

Note

Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge

Anna Bishop*

February 2011 marked a significant period of change for the Libyan people as they united against the Muammar Gaddafi regime that had oppressed them for forty-two years.¹ What started as peaceful demonstrations quickly escalated into a full-blown civil war. Colonel Gaddafi pledged to go from house to house and show no mercy to quell the dissent.² Gaddafi, assisted by Saif al-Islam Gaddafi (“Saif”), Gaddafi’s heir apparent, and intelligence chief Abdullah al-Senussi, waged a brutal war against his citizens.³ On March 23, 2011, NATO forces were called in to protect Libyan citizens, and by August 23, 2011, rebel troops had taken Tripoli and effective control of the nation.⁴ The United Nations Security Council referred the situation to the International Criminal Court (“ICC”) for investigation due to reports of widespread persecution and disregard for human life by the Gaddafi regime during the uprising.⁵ The war-torn country now faces the question whether its judicial system is capable of providing a fair trial to

* J.D. candidate 2014, University of Minnesota Law School; B.A. Bethel University, 2010.

1. See John J. Liolos, *Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes*, 35 B. C. INT’L & COMP. L. REV. 589, 589 (2012).

2. G.J. Knoops, *Prosecuting the Gaddafis: Swift or Political Justice?*, 4 AMSTERDAM L.F. 78, 78 (2012).

3. See Mark Kersten, *No Winners in ICC-Libya Standoff*, THE MIDDLE EAST CHANNEL (Oct. 8, 2012, 2:50 PM), http://mideast.foreignpolicy.com/posts/2012/10/08/no_winners_in_icc_libya_standoff.

4. See Brendan Leanos, *Cooperative Justice: Understanding the Future of the International Criminal Court through Its Involvement in Libya*, 80 FORDHAM L. REV. 2267, 2269 (2011–12).

5. See *id.* at 2270.

the leaders of the Gaddafi regime.⁶ While the ICC has initiated an investigation into the Gaddafi era crimes, Libya believes that justice can be delivered domestically and has filed a formal Admissibility Challenge disputing the ICC's jurisdiction to investigate or prosecute the matter.⁷

This Note seeks to understand the significance of national due process in the complementarity regime of the ICC through an evaluation of the ICC proceedings surrounding the Libyan situation. Part I briefly outlines the structure of the ICC, details the role of complementarity in that system, examines the jurisdiction of the ICC, and lists the requirements for the ICC to declare a case admissible. Part II analyzes the Admissibility Challenge raised by Libya and evaluates the use of due process violations as grounds for admissibility before the ICC. The Note concludes that while domestic due process violations do not establish admissibility of a case before the ICC on their own, flagrant disregard for fundamental due process rights are relevant when evaluating admissibility if the violations make the accused more difficult to convict, as is the case against Saif.

I. ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court ("Rome Statute"), which effectively established the permanent ICC, was signed on July 17, 1998.⁸ The ICC was created in response to a recognized need for an independent and permanent criminal court that could help bring those committing the most serious crimes against humanity to

6. See Kersten, *supra* note 3.

7. *Id.*

8. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; See Michael P. Scharf, *Results of Rome Conference for an International Criminal Court*, AM. SOC'Y OF INT'L L. (Aug. 1998), <http://www.asil.org/insigh23.cfm> (stating that members voted 120 to 7 to adopt the Rome Statute, whereas the United States, China, India, Iran, Iraq, Israel, and Libya voted against its adoption, that the Statute came into force on July 1, 2002 and that there are currently 137 signatories and 121 parties); See also United States of America: Communication, Rome Statute of the International Criminal Court, May 6, 2002, C.N.434.2002.TREATIES-21, available at <http://treaties.un.org/doc/Treaties/1998/11/19981110%2006-38%20PM/Related%20Documents/CN.434.2002-Eng.pdf> (informing the Secretary-General that the United States had no legal obligations after signing the Statute on December 31, 2000).

justice.⁹ The ICC's jurisdiction is limited to four specific crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁰

The Rome Statute firmly establishes that an individual is criminally responsible for his or her conduct, regardless of title, and holds individuals accountable for violations of the most serious crimes that otherwise would often escape punishment.¹¹ Responsibility extends to individuals who commit a crime by themselves or jointly; to an individual who orders, solicits, or induces a crime or an attempted crime; and to an individual who facilitates, aids, abets, or assists the commission or attempted commission of a crime.¹² An individual who takes substantial steps toward committing a crime can be held criminally liable by the ICC unless he or she abandons the effort or prevents the completion of the crime.¹³ For the crime of genocide, an individual can be held responsible not only for his or her actions but also for directly and publicly inciting others.¹⁴ Conversely, only individuals who are in a position to direct or exercise control over state military or political action can be held liable for the crime of aggression.¹⁵

In order to eliminate impunity, the ICC has jurisdiction over crimes specified in article 5 regardless of status or official capacity.¹⁶ As such, the ICC's jurisdiction is not hindered by

9. Although the international community in the period following the end of the Cold War created tribunals such as the International Criminal Tribunal for the former Yugoslavia and Rwanda to address crimes committed during a specific conflict, consensus remained that a court was needed to deal with such issues on a permanent basis. *See About the Court*, INT'L CRIM. CT., <http://www2.iccpi.int/Menus/ICC/About+the+Court/> (last visited Oct. 6, 2012); *See also* Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 2 (2001-02) ("Most commentators believe that a permanent International Criminal Court is necessary to ensure that acts of mass murder, rape, and torture are not committed with impunity, and individuals responsible for such heinous acts and serious violations of international humanitarian law are brought to justice and severely punished for their crimes.").

10. Rome Statute, *supra* note 8, art. 6-8, at 4-9 (listing and defining the four crimes under ICC jurisdiction).

11. *See id.* art. 25(2)-(3), at 15-16.

12. *Id.* art. 25(3), at 16.

13. *Id.* art. 25(3)(f), at 16.

14. *Id.* art. 25(3)(e), at 16.

15. *See id.*

16. Rome Statute, *supra* note 8, art. 27(1), at 16 ("This statute shall apply equally to all persons without any distinction based on official capacity. In

traditional state immunities based on official capacity.¹⁷ To eliminate further impunity, the Rome Statute holds military commanders criminally responsible for the acts of their subordinate forces.¹⁸ In certain situations, superiors in other fields can be held responsible for the crimes of their subordinates as well.¹⁹

A. JURISDICTION AND THE PRINCIPLE OF COMPLEMENTARITY

The ICC may exercise jurisdiction over Article 5 crimes in three situations: (1) when a State party refers a situation to the ICC Prosecutor (“Prosecutor”);²⁰ (2) when the Security Council acting under Chapter VII of the U.N. Charter refers a situation to the Prosecutor;²¹ or (3) when the Prosecutor initiates an investigation of a situation in accordance with Article 15.²² The

particular, official capacity . . . shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”).

17. *Id.* art. 27(2), at 16.

18. *See id.* art. 28(a), at 16–17.

19. *Id.* art. 28(b), at 17 (stating that a superior shall be held responsible for crimes committed by subordinates under his or her direct control where “the superior either knew or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; [t]he crimes concerned activities that were within the effective responsibility and control of the superior; and [t]he superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”).

20. *Id.* art. 13(a), at 10. Article 14 further provides:

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Id. at 11.

21. *Id.* art. 13(b), at 10.

22. *See id.* art. 13(c), at 10. Allowing the Prosecutor power to initiate an investigation on his own was controversial during the drafting of the Rome Statute. Proponents believed that the Court’s credibility and independence would be improved and pointed out that recent Tribunals had granted the Prosecutor that power. Opponents were worried about prosecutorial power and wanted measures to hold the Prosecutor accountable. The result was a compromise where the Prosecutor required approval from the Pre-Trial Chamber before investigating on his/her own. *See Gurule, supra* note 9, at 11.

ICC may only establish jurisdiction through the consent of the State where the crime occurred (the territorial State) or the State of which the accused is a national (the nationality State).²³ Consent is imputed to a State when it has ratified the Rome Statute.²⁴ The only situation where the ICC may exercise jurisdiction without State consent is when the Security Council has referred the situation regarding a non-party national or where a non-party state has accepted the ICC's jurisdiction to the specific case in question.²⁵

Regardless of whether the ICC theoretically has jurisdiction over a matter, in practice the principle of complementarity embedded in the Rome Statute significantly reduces the ICC's ability to exercise that jurisdiction.²⁶ Under the complementarity principle, national courts have primary jurisdiction, while the ICC fills the gaps when States are unable to prosecute the most serious international crimes or have failed to take the initiative.²⁷ Because of this principle, "the [ICC] has no jurisdiction over a case when the matter is 'being appropriately dealt with by a national justice system.'"²⁸

23. Rome Statute, *supra* note 8, art. 12(2), at 10.

24. *Id.*

25. Ademola Abass, *The International Criminal Court and Universal Jurisdiction*, 6 INT'L CRIM. L. REV. 349, 352 (2006) (discussing the jurisdiction of the ICC); *see also* Rome Statute, *supra* note 8, at 10.

26. Remigius Oraeki Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 ANN. SURV. INT'L & COMP. L. 185, 187 (2006) (observing that the compromises needed to ratify the Rome Statute which centered on the principle of complementarity, significantly diluted the aspirations of the ICC). The first express reference to a principle of complementarity in the Rome Statute appeared in the 1994 Draft Statute in which the preamble stated that the "court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective." JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 73-74 (Ruth MacKenzie, et al. eds., 2008). The complementarity provisions of the 1994 Draft Statute were regarded as insufficient and the Ad Hoc Committee in April 1995 elaborated on the principle further. *Id.* at 76-79.

27. Rome Statute, *supra* note 8, at 12 (establishing the criteria for when national jurisdiction supersedes the ICC's jurisdiction); *id.* art. 17, at 3 (the ICC "shall be complementary to national criminal jurisdictions."); *see id.* art 17, at 2 ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . ."); *see also* Gurule, *supra* note 9, at 6-7 (indicating that according to the Rome Statute, the proper role of the ICC is to complement national court jurisdictions).

28. Chibueze, *supra* note 26, at 191 (quoting WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85 (2d ed. 2004)).

The principle of complementarity was included in the Rome Statute when the United States and other countries voiced concern about national sovereignty.²⁹ In practice, this principle forces the ICC to defer to national jurisdiction when appropriate.³⁰

Without the principle of complementarity, the drafters were concerned that the ICC would become an international appellate court.³¹ They feared a court with the power to disagree with a State's prosecutorial decisions and exercise de novo review.³² As a result, the final text of the statute retains significant deference to state sovereignty and limits the ICC's power through the principle of complementarity.³³ The complementarity structure of the ICC differs substantially from the primary jurisdiction that was common in ad hoc tribunals.³⁴ Because of this structure, some have suggested that the ICC has effectively become "a court of last resort."³⁵

When the Prosecutor is referred a case, he must notify all States that have the ability to exercise jurisdiction before he

29. See Gurule, *supra* note 9, at 4–5 (stating that while the United States generally supported the creation of the ICC, it refused to ratify the Rome Statute because United States military personnel and government officials could face liability as a result of unintended civilian casualties during international peacekeeping operations).

30. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L. J. 47, 59–60 (2001–02) (noting that the complementarity principle was partly an accommodation to the United States' concern that broad ICC jurisdiction would expose U.S. citizens).

31. See Gurule, *supra* note 9, at 9 ("[T]he ICC's role with respect to national criminal jurisdictions would be more analogous to that of a 'super' international appellate court, vested with de novo review authority, rather than a court intended to complement States with primary jurisdiction.").

32. *Id.*

33. See Jakob Pichon, *The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court*, 8 INT'L CRIM. L. REV. 185, 188 (2008) ("[T]his balance may be criticized for being 'overly concerned with a protection of the sovereignty of States.'").

34. Chibueze, *supra* note 26, at 192 (stating that the tribunals for Nuremberg, Tokyo, Former Yugoslavia, Rwanda, Sierra Leone, Timor–Leste, and Cambodia have all exercised primary jurisdiction over national courts); see Harman van der Wilt & Sandra Lyngdorf, *Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle*, 9 INT'L CRIM. L. REV. 39, 39 (2009) (noting that whereas the statutes for ad hoc tribunals often dictate that their jurisdiction prevails over national courts, the Rome Statute does the reverse).

35. Chibueze, *supra* note 26, at 192.

commences an investigation.³⁶ Within one month after the Prosecutor's notice, a State with jurisdiction may inform the ICC that it will investigate the matter.³⁷ The Prosecutor must defer to the State's investigation, but can petition the Pre-Trial Chamber to authorize the ICC's investigation.³⁸ Because the Prosecutor must comply with the State's request to investigate, the request is more a "demand or an assertion by the State of its right to primacy."³⁹ In effect, States can undermine the ICC's jurisdiction and potentially shield their nationals from accountability simply by informing the Prosecutor of their desire to investigate and prosecute the matter.⁴⁰ Therefore, even if the ICC has jurisdiction over a case, the ICC may not be able to hear the case if forced to defer to a State's judicial system.⁴¹

Article 17 of the Rome Statute outlines when a case is "inadmissible" before the ICC.⁴² Even if the ICC has jurisdiction, it is prohibited from considering a case when: (1) a State with jurisdiction is investigating or prosecuting the case; (2) the case has been investigated by a State which has jurisdiction and the State has decided not to prosecute, unless the State made that decision based on an unwillingness or inability genuinely to prosecute; (3) the person involved in the case has already been tried for the conduct specified in complaint; or (4) the case is not of sufficient gravity to justify

36. Rome Statute, *supra* note 8, art. 18(1), at 12.

37. *Id.* art. 18(2), at 12.

38. *Id.*; See *Pre-Trial Division*, INT'L CRIM. CT., <http://www.icc.cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/Pre+Trial+Division/> (last visited Oct. 27, 2001) (detailing the Pre-Trial Chambers role as the judicial body handling cases until the confirmation of charges, when a Trial Chamber is convened).

39. Chibueze, *supra* note 26, at 192 (quoting Daniel D. Ntanda Nsereko, *Article 18: Preliminary Rulings Regarding Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 627, 632 (Otto Triffterer 2d ed. 2008)).

40. *Id.* at 192–93; See Rome Statute, *supra* note 8, art. 18(2)–(3), at 12–13 (outlining the procedures for jurisdiction, including the fact that the Prosecutor must, upon notification from a State of its intent to investigate, defer review for six months or at any point when a significant change of circumstances toward the State's willingness to ability to genuinely carry out the proceedings has occurred).

41. See Pichon, *supra* note 33, at 188 (explaining that admissibility is distinguishable from jurisdiction and that a case can be inadmissible before the ICC even though it has jurisdiction).

42. Rome Statute, *supra* note 8, at 12.

further action by the ICC.⁴³ Notably, Article 17 assumes admissibility before the ICC except when one of these four situations occur.⁴⁴ If none of these conditions are met, a case is *de facto* admissible.⁴⁵ If the Rome Statute had been drafted with a presumption of inadmissibility, its objective of ending impunity⁴⁶ would be undermined as an accused could escape punishment through State inactivity alone.⁴⁷ Therefore, a State is required to make a good faith attempt to investigate or prosecute the case before it can divest the case of admissibility before the ICC.⁴⁸

B. EXCEPTIONS TO THE INADMISSIBILITY OF A CASE UNDER ARTICLE 17 OF THE ROME STATUTE

Even if a case is being investigated or prosecuted by a State with jurisdiction, thus meeting one of the criteria for the case to be deemed inadmissible before the ICC, Article 17 of the Rome Statute provides a narrow exception that allows the ICC to retain admissibility. The ICC is not required to find inadmissibility if “the State is *unwilling* or *unable* genuinely to carry out the investigation or prosecution.”⁴⁹ Thus, the fact that a State is investigating or prosecuting a case is not enough to determine inadmissibility on its own. Inadmissibility in these circumstances depends on a subsequent finding that the State is both willing and able to genuinely conduct the proceedings.⁵⁰ The Rome Statute specifies guidelines for determining when a State is “unwilling” or “unable” to conduct the investigation or

43. *Id.*

44. KLEFFNER, *supra* note 26, at 104–05; see MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE 159 (2008) (noting that Article 17 is drafted in a negative form).

45. EL ZEIDY, *supra* note 44, at 159.

46. See Rome Statute, *supra* note 8, at 2 (“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.”).

47. KLEFFNER, *supra* note 26, at 105 (noting that an assumption of inadmissibility would be contrary to the object and purpose of the Statute to bring effective prosecution and end impunity for the most serious of international crimes).

48. *Id.* (“[C]omplete inaction on the national level would thus allow the ICC to take up a case without having to enter into an assessment of the admissibility criteria . . .”).

49. Rome Statute, *supra* note 8, art. 17(1)(a), at 12 (emphasis added).

50. See EL ZEIDY, *supra* note 44, at 161–62 (noting the ICC’s support of this proposition in their 2006 decision in the *Thomas Lubanga Dyilo* case).

prosecution, thus giving rise to admissibility before the ICC.⁵¹ In practice, this exception allows the ICC to intervene when national judicial proceedings are merely a pretense to shield the accused from criminal responsibility.⁵²

1. Criterion of “Unwillingness”

Concerned about sacrificing State sovereignty and reluctant to provide the ICC with the power to assess a State’s judicial capacity, the Rome Statute drafters found it difficult to decide on a workable definition of “unwillingness.”⁵³ To combat these concerns, the drafters sought to reduce the subjective nature of the definition while recognizing that the ICC needed to maintain some discretion in the determination.⁵⁴ As a compromise, the drafters added the element of “genuineness” to the Article 17 determination of admissibility.⁵⁵ None of the Rome Statute itself, the Rules or Regulations of the Court, or the ICC’s jurisprudence has defined “genuine,” but most scholars have interpreted the term as to invoke a requirement of good faith put forth on behalf of the State in their investigation and prosecution of a case.⁵⁶ This requirement applies both to the determination of “unwillingness” and “inability.”⁵⁷

Unlike its vague use of the term “genuinely,” the Rome Statute clearly outlines the circumstances which ICC should consider applicable for a determination of “unwillingness.”⁵⁸

51. See Rome Statute, *supra* note 8, art. 17, at 12.

52. Gurule, *supra* note 9, at 7–8.

53. EL ZEIDY, *supra* note 44, at 163; see also, NIDAL NABIL JURDI, THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS 13 (Mark Findlay & Ralph Henham eds., 2011) (“Many states did not want the ICC to function as a court of appeal.”).

54. See EL ZEIDY, *supra* note 44, at 163 (noting that the use of criteria such as “apparently well founded” or “ineffective” trial procedures were rejected as being too subjective).

55. *Id.* at 163–64 (“[T]he drafters compromised by adding the word ‘genuinely’ as the least disagreeable and most objective term.”); see Rome Statute, *supra* note 8, art. 17(1)(a), at 12 (explaining that a case is inadmissible if being investigated by the State “unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution”) (emphasis added).

56. See Chibueze, *supra* note 26, at 194 (noting that “genuinely. . . appears to invoke a requirement of good faith on behalf of the State”); EL ZEIDY, *supra* note 44, at 164–65 (“[T]he most resemblance to genuineness is perhaps the concept of good faith.”).

57. See JURDI, *supra* note 53, at 13.

58. Rome Statute, *supra* note 8, art. 17(2), at 12 (outlining conditions

The first criterion of the determination retains a subjective element, requiring the ICC to evaluate the State's intention in the proceedings.⁵⁹ The second two elements retain a notion of objectivity in their determination.⁶⁰ Some scholars have noted that the three scenarios listed in Article 17(2) which present a clear indication of "unwillingness" are not exhaustive, but merely illustrative of the conditions that would lead to a determination of "unwillingness."⁶¹

When considering a State's unwillingness to investigate or prosecute a crime, the ICC is to consider the situation with "regard to the principles of due process recognized by international law."⁶² This language raises the question of whether a violation of due process alone can be determinative of a State's "unwillingness" or "inability" to conduct the investigation or prosecution.⁶³ "The ensuing question is whether a State which *is* investigating the case, but in breach of certain due process guarantees, can be declared unwilling (or unable) to investigate, even if this seems to be a contradiction

where a State will be determined to be unwilling: "a) The proceedings were or are being undertaken or the nation 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."; see Wilt & Lyngdorf, *supra* note 34, at 40 ("Unjustified delays, sham trials which serve to shield the perpetrator from criminal responsibility, or proceedings lacking independence or impartiality are indicative of unwillingness . . .").

59. EL ZEIDY, *supra* note 44, at 168; see also, Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, 129, 131 (Herman A.M. von Hebel et al. eds., 1999) (commenting that "the Prosecutor must prove a devious intent on the part of the State, contrary to its apparent actions").

60. EL ZEIDY, *supra* note 44, at 168.

61. See Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 500 (2003) (discussing that the phrase "the Court shall consider . . . whether one or more of the following exist" leads to the conclusion that the list is not exhaustive). *But see*, EL ZEIDY, *supra* note 44, at 168 ("'Unwillingness' is the exception to this rule and, thus, the provision should be given a narrow interpretation – treating the list under paragraph (2) as exhaustive.").

62. Rome Statute, *supra* note 8, art. 17(2), at 12.

63. See Pichon, *supra* note 33, at 191 (noting that the language of Article 17(2) in combination with Article 17(2)(c) may indicate that a lack of due process can lead to the admissibility of a case before the ICC).

in terms.”⁶⁴ Most international criminal law scholars believe that if the ICC determines that a State will not provide a defendant with due process, the case is admissible. These scholars argue that under those circumstances, the State is “unable” to investigate or prosecute (“Due Process Theory”).⁶⁵ However, it remains to be seen whether the Prosecutor will secure admissibility of a case simply on the basis of a lack of national due process.⁶⁶

2. Criterion of “Inability”

The second ground for the ICC to rebut a State’s contention of inadmissibility is when a State is “unable” to carry out the investigation or prosecution.⁶⁷ Article 17(3) defines “inability” as a situation in which “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.”⁶⁸ Agreement on the definition of “inability” was achieved more easily than the definition of “unwillingness” because of the

64. *Id.* at 191.

65. See 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) (“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.”); see also, Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 257–59 (2006) (“[I]s a case admissible under article 17 if the Court determines that the State asserting jurisdiction over it will not provide the defendant with due process? 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.”); see also Frank Meyer, *Complementing Complementarity*, 6 INT’L CRIM. L. REV. 549, 567 (2006) (“[I]mpunity could also result de facto from conduct under the color of law. Thus, minimal standards [of national practices] have to be satisfied.”); see also Pichon, *supra* note 33, at 192 (“A multitude of international criminal law scholars uncritically agree that the principle of complementarity is applicable to all questions of a due process.”).

66. See Kevin Jon Heller, *Libya Challenges the Admissibility of the Cases Against Gaddafi and Al-Senussi*, OPINIO JURIS (May 2, 2012), <http://opiniojuris.org/2012/05/02/libya-challenges-the-admissibility-of-the-cases-against-gaddafi-and-al-senussi/> (arguing that the Rome Statute was specifically drafted to prevent admittance of a case based solely on a lack of national due process).

67. See Rome Statute, *supra* note 8, art. 17(1)(a), at 12.

68. *Id.* art. 17(3), at 12.

more objective nature of the determination.⁶⁹ “Inability” of a State can arise in two separate ways: through either a substantial collapse⁷⁰ or the unavailability of the judicial system.⁷¹ In order for the ICC to rule a case admissible, the inability must manifest itself in one of the following situations: 1) the State is unable to secure the custody of the perpetrator; 2) the State is unable to gather the evidence and testimony needed; or 3) the State is otherwise unable to carry out the proceedings.⁷² The third scenario was added “to serve as a catch-all clause for all sorts of situations that might arise in the course of the domestic process.”⁷³

Inevitably, the determination of whether a State is “unwilling” or “unable” to carry out an investigation or prosecution involves a review of the States’ national judicial system, one which has the potential to be viewed as an unwelcome threat to national sovereignty.⁷⁴ Determinations of admissibility are made by the ICC based on its own independent assessment.⁷⁵ It is unclear whether the ICC should be permitted to intervene and disregard complementarity only when sham proceedings occur or whether the ICC should intervene to “correct a perceived miscarriage of justice for any reason,” thus substituting its judgment for that of the national courts.⁷⁶ Because of this review function, developing countries will be much more likely to have their judicial systems judged as unable or unwilling to conduct prosecutions, while developed nations will be able to benefit from the complementarity principle and avoid the jurisdiction

69. See KLEFFNER, *supra* note 26, at 152–53 (noting that the agreement on “inability” was achieved more easily than that of “unwillingness”).

70. *Id.* at 153 (commenting that notions of a “partial collapse” in earlier drafts were replaced by a requirement of “total and complete” collapse in the final version of the Rome Statute).

71. See *id.* at 153; EL ZEIDY, *supra* note 44, at 222 (“This might be caused by public disorder, national disasters and chaos resulting from a civil war or the unavailability of an effective judicial system . . .”).

72. See Rome Statute, *supra* note 8, art. 17(3), at 12.

73. EL ZEIDY, *supra* note 44, at 224.

74. Chibueze, *supra* note 26, at 194.

75. Declarations by a State that it considers itself to be unable to investigate or prosecute a crime will not be binding on the Court. See KLEFFNER, *supra* note 26, at 102 (explaining the process for determining whether the criteria for admissibility of a case have been met).

76. Gurule, *supra* note 9, at 8–9 (noting that one possible solution would be to require a “clearly erroneous” standard of review or a “no reasonable basis” test before the ICC upsets its deference to State prosecution).

of the ICC.⁷⁷ As such, the ICC has the potential of becoming a default criminal jurisdiction for developing countries that are unable to prove the worth of their legal systems.⁷⁸ These States will inevitably view the ICC as a pawn of western countries who are free from accountability before it, tainting the legitimacy of the ICC as an independent international judicial institution.⁷⁹

If the ICC has any doubts regarding the admissibility of a case, it may, “on its own motion, determine the admissibility of a case” under Article 19.⁸⁰ Furthermore, challenges to the admissibility of a case or the jurisdiction of the ICC may be brought by: “(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) A State from which acceptance of jurisdiction is required under article 12.”⁸¹ This challenge must occur prior to the commencement of trial and may occur “only once by any person or State.”⁸² Until the recent challenge by Libya, an admissibility challenge of this nature had never been brought before the ICC.⁸³

C. THE INTERNATIONAL CRIMINAL COURT INITIATES PROCEEDINGS AGAINST MUAMMAR GADDAFI, SAIF AL-ISLAM GADDAFI, AND ABDULLAH AL-SENUSSI

Following the U.N. Security Council’s unanimous referral

77. See Chibueze, *supra* note 26, at 196 (noting that developed countries will be able to use the complementarity principle as a trump card to evade prosecution by the ICC, a benefit which will elude developing countries).

78. See *id.*

79. See *id.*

80. See Rome Statute, *supra* note 8, art. 19(1), at 13 (“The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.”).

81. *Id.* art. 19(2), at 13–14.

82. See *id.* art. 19(4), at 14.

83. See Press Release, Security Council, International Criminal Court Chief Tells Security Council Libya Wants Domestic Courts to Handle Proceedings Against Son of Former Libyan Leader Qadhafi, U.N. Press Release SC/10651 (May 16, 2012), *available at* <http://www.un.org/News/Press/docs/2012/sc10651.doc.htm> (recognition by ICC Prosecutor Luis Moreno-Ocampo that Libya’s admissibility challenge was “the first time in the Court’s history that such a challenge had occurred”).

of the situation in Libya to the ICC on February 26, 2011,⁸⁴ the Prosecutor opened a formal investigation on potential crimes committed during the uprising. Although recognizing that Libya is not a party to the Rome Statute and thus not bound by the jurisdiction of the ICC, the Security Council urged Libya to “cooperate fully with . . . the Court and the Prosecutor.”⁸⁵ On May 16, 2011, after only two months of the investigation,⁸⁶ the Prosecutor sought arrest warrants from the Pre-Trial Chamber⁸⁷ for alleged crimes committed by Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi.⁸⁸ Moving remarkably quickly, the Pre-Trial Chamber accepted the Prosecutor’s application on June 27, 2011.⁸⁹ The Pre-Trial Chamber determined that there were reasonable grounds to believe that the three men were criminally responsible for one count of murder as a crime against humanity under Article 7(1)(a) of the Rome Statute and one count of persecution as a crime against humanity under Article 7(1)(h).⁹⁰ As such, the

84. See S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (“The Security Council . . . [d]ecides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court.”).

85. See *id.* ¶ 5, at 2.

86. See, e.g., Mark Kersten, *Whither ICC Deterrence in Libya?*, JUST. IN CONFLICT (Mar. 6, 2012) <http://justiceinconflict.org/2012/03/06/whither-icc-deterrence-in-libya/> (discussing that two month is a very short period of time for investigation before an application to the Pre-Trial Chamber for arrest warrants and speculating that the ICC moved quickly hoping to prove its effectiveness at deterrence if the conflict was terminated) [hereinafter Kersten, *Whither ICC Deterrence*]; see also, Kersten, *supra* note 3 (“With unprecedented speed, the Court opened an investigation in early March and, in June 2011, issued arrest warrants . . .”).

87. See *Pre-Trial Division*, *supra* note 38 (describing that the Pre-Trial Chamber of the ICC is in charge of authorizing the investigation, determining whether a reasonable basis for jurisdiction exists, issuing warrants of arrest, and conducting other preliminary matters before charges are confirmed and the case moves to the Trial Chamber of the ICC).

88. Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11-4-Red, Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (May 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf>.

89. Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11-01/11-1, Decision on the Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101337.pdf>.

90. Rome Statute, *supra* note 8, art. 7(1)(h), at 5 (“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in

Pre-Trial Chamber issued warrants for the arrest of the three men.⁹¹ Based upon the scope of the Security Council referral, the ICC warrants only cover conduct beginning on February 15, 2011.⁹²

On July 4, 2011, the ICC filed its request⁹³ for Libya to arrest and surrender the accused men in accordance with the directive of U.N. Security Council Resolution 1970.⁹⁴ Muammar Gaddafi was killed by Libyan forces on October 20, 2011,⁹⁵ causing the ICC to terminate proceedings against him shortly thereafter.⁹⁶ On November 19, 2011, Saif al-Islam Gaddafi (“Saif”) was captured in an attempt to flee to Niger, arrested, and taken to Zintan where he remains in militia custody.⁹⁷ Just

connection with any action referred to in this paragraph or any crime within the jurisdiction of the Court.”).

91. See Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11-01/11-2, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101339.pdf>; see also, Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11-01/11-3, Warrant of Arrest for Saif Al-Islam Gaddafi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101345.pdf>; see also, Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11-01/11-4, Warrant of Arrest for Abdullah Al-Senussi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101360.pdf>.

92. *Libya: Q&A on the ICC and Saif al-Islam Gaddafi*, HUM. RTS. WATCH (Jan. 23, 2012), <http://www.hrw.org/news/2012/01/23/libya-qa-icc-and-saif-al-islam-gaddafi>.

93. Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Request to the Libyan Arab Jamahiriya for the Arrest and Surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 4–5 (July 4, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1102510.pdf>.

94. S.C. Res. 1970, *supra* note 84, ¶ 5 (“[W]hile recognizing that States not party to the Rome Statute have no obligation under the Statute, [the Security Council] urges all States . . . to cooperate fully with the Court and the Prosecutor . . .”).

95. See Kareem Fahim, Anthony Shadid & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N. Y. TIMES, Oct. 20, 2011, <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html?pagewanted=all> (discussing the circumstances surrounding the death of Muammar Gaddafi and the possibility that anti-regime forces executed him).

96. Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, 4–5 (Nov. 22, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1274559.pdf> (terminating the proceedings against Muammar Gaddafi based on the changed circumstances due to his death).

97. See Jomana Karadsheh, *Libyans Celebrate Capture of Gadhafi's Son Saif al-Islam*, CNN, Nov. 19, 2011, http://articles.cnn.com/2011-11-19/africa/world_africa_libya-gadhafi-son_1_saif-al-islam-prime-minister-abdurrahim-el-keib-moammar-gadhafi?_s=PM:AFRICA (discussing capture of

four days later, the Libyan Government initiated an investigation into Saif's alleged crimes of corruption and other financial crimes, but not the same crimes of murder and persecution the ICC warrant covered.⁹⁸ Not until January 8, 2012 did the Libyan Prosecutor begin investigating the crimes of murder and rape allegedly committed by Saif during the 2011 Libyan revolution.⁹⁹

While the Libyan Government conducted an internal investigation as to Saif's crimes, the ICC continued to conduct its own investigation simultaneously. On December 6, 2011, the Pre-Trial Chamber authorized the Office of Public Counsel for the Defense ("OPCD") to represent Saif and on February 3, 2012, issued a decision ordering the Registry, the administrative arm of the ICC, to arrange for an OPCD visit to Libya to meet with Saif.¹⁰⁰ The OPCD visited Libya from February 29 to March 4, 2012, where it met with Saif at the detention facility in Zintan where he has remained in custody since his arrest.¹⁰¹ Following its visit, the OPCD filed two confidential reports with the Pre-Trial Chamber documenting the results of its meeting. The first, written on March 2, 2012, notes that "[t]he objective of the visit was completely frustrated. Based on the information that the OPCD received during this visit, the OPCD has grave concerns regarding whether it will be possible to uphold the rights of Mr. [Saif] Gaddafi before the ICC in an effective manner, whilst he is

Saif and the implications on the ICC arrest warrant); *see also* Kersten, *supra* note 3 (noting that as of October 8, 2012, Saif remains in custody in Zintan).

98. *See* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ¶ 23 (May 1, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf> ("On the same date [November 23, 2011] the Libyan Government commenced an investigation into criminal conduct (and in particular, allegations of corruption and other financial crimes) by Mr. Gaddafi.") [hereinafter Admissibility Challenge]. Notably, on December 17, 2011, the investigation was expanded to include allegations surrounding Saif's "crimes against the person." *Id.*

99. *Id.* ¶ 25.

100. *See id.* ¶¶ 24, 27; Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision on the Registry-OPCD Visit to Libya (Feb. 3, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1326911.pdf> ("Considering . . . that a personal visit from the Registry and the OPCD is the best mechanism to ensure that Saif Al-Islam Gaddafi is well informed about the current stage of the proceedings before the Court and of the appointment of the OPCD to represent his interests . . .").

101. Admissibility Challenge, *supra* note 98, ¶ 27.

being detained in Libya by the current authorities.”¹⁰² The second, filed on March 5, 2012, after visiting with Saif, details the conditions of Saif’s detention, notes Saif’s desire to be detained under the custody of the ICC in The Hague, and his futile requests for a lawyer in connection with the Libyan proceedings.¹⁰³ This report further details that Libyan authorities informed Saif that they had terminated their investigation as to the allegations of rape and murder for a lack of evidence and that Saif had only been interviewed by Libyan authorities in connection with allegations of minor offenses related to improper camel licensing and the cleanliness of his fish farms.¹⁰⁴ Libya vigorously denies these allegations.¹⁰⁵

On March 17, 2012, Abdullah al-Senussi (“al-Senussi”) was arrested in Mauritania, leading many to hope that he would be transferred to the ICC.¹⁰⁶ In addition to the outstanding ICC

102. Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Public Redacted Version Urgent Report Concerning the Visit to Libya, ¶ 2 (Mar. 2, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1391722.pdf>. The OPCD was informed that it was not possible for it to have privileged communications with Saif regarding its representation of him while he was detained, detailed how Saif had not been provided with any arrest warrant or documents concerning the proceedings before the ICC, and explained that the OPCD visit with Saif had been cancelled by Libyan authorities at the last moment with no legitimate explanation. *Id.* ¶¶ 22, 26, 29–37.

103. Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Second Public Redacted Version Urgent Report Concerning the Visit to Libya (Mar. 5, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1388863.pdf>.

104. *Id.* ¶ 38–39.

105. See Admissibility Challenge, *supra* note 98, ¶ 28 (“[T]hese allegations were made without any attempt to check their accuracy”); *id.* ¶ 38 (“It is particularly unfortunate that [Libya] brings its Article 19 application in the context of unverified and unwarranted allegations of bad faith made by the OPCD The Libyan Government trusts that the Pre-Trial Chamber will not allow such baseless allegations to prejudice Libya’s Article 19 application.”); *id.* ¶ 94 (“The inappropriate and unsubstantiated allegations by the OPCD against Libya in this regard have been prejudicial and contradictory. . . . These allegations are irresponsible and patently false. No evidence has been tendered to support them.”); see also *id.* ¶ 35 (alleging that Saif has been kept in adequate conditions of detention, provided with good quality food, given access to ICC lawyers, not subject to physical abuse, provided with medical and dental care, and is being “investigated under Libyan law with respect to crimes arising out of the same serious conduct as that set forth in the arrest warrant issued by the [ICC].”). *But see* Heller, *supra* note 66 (discussing how the OPCD as an official organ of the court has no reason to lie about Saif’s confinement conditions whereas the Libyan government has countless reasons to do so).

106. *Gaddafi Spy Chief Abdullah al-Senussi Held in Mauritania*, BBC

warrant seeking custody of the single man said to know the darkest secrets of Gaddafi's regime,¹⁰⁷ French President Nicolas Sarkozy also requested extradition from Mauritania for al-Senussi based on his conviction and pending life sentence in France.¹⁰⁸ In addition, Libya demanded that Mauritania hand al-Senussi over to face trial for his alleged crimes in connection with the 2011 uprising.¹⁰⁹ Following his arrest, on April 3, 2012, Libyan officials began to investigate al-Senussi for both financial crimes and crimes against the person under Libyan law.¹¹⁰ Despite the competing requests for extradition, Mauritania surrendered al-Senussi to Libya on September 5, 2012.¹¹¹ Based on the ongoing competing ICC investigation into al-Senussi and Saif's crimes, on May 1, 2012, the Libyan Government formally filed an admissibility challenge of the ICC's case, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*.¹¹²

II. ANALYSIS OF ADMISSIBILITY OF THE CASE OF SAIF AND AL-SENUSSI BEFORE THE INTERNATIONAL CRIMINAL COURT

The Admissibility Challenge raised by Libya comes at a time when both the Libyan government and the ICC are trying

NEWS, Mar. 17, 2012, <http://www.bbc.co.uk/news/world-africa-17413626>; Vivienne Walt, *Why Libya—and Not The Hague—Will Try Gaddafi's Son*, TIME, Oct. 10, 2012, <http://world.time.com/2012/10/10/why-libya-and-not-the-hague-will-try-gaddafis-son/>.

107. Ian Black, *Abdullah al-Senussi: Spy Chief Who Knew Muammar Gaddafi's Secrets*, GUARDIAN, Sept. 5, 2012, <http://www.guardian.co.uk/world/2012/sep/05/abdullah-al-senussi-libya-secrets>.

108. Al-Senussi had been convicted and sentenced to life imprisonment in France for his involvement in a 1989 attack that killed 170 people on a French plane. If al-Senussi had been extradited to France, it is likely that France would have been obligated to surrender him to the ICC. See BBC NEWS, *supra* note 106 ("Already sentenced to life in prison in France; President Sarkozy says French authorities involved in arrest; but France may be obliged to hand [Al-Senussi] to ICC.").

109. *Id.*

110. Admissibility Challenge, *supra* note 98, at ¶ 23.

111. See *Mauritania Depots Libya Spy Chief Abdullah al-Senussi*, BBC NEWS, Sept. 5, 2012, <http://www.bbc.co.uk/news/world-africa-19487228> (noting that Al-Senussi was extradited to Libya based on Libyan assurances that he would receive a fair trial). Mauritania is not a signatory to the Rome Statute and was not obligated to surrender Al-Senussi to the ICC although many hoped it would, ensuring that he would receive a fair trial. BBC NEWS, *supra* note 106.

112. Admissibility Challenge, *supra* note 98.

to establish their identity in the international arena. While the ICC desires to legitimize itself as an effective international judicial institution, the new Libyan government seeks to demonstrate its sovereignty and ability to prosecute those behind the mass human rights abuses which characterized the Gaddafi regime.¹¹³ Part II seeks to examine the Admissibility Challenge in light of these competing goals. First, Part II.A begins by evaluating the arguments made by Libya in the Admissibility Challenge and explains why a lack of national due process on its own is not grounds for admissibility of a case before the ICC. Part II.B then explains how Libya's failure to provide Saif with due process rights remains relevant to the discussion of admissibility. Part II.C concludes by addressing how the ICC should respond to the Admissibility Challenge and what changes need to be made for the ICC to remain a relevant and effective international judicial body. At the onset, it should be noted that Libya's Challenge is primarily directed only at the admissibility of the case concerning Saif, not al-Senuissi.¹¹⁴

A. THE ABSENCE OF NATIONAL DUE PROCESS IS NOT A GROUNDS FOR ADMISSIBILITY

Libya raises its Admissibility Challenge under Article 19(2)(b) of the Rome Statute, challenging the jurisdiction of the ICC to hear the case on the grounds that it is actively investigating the crimes of Saif and al-Senuissi domestically.¹¹⁵ If Libya is truly actively investigating, then according to Article 17(1)(a) the case should be inadmissible unless Libya is "unwilling" or "unable" to genuinely carry out the investigation.¹¹⁶ The Challenge is devoted towards persuading

113. See Kersten, *Whither ICC Deterrence*, *supra* note 86 (contemplating that the dispute over where to try Saif and al-Senuissi could frustrate and undermine both of these goals).

114. Libya argues that the case against each individual must be treated as a separate inquiry and the proper scope of the current Admissibility Challenge relates only to the charges against Saif. If the Pre-Trial Chamber determines otherwise, Libya notes that it is actively investigating the case of Al-Senuissi as well and the same arguments apply as are being made in regards to Saif. Because of this position, the Admissibility Challenge is written as an evaluation of the investigation of the charges against Saif alone. See Admissibility Challenge, *supra* note 98, ¶¶ 69–75.

115. See *id.* ¶ 1; see also Rome Statute, *supra* note 8, art. 19(2), at 13 ("Challenges to the admissibility of a case . . . may be made by: . . . A state which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted . . .").

116. See Rome Statute, *supra* note 8, art. 17(1)(a), at 12.

the Pre-Trial Chamber that the Libyan authorities are willing and able to conduct Saif's investigation domestically and that to deny them of this opportunity would be "inconsistent with the object and purpose of the Rome Statute."¹¹⁷

1. Libya's Admissibility Challenge Argues that Libya is Able to Guarantee Due Process Rights to Saif

In order to demonstrate its ability and willingness to investigate Saif and its commitment to provide him with internationally recognized due process rights along the way, Libya details in the Admissibility Challenge the Libyan Code of Criminal Procedure ("Criminal Procedure Code") and the recently enacted Libyan Constitutional Declaration which together outline the due process rights guaranteed to Libyan citizens.¹¹⁸ The Libyan Constitutional Declaration provides certain judicial guarantees to citizens, including an independent and impartial judiciary, which Libya had not experienced in over four decades of Gaddafi rule.¹¹⁹ Not only is this guarantee constitutionally mandated but it is also protected under provisions of domestic Libyan law.¹²⁰ Furthermore, the Constitutional Declaration guarantees the following due process rights to Libyan citizens:

- i. There shall be no crime or penalty except by virtue of the text of the law;
- ii. Any defendant shall be innocent until he is proven guilty by a fair trial wherein he shall be granted the guarantees necessary to defend himself;
- iii. Each and every citizen shall have the right to recourse to the judicial authority in accordance with the law;
- iv. Right of resorting to judiciary shall be preserved and guaranteed for all people;
- v. Each and every citizen shall have the right to resort to his natural judge;
- vi. The State shall guarantee to bring the

117. Admissibility Challenge, *supra* note 98, ¶ 2.

118. *See id.* ¶¶ 39–67.

119. THE CONSTITUTIONAL DECLARATION, Mar. 8, 2011, Part 4, art. 31–32 (Libya).

120. *See* Admissibility Challenge, *supra* note 98, ¶ 55 (noting that an independent judiciary is guaranteed in Article 52 of the Judicial System Law and Article 31 in the Freedoms Act).

judiciary authorities near the litigants and shall guarantee the swift determination on lawsuits;
vii. Laws shall not provide for the prohibition of judiciary authority to control any administrative decree.¹²¹

Likewise, the Criminal Procedure Code specifies that the accused has the right to a lawyer,¹²² the right to view investigative materials relating to the case,¹²³ and numerous trial proceeding rights.¹²⁴

Despite Libya's assurances that Saif has these due process guarantees under Libyan law and that their investigation complies with these rights, the general consensus remains that Saif will not have a fair trial if it is conducted in Libya.¹²⁵ Several respected independent agencies have documented widespread and serious human rights abuses by militia leaders across Libya since the collapse of the Gaddafi regime, leading Amnesty International to declare that "[l]awlessness still pervades Libya a year after the outbreak of the uprising."¹²⁶ When Amnesty International delegates visited eleven detention centers across Libya in January and February 2012, they found torture and ill-treatment of suspected Gaddafi loyalist detainees in ten of those locations.¹²⁷ Despite being alerted of

121. THE CONSTITUTIONAL DECLARATION, Mar. 8, 2011, Part 4, art. 31–32 (Libya).

122. Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Libyan Government's Filing of Compilation of Libyan Law Referred to in its Admissibility Challenge, Annex B, art. 106 (May 28, 2012), <http://www.icc-epi.int/iccdocs/doc/doc1418852.pdf> ("[I]nvestigator may not interrogate any accused or confront him with other accused persons or witnesses except after summoning his lawyer to appear . . .") [hereinafter *Compilation of Libyan Law*]; *id.* art. 161 ("Indictment shall automatically appoint an advocate for any accused of a felony . . . if he did not elect an advocate to defend him.").

123. See Admissibility Challenge, *supra* note 98, ¶ 2.

124. See *Compilation of Libyan Law*, *supra* note 122, arts. 241, 247, 251, 266, 276.

125. See Leanos, *supra* note 4, at 2295 (Noting that after four decades of repression and disregard for the independency of the legal system, "observers worry that Libya lacks a viable judicial system").

126. Amnesty International, *Militias Threaten Hopes for New Libya*, 5 AI Index: MDE 19/002/2012 (Feb. 2012).

127. See *id.* at 6 ("Detainees are often tortured immediately after being seized by militias and subsequently during interrogation, including in officially recognized detention centres. To date, detainees have not been allowed access to lawyers, except for rare cases in eastern Libya. . . . Some detainees were too scared to speak – fearing further torture if they did so – and were only prepared to show Amnesty International delegates their torture

the ongoing militia abuses,¹²⁸ the Libyan transitional government has been unwilling to recognize the problem and has failed to take any action to hold the militia responsible.¹²⁹ The Amnesty International Report summarizes that:

Despite pledges to bring to justice those who committed war crimes and human rights abuses on both sides, the authorities have so far failed to take action against suspects who fought with the NTC forces, sustaining a climate of impunity for human rights abuses Thousands of detainees remain held in scores of detention facilities in Libya where torture is rife Indeed, the failure of the authorities to even begin to investigate with a view to bringing to justice former anti-Gaddafi fighters responsible for war crimes during the conflict and human rights abuses has perpetuated the climate of impunity for such crimes.¹³⁰

Likewise, the United Nation's International Commission of Inquiry on Libya issued a similar report declaring that "[b]reaches of international human rights law continue to occur in a climate of impunity."¹³¹

These allegations, coupled with the unfavorable OPCD reports regarding their visit with Saif in March 2012, make a strong case for concluding that Libya is not able to provide Saif with due process guarantees. Melinda Taylor, the OPCD defense counsel appointed for Saif, notes that Saif has been denied access to meet with lawyers and argues that Libya has

wounds."); *see also* Leanos, *supra* note 4, at 2296 ("[T]here are numerous reports that detainees from the revolution currently held in Libyan prisons are being tortured and subjected to human rights abuses. Also, according to Amnesty International, many of the over 8,000 detainees were arrested without a warrant and without any legitimate reason whatsoever, other than being thought to have supported Gaddafi.").

128. In May 2011, the National Transitional Government ("NTC") was told of the patterns of abuse, torture, and killings by opposition fighters through an Amnesty International memorandum. In September and October 2011, Amnesty International published two additional reports detailing the militia abuse. On January 26, 2012, Medecins Sans Frontieres, an independent, international medical humanitarian organization, suspended its work in Misratah because of ongoing torture there. That day, Amnesty International also released further reports on recent incidents of torture and death across Libyan detention facilities. Amnesty International, *supra* note 126, at 6.

129. *Id.* at 7.

130. *Id.* at 6–7, 10.

131. Kersten, *Whither ICC Deterrence*, *supra* note 86.

provided no information regarding their plan to conduct a fair and safe trial for him in the midst of ongoing instability in Libya.¹³² Most in the international community question Libya's ability to give Saif a fair trial, especially in light of reports concerning his current treatment.¹³³ Despite the new statutory and constitutional guarantees in Libyan law, Libya's guarantees mean nothing unless they are actually observed. The international community has witnessed similar conundrums. Iraq's failed guarantee that it could provide a fair trial for Saddam Hussein because of the formal legal procedures governing the Iraqi High tribunal still resonates with the international community; many fear a repeat situation in Libya.¹³⁴ Unfortunately, as many in the international criminal law community realize, "the statutory and constitutional right to a fair trial does not guarantee that a defendant will actually receive a fair trial."¹³⁵

2. Flaws in the Due Process Theory as Grounds For Admissibility

Despite the negative implications, a lack of national due process on its own is not grounds for admissibility of a case before the ICC. Defending a State's right to hold unfair trials is not a popular view and most scholars choose not to take this position. Nonetheless, an examination of the drafting history of the Rome Statute and the plain language of the statute reveals that however unpopular, this view is correct.

132. See Walt, *supra* note 106 (quoting Ms. Taylor as saying that "we have not had any ability to contact Mr. Gaddafi and none of his friends and family have been able to contact him").

133. See Heller, *supra* note 66 ("I don't know many people who work in [international criminal law] who actually believe that Libya intends to give Saif and Al-Senussi trials that comport with international standards of due process, regardless of its protestations to the contrary."); Amnesty International, *Libya Must Seek Justice Not Revenge in the Case of Former Al-Gaddafi Intelligence Chief*, (Oct. 18, 2012), http://www.amnesty.org.uk/news_details.asp?NewsID=20390 ("Trying al-Senussi in Libya where the justice system remains weak and fair trials are still out of reach, undermines the right of victims to seek justice and reparation. Instead, he should face the ICC's charges of crimes against humanity in fair proceedings.").

134. See Heller, *supra* note 66 ("[It] wasn't so long ago that Iraq guaranteed it would give Saddam Hussein a fair trial and defended that guarantee by pointing to the (ostensible) formal adequacy of the law and procedure governing the Iraqi High Tribunal. And we all know that that trial turned out.").

135. *Id.*

In order for a case to be admissible before the ICC despite an ongoing investigation or prosecution by a State, it must be shown that the State “is unwilling or unable genuinely to carry out the proceedings.”¹³⁶ Article 17(2) of the Rome Statute states: “In 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”¹³⁷ Although these “principles of due process” have not been clearly defined, this phrase has been interpreted as setting some minimum standards of conduct that a State must satisfy in order to show that it is “willing” to investigate or prosecute a particular case.¹³⁸ Reading a due process requirement to the complementarity doctrine creates a safety net for situations when a deferral to State jurisdiction would expose the accused to national judicial systems that are unable to guarantee due process.¹³⁹ Unfortunately, this fallback does not exist in the true complementary regime designed by the Rome Statute. Article 17 still requires the ICC to defer to the jurisdiction of a State in situations where unfair trial proceedings (a lack of due process guarantees) are used to make the accused easier to convict.¹⁴⁰

Due Process Theory advocates point to the “independent” and “impartial” language in Article 17(c) to support the claim that Article 17 creates a due process requirement.¹⁴¹ These advocates argue that proceedings in which an individual is easier to convict because of violations of his due process guarantees are proceedings not conducted independently or impartially.¹⁴² A reading of Article 17(2)(c) in its entirety however, refutes this premise. Article 17(2)(c) states that in order to determine unwillingness the ICC shall consider whether: “The proceedings were not or are not being conducted independent or impartially, *and* they were or are being

136. Rome Statute, *supra* note 8, art. 17(1)(a), at 12.

137. *Id.* 17(2), at 12 (emphasis added).

138. See KLEFFNER, *supra* note 26, at 127 (“The Statute does not identify [these principles] and the drafting history of Article 17(2) does not elucidate what the drafters of the Statute had in mind when including the notion of ‘principles of due process’ in the provision.”); Meyer, *supra* note 65, at 567.

139. Heller, *supra* note 65, at 256.

140. *Id.* at 257.

141. *Id.* at 260.

142. *Id.* (“[W]e would not describe a proceeding that violates due process in order to make the defendant easier to convict as either ‘independent’ or ‘impartial.’”).

conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”¹⁴³ The use of the coupling term “and” indicates that both requirements must be met in order for the ICC to determine a state to be “unwilling” and a case therefore admissible.¹⁴⁴

As a result, in order for due process violations to be a basis for declaring a state to be “unwilling,” those due process violations must also be inconsistent with an intent to bring the accused to justice.¹⁴⁵ Therefore, due process is only applicable to admissibility when it is designed to make the accused *more* difficult to convict.¹⁴⁶ However, in most cases, due process violations are used to make a defendant easier to convict. In those cases, Article 17(2)(c) would not apply. Article 17(2)(c) simply cannot apply when due process violations make it easier to secure a conviction because “such a proceeding, though unfair, is simply not inconsistent with the intent to bring the defendant to justice.”¹⁴⁷

For this same reason, basing the Due Process Theory on the “principles of due process recognized by international law” language of Article 17(2) is flawed.¹⁴⁸ A violation of the principles of due process recognized by international law on its own is not a basis for determining unwillingness.¹⁴⁹ Instead, one of the three conditions in Article 17(2)(a)-(c) must be established and the ICC should judge these through the lens of “principles of due process recognized by international law.”¹⁵⁰ Each of the Article 17(2)(a)-(c) requirements contains language which makes due process irrelevant to admissibility unless it makes the defendant more difficult to convict, as noted above.¹⁵¹

143. Rome State, *supra* note 8, art. 17(2)(c), at 12 (emphasis added).

144. Heller, *supra* note 65, at 261.

145. *Id.*

146. See Pichon, *supra* note 33, at 193 (pointing out that Article 17(2)(c) only applies to national proceedings which aim to make the accused harder to convict). See also Heller, *supra* note 65, at 260–61.

147. Heller, *supra* note 65, at 261.

148. *Id.* at 262.

149. *Id.* at 262–63.

150. *Id.*

151. See Rome Statute, *supra* note 8, art. 17(2)(a), at 12 (unwillingness is found if the proceedings were undertaken “for the purpose of shielding the person concerned from criminal responsibility”); *id.* art. 17(2)(b), at 12 (unwillingness is found if there has been an unjustified delay “inconsistent with an intent to bring the person concerned to justice”); *id.* art. 17(2)(c), at 12

A Due Process Theory based on the Article 17(3) “inability” determination is likewise flawed.¹⁵² To declare a State “unable” to investigate or prosecute a case, the ICC “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.”¹⁵³ A judicial system that is missing due process guarantees is not one that has collapsed or is no longer able to obtain the defendant, evidence, or testimony.¹⁵⁴ The “inability” determination more appropriately applies in situations where an investigation or prosecution is not practically possible.¹⁵⁵ The Informal Expert Paper written by the ICC Office of the Prosecutor confirms this interpretation, listing factors such as a lack of judges or investigators, a lack of judicial infrastructure, or a lack of access as being relevant to a determination of “inability.”¹⁵⁶ Therefore, “inability” is satisfied only by a collapse of unavailability that prevents an *effective* investigation or prosecution, not a collapse that prevents a *fair* investigation or prosecution.¹⁵⁷ In conclusion, no matter what basis the Due Process Theory is rooted in, “the principle of complementarity only addresses situations where breaches of human rights standards, more precisely the right to an independent and impartial judiciary, work *in favour* of the accused.”¹⁵⁸

Therefore, as much as one may hope that Libya’s due process violations would automatically make Saif’s case admissible before the ICC, a plain reading of the text of Article

(unwillingness is found if the proceedings were conducted in a manner “inconsistent with an intent to bring the person concerned to justice”). See also KLEFFNER, *supra* note 26, at 130 (“Article 17(2) addresses the situation in which criminal processes are abused *to the benefit* of the suspect or accused. This is diametrically opposed to the general assumption and objective of fair trial guarantees, which are designed to protect individuals against abuses *to their disadvantage*.” (emphasis in original)).

152. Heller, *supra* note 65, at 263.

153. Rome Statute, *supra* note 8, art. 17(3), at 12.

154. *Id.* at 264.

155. *Id.* (“[T]he ordinary meaning . . . seems to embrace only (relatively) objective criteria such as a political situation that makes holding trials impossible or a debilitating lack of judges, prosecutors, and other court personnel.”).

156. See ICC Office of the Prosecutor, ICC-01/04-01/07-AnxA, Informal Expert Paper: The Principle of Complementarity in Practice, ¶ 50 (2003), http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/complementarity.pdf.

157. Pichon, *supra* note 33, at 192.

158. *Id.* at 194.

17 does not support this proposition. Despite Libya's devotion of much of their Admissibility Challenge to persuading the ICC that they will provide Saif with the due process guarantees afforded to him under Libyan law, Libya's Challenge is fundamentally based on the notion that Article 17 does not make an absence of national due process a ground for admissibility.¹⁵⁹ The Challenge points out:

"[T]here is a danger that the provisions of Article 17 will become a tool for overly harsh assessments of the judicial machinery in developing countries." It is not the function of the ICC to hold Libya's national legal system against an exacting and elaborate standard beyond that basically required for a fair trial.¹⁶⁰

The Libyan Admissibility Challenge further recognizes that both the drafters of the Rome Statute and commentators have noted that:

Arguments have been made that the Court is thus given a general role in monitoring the human rights standards of domestic authorities. The better view is that delay and lack of independence are relevant only in so far as either of them indicates an intention to shield the person concerned from justice. There does not appear to be anything in the Statute to make the Court responsible for the protection of the human rights of the accused in the national enforcement of international criminal law¹⁶¹

As explained above, Libya is correct in its assertion that Article 17 does not allow the ICC to declare a case admissible solely on the grounds that the Libyan judicial system lacks due process guarantees. To hold otherwise would invite the ICC to act as a supranational court, scrutinizing national judicial courts for violations of international due process guarantees.¹⁶²

159. Heller, *supra* note 66. See Admissibility Challenge, *supra* note 98, ¶ 99.

160. Admissibility Challenge, *supra* note 98, ¶ 99 (quoting Sharon A. Williams & William A. Schabas, *Article 17*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 624 (Otto Triffterer ed., 2d ed. 2008)) (internal quotation marks omitted).

161. *Id.* (quoting ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL LAW AND PROCEDURE, 156–57 (2d. ed. 2010)).

162. See Chibueze, *supra* note 26, at 196 (discussing how the court would be viewed as a vestige of western countries by developing countries if the court

This was not the intention of the drafters of the Rome Statute for the ICC. In fact, the delegates to the Rome Conference specifically rejected a draft version of Article 17 that would have allowed a consideration of whether “the said investigations or proceedings. . . were or are conducted with full respect for the fundamental rights of the accused.”¹⁶³ As such, the ICC should not use a lack of national due process as the only grounds for admissibility of a case before it, no matter the unpleasant implications that may follow.

B. LIBYA’S FAILURE TO PROVIDE SAIF WITH DUE PROCESS GUARANTEES IS INCONSISTENT WITH AN INTENT TO BRING HIM TO JUSTICE

Despite the fact that a lack of national due process on its own does not establish admissibility, Libya’s inability to provide Saif with foundational due process rights remains relevant for the admissibility of the case. When a national criminal justice system has its own due process requirements, and those requirements are violated during the investigation or prosecution process, a State has made it more difficult to convict the defendant because any conviction could be overturned on appeal based on the due process violations.¹⁶⁴ If a denial of basic due process rights guaranteed under national law means that the charges must be dismissed, and the defendant has in fact been denied of those guarantees, then proceedings have been “conducted in a manner which . . . is inconsistent with an intent to bring the person concerned to justice.”¹⁶⁵ In these circumstances, therefore, the Article

required the kind of procedural guarantees present in western countries).

163. Heller, *supra* note 65, at 272 (“Because many delegations believed that procedural fairness should not be a ground for defining complementarity, [the] proposal was defeated. In the view of the delegations, the purpose of paragraph 2 [of Article 17] was to preclude the possibility of sham trials aimed at shielding perpetrators – and nothing more.”) (quoting John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS*, 41, 50 (Roy S. Lee Ed., 1999) (internal quotation marks omitted)).

164. See Kevin Jon Heller, *Why the Failure to Provide Saif with Due Process is Relevant to Libya’s Admissibility Challenge*, OPINIO JURIS (Aug. 2, 2012), <http://opiniojuris.org/2012/08/02/why-the-failure-to-provide-saif-with-due-process-is-relevant-to-libyas-admissibility-challenge>.

165. Rome Statute, *supra* note 8, art. 17(2)(c), at 12. See Heller, *supra* note 164 (promulgating the idea that the State’s failure to provide a suspect with due process rights demanded by national law means that the State is conducting the proceedings in a manner which will make it more difficult to bring the accused to justice).

17(2)(c) requirements for declaring a State “unwilling” would be met and a case would be admissible before the ICC.¹⁶⁶

The reports from the OPCD, Amnesty International and other international organizations, and even Libya’s Admissibility Challenge itself, show that these are the circumstances surrounding Libya’s investigation and prosecution of Saif. Libyan authorities are constitutionally required to give Saif due process protections and they have denied him of those protections.¹⁶⁷ Therefore, it is likely that any conviction would be overturned. Libya’s blatant disregard for Saif’s constitutional due process rights has made it impossible to secure a conviction that will withstand an appeal.¹⁶⁸ As such, Libya’s actions have (albeit unintentionally) demonstrated an unwillingness to investigate or prosecute because they have conducted the investigation in a manner which is inconsistent with an intent to bring Saif to justice, violating Article 17(2)(c). Because of Libya’s ongoing violations of Article 17(2)(c), the ICC should declare the case admissible and guarantee that Saif receives a fair trial at The Hague.

As mentioned above, Libya spends considerable time in the Admissibility Challenge describing Libyan law and the due process guarantees provided to Saif under domestic law.¹⁶⁹ Also included in the Libyan Code of Criminal Procedure are provisions specifying the consequences of noncompliance with these fundamental guarantees. For example, Article 304 demands that the “breach of any disposition of law concerning essential procedures *gives rise to the nullity of the procedure.*”¹⁷⁰ Article 305(1) requires that the “breach of a provision concerning the composition of the tribunal, his functions, his competence in the qualification of the crime or, in any case, any matter related to public order *gives rise to nullity.*”¹⁷¹ Article 309 specifies that “the declaration that a certain procedure is

166. See Heller, *supra* note 164.

167. See, e.g., Amnesty International, *supra* note 126; Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Public Redacted Version of the Corrigendum to the “Defence Response to the ‘Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute’”, ¶ 75 (July 31, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1446165.pdf> (emphasis added) [hereinafter Defence Response].

168. See Heller, *supra* note 161.

169. See Admissibility Challenge, *supra* note 98, ¶¶ 39–67.

170. Defence Response, *supra* note 167, ¶ 217.

171. *Id.* (emphasis added).

null, also affects any consequences of that procedure.”¹⁷² The existence of these provisions means that a violation of the due process rights afforded to Saif under Libyan domestic law should lead to a nullity of the procedure. For Libyan domestic courts to hold otherwise would be an indication of the lack of independence or impartiality of the judiciary.¹⁷³

Unfortunately, Libya’s treatment of Saif thus far violates not only international law but Libyan law as well. The OPCD’s response to the Admissibility Challenge is riddled with examples of breaches of Saif’s fundamental due process rights guaranteed by Libyan law.¹⁷⁴ Any one of these breaches is grounds for Libyan domestic courts to declare that an essential provision of the law was not followed, thereby necessitating that they dismiss the case against Saif.¹⁷⁵ Not only are these violations alleged by the OPCD, but they are confirmed by respected international organizations.¹⁷⁶ Saif’s lack of access to a lawyer is just an example of one such confirmed violation. During the investigation phase of the case, the phase Saif remains in, Article 106 of the Libyan Criminal Procedure Code provides that Saif has a right to an attorney both in interrogations with the investigator and when being confronted with witnesses.¹⁷⁷ Despite this right, Human Rights Watch,¹⁷⁸

172. *Id.*

173. *See* Heller, *supra* note 164.

174. *See* Defence Response, *supra* note 167, ¶ 6 (conveying Saif’s statements that he has not been allowed to speak with an attorney to prepare his defense); *id.* ¶ 75 (noting that Saif has not been provided with the evidence or basis for his detention); *id.* ¶ 91 (asserting that Libya’s reliance on intercept evidence of Saif’s guilt without a court order is a violation of Libyan law); *id.* ¶ 95 (describing how witness statements obtained through torture or by suspects denied council are excluded from proceedings under Libyan law); *id.* ¶¶ 107–115 (listing the names of Libyan witnesses that have been tortured, interrogated without counsel, and detained in violation of their rights); *id.* ¶ 182 (noting that both the Human Rights Watch and the U.N. Commission of Inquiry have confirmed that Saif has not been brought before a judge or allowed an opportunity to dispute his detention, violating Libyan law); *id.* ¶ 188 (alleging that Saif has not been detained in a proper purpose built facility as demanded by the Libyan Prisons Act); *id.* ¶¶ 194–97 (describing Libya’s denial to the OPCD of contact with Saif as his attorney); *id.* ¶¶ 200, 207 (asserting that Saif has been denied access to legal advice).

175. *Id.* ¶ 91.

176. *See* Fred Abrahams, *In His First Interviews, Saif al-Islam Says He Has Not Been Given Access to a Lawyer*, THE DAILY BEAST (Dec. 30, 2011, 4:45 AM), <http://www.thedailybeast.com/articles/2011/12/30/in-his-first-interview-saif-al-islam-says-he-has-not-been-given-access-to-a-lawyer.html>.

177. Compilation of Libyan Law, *supra* note 122, art. 106 (“In any other case except *Flagrante delicto*, and in case of haste or fear of evidence loss,

the U.N. International Commission on Libya,¹⁷⁹ the OPCD,¹⁸⁰ and Saif himself¹⁸¹ have complained about Libya's disregard for this due process guarantee. The overwhelming evidence that Saif has been denied access to legal representation is but one example of Libya's failure to provide due process guarantees to Saif which are demanded by its own domestic law.

Therefore, "by continuing to deny Saif even the semblance of due process, the Libyan government is making it almost impossible for the Libyan judiciary to allow the charges to proceed against him."¹⁸² As the Defence Response notes, an application of Libyan domestic law in an impartial and independent manner would necessarily lead to a finding that the proceedings to date have "flagrantly violated Mr. Gaddafi's rights, and have failed to comply with fundamental tenets of the law."¹⁸³ A finding of this nature "would frustrate the ability of the domestic authorities to bring Mr. Gaddafi to 'justice'" as it would mean that the proceedings against him were null.¹⁸⁴ This action inevitably is "inconsistent with an intent to bring the person concerned [Saif] to justice" and therefore, warrants a determination by the ICC that Libya is "unwilling" to genuinely carry out the investigation or prosecution of Saif.¹⁸⁵

investigator may not interrogate any accused or confront him with other accused persons or witnesses except after summoning his lawyer to appear, if any, and the accused shall announce the name of his lawyer with a report submitted to the clerk office or prison warden, his lawyer may handle such statement or announcement.").

178. See Abrahams, *supra* note 176 (confirming that Saif has been left in total isolation without any access to legal consultation).

179. Human Rights Council, *Rep. of the Int'l Comm'n of Inquiry on Libya*, ¶ 787, U.N. Doc. A/HRC/19/68 (March 2, 2012) ("Until now he [Saif] has been held by *thumar* in Zintan, without any access to a lawyer or to his family." (emphasis in original)).

180. See Defence Response, *supra* note 167, ¶ 196 ("[T]he OPCD was informed that it would not be possible for Mr. Gaddafi to have privileged communications with a lawyer, whilst he is being detained in Zintan"); Walt, *supra* note 106 ("[Melinda] Taylor [Saif's OPCD counsel] said Libya has denied Saif access to meet with lawyers, regarded as a basic right under international law. 'We have not had any ability to contact Mr. Gaddafi and none of his friends and family have been able to contact him' . . .").

181. See Defence Response, *supra* note 167, ¶ 6 ("There will be no truth if I [Saif] am kept locked up and silenced in a remote mountain village, with no or very limited possibility to speak to my lawyers in order to convey my defense.").

182. Heller, *supra* note 165.

183. Defence Response, *supra* note 167, ¶ 216.

184. *Id.* ¶ 218.

185. See generally Rome Statute, *supra* note 8, art. 17(2)(c), at 12; *id.*

C. THE NEXT STEPS FOR THE INTERNATIONAL CRIMINAL COURT

Unfortunately, even a determination that Saif's case is admissible before the ICC does not guarantee Libya will surrender Saif to the jurisdiction of the Court. Because the situation is before the ICC on a referral from the Security Council, if Libya refuses to surrender Saif after an admissibility finding the ICC may issue a finding of non-compliance under Article 87 and inform the Security Council.¹⁸⁶ Although not required to take any action, the Security Council could potentially invoke a number of responses from issuing a resolution or presidential statement to invoking sanctions of the country have the potential of being incredibly damaging to a country trying to regain its footing after having been ravished by 42 years of Gaddafi-era rule and over a year of civil war.¹⁸⁷

Regardless of what steps are taken to guarantee that Saif is surrendered to the ICC, it is clear that a finding of admissibility is warranted in this situation. While Saif will surely face justice before Libyan courts, it will come at the cost of denying him access to any semblance of a fair trial.¹⁸⁸ Although the primary goal of the ICC is to end impunity and bring those guilty of the most serious human rights violations

17(1)(a), at 12. Recent developments indicate that Libya may also be "unable" to genuinely carry out the prosecution because they have yet to obtain custody of Saif. Since his arrest on November 19, 2011, Saif has remained in militia custody in Zintan. Art. 17(3) is clear that a State is unable to prosecute if it is unable to obtain custody of the accused due to a total or substantial collapse of its national judicial system and to date, Libya has been unable to show that it has the ability to do so. See Rome Statute, *supra* note 8, art. 17(3), at 14; Kevin Jon Heller, *Is Libya "Able" to Obtain Saif?*, OPINIO JURIS (Feb. 23, 2013), <http://www.opiniojuris.org/2013/02/23/is-libya-able-to-obtain-saif/>; Kevin Jon Heller, *The OTP Makes a Serious Legal Error Concerning Libya and Saif*, OPINIO JURIS (Feb. 14, 2013), <http://opiniojuris.org/2013/02/14/the-otp-makes-a-serious-legal-error-concerning-libya-and-saif/>.

186. See Rome Statute, *supra* note 8, art. 87(5)(b), at 52 ("Where a State not a party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the court may so inform the Assembly of State Parties, or, where the Security Council referred the matter to the Court, the Security Council.")

187. *Libya: Q&A on the ICC and Saif al-Islam Gaddafi*, *supra* note 92.

188. See Heller, *supra* note 66 ("I don't know many people who work in [International Criminal Law] who actually believe that Libya intends to give Saif and Al-Senussi trials that comport with international standards of due process, regardless of its protestations to the contrary.").

to justice,¹⁸⁹ this goal should not be pursued without regard to due process. If the ICC surrenders jurisdiction to Libya and Saif ends up facing a sham trial and quick execution, the ICC stands to be viewed as an ineffective international judicial body capable of doing little to supplement domestic judicial systems. As Saif himself said:

There will . . . be no truth if witnesses are faced with possible life sentences for simply testifying in my favor, there is no security or protection for them, nor any consequences if these witnesses are threatened and killed. There will certainly be no justice in this case, if the prosecution is based on evidence extracted from torture and other inadmissible evidence, or persons who are too scared to say the truth. I am not afraid to die but if you execute me after such a trial you should just call it murder and be done with it.¹⁹⁰

III. CONCLUSION

The principle of complementarity woven throughout the structure of the ICC demands that the ICC surrender jurisdiction to national courts that are actively engaged in investigating or prosecuting a case. Unfortunately, as is evidenced by the situation surrounding the cases of Saif and al-Senussi in Libya, this can mean surrendering jurisdiction to a national court that has no meaningful due process guarantees for the accused. The ICC and the international community must accept this premise as true and make appropriate amendments to the Rome Statute to account for flagrant due process violations if the ICC is to retain its legitimacy in the international judicial realm.

Fortunately, the case of Saif presents an interesting opportunity for the ICC to circumvent its complementarity provision and ensure that Saif is brought to justice while being afforded internationally recognized standards of due process. However unintentional, Libya's blatant disregard for Saif's due process rights violates not only international due process standards, but also due process rights guaranteed to Saif under Libyan domestic law. As such, Libya's conduct has made it

189. See Rome Statute, *supra* note 8, at 2 ("Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .").

190. See Defence Response, *supra* note 167, ¶¶ 6–8.

2013] *FAILURE OF COMPLEMENTARITY* 421

more difficult for a Libyan domestic court to convict Saif and therefore, meets the Article 17(2) requirements for the ICC to declare Libya “unwilling” to prosecute. The ICC has proper grounds to deem Saif’s case admissible and must do so if it is to retain its legitimacy as a court of international significance.