the same conduct, same person test.” So far, there are “shadow sides” within the complementarity regime.

As an instance, the Statute is unclear whether it should declare a case admissible where the intrinsic rights of the suspect is being violated by the State. Most of the scholars suggest it should. However, it is not clear whether the Court would consider that as a ground of admissibility. Heller³⁰² suggests that the Rome Statute should be amended by the State parties. The author shares this view and recommends that the Court have the possibility to interpret the Rome Statute in consistence with the human rights standards as it is required by article 21 (3) of the Rome Statute even if the attempt to amend the Rome Statute fails.

The lack of transparency in the Rome Statute in various respects has recently positioned the ICC in a very controversial situation regarding Libya and Saif Al-Islam Qaddafi. After his arrest by a militant Group, Zninitani, Libya refused to hand him over to the ICC and challenged the ICC's jurisdiction based on the ground that it is actively investigating the suspect while he is not under the effective control of the government. However, he has been held in detention for almost 16 months; no proceedings concerning the ICC's allegations have been reported. According to article 17 if Saif Al-Islam's case is to be declared inadmissible, the State has to prove that it is investigating the suspect first, and then if there is an investigation, the matters of "unwillingness" and "inability" of the State have to be considered.

Regarding Libya's active investigation, evidence suggests that Libya may not pass the "same person same conduct" test of the ICC due to the lack of functional provisions for investigating crimes within the jurisdiction of the Court as well as the inability of the Libyan judicial system. Besides, the excuse that Libya does not have the possibility to reveal its investigative steps and evidence may not satisfy the Court that the State is actually investigating the suspect.

As for "unwillingness," subject to the article 17 (2), there is a strong possibility that Libya will be considered "unwilling" premised on the two grounds stipulated in article 17 (2) (b) and (c). First, there is an "unjustified delay" in Saif's proceedings, almost 16 months to this date. Second, the fragile security due to the power of militia groups as well as the political instability and incapacity of Libya's judicial system has casted serious doubts on the "impartiality" and "independence" of the judiciary in Libya.

Concerning, the "ability" of Libya's judiciary to carry out an investigation and requirements of article 17 (3), it seems that the strongest argument might be put forward in this regard for some reasons. First, lack of effective control of the Libyan authorities over Saif Al-Islam Qaddafi is the most noticeable issue that has led to his prolonged detention without a trial. So far, they have failed to obtain him. That problem also may indicate the lack of capacity of both the authority and the judiciary of Libya. Furthermore, the second criteria of article 17 (3) – the lack of ability to acquire the necessary

³⁰² Kevin John Heller, *Supra* note 9, page 6

evidence and testimony – it has a close nexus to the claim of Libya to actively investigate Saif Al-Islam. It was shown that it is highly doubtful that Libya is actively investigating the case. And finally, as the catch-all provision contained in article 17 (3), taking all other circumstances together – credibility of active investigation, unjustified delay in Saif proceedings, lack of sufficient capacity of Libya judiciary, fragile independence and impartiality of Libya judiciary -- together with violations of Saif Al-Islam’s inherent human rights as a detainee would contribute to the fact that Libya is otherwise unable to carry out Saif’s investigation genuinely.

It has been demonstrated that the major problem in the Saif Al-Islam Qaddafi case with regard to the prosecution of crimes committed during the conflict from 15 February 2011 onwards exist in the area of “inability” rather than “unwillingness.” The Libya case still has not been adjourned by the ICC but it does not seem that Libya has a great chance to win the admissibility challenge. The Prosecution’s position in previous cases in comparison with Libya’s case is striking. While the Prosecution has always been in a position against the State, in the Libya case the Prosecution has not been much of an enemy for the State. In this case, the prosecutor’s position has been played by the Office of the Public Council for Defence. Whatever is the ICC’s decision, it will be an unprecedented one, which will inspire future decisions. It is not clear what would be the ICC’s decision, but simple adoption of the complementarity principle to the Saif Al-Islam case does not pronounce the inadmissibility of his case before the court.

However, the extent of political considerations by the Court would play a key role. Perhaps the change in the prosecution position in this case stems from political considerations, as Kenneth Rodman argues that the court and particularly its prosecutor must take political, conflict management objectives into account as it reaches decisions about prosecutions³⁰³ or in a similar vein Michael Struett asserts that the Court should pretend to be merely legally motivated while taking actually contextual factors into consideration³⁰⁴.

In total, according to the provided facts, Libya is moving forward but the State is not stable enough to deal with a critically important political case. The NTC insists on carrying out the proceedings while they are aware that the State’s precarious situation and fragility of security may not be translated as authenticity in their intention to investigate Saif but rather it might indicate the political motivations behind the scene that increases the risk of interference of other parties in the case if it will be adjudicated in Libya. These considerations shall be taken into account by the Court alongside the ability of Libya in dealing with such a high-importance case in deciding whether they should declare the case admissible.

³⁰³ Kenneth Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, cited in “The ICC’s Potential for Doing Bad When Pursuing Good,” Benjamin Schiff

³⁰⁴ *Ibid*

Any attempt to manage the circle of justice, as it is recommended by Rodman and Struett, would create the ground for application of various preferences by those who are responsible to manage. This will be detrimental to the ICC's credibility as a significant part of the international criminal justice system. The Court should remain strictly legal in order to avoid different ruling in similar positions. In doing so, additionally, further clarification of the complementarity principle in order to define its borders would provide a better basis for the ICC to have a steady manner in its extraordinarily important task.

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