



The International Criminal Court and  
Positive Complementarity:  
The Impact of the ICC's Admissibility Law and  
Practice on Domestic Jurisdictions.

Emilie Hunter

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

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European University Institute

**Department of Law**

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At the start of this thesis, a friend and colleague warned me that I would learn more about myself than I may ever want to know. The PhD process inevitably led me to bleak places, replete with terrifying precipices, barren outcrops and dead-ends. But, as the greek myth of Pandora reminds us, hope is a relentless, powerful and eternal force, and having got to the other side, having slept, turned off my computer and slowly reintegrated into 'ordinary' life, that delicate butterfly has shown me that the PhD has been an altogether uplifting and vigorous experience, where I have learnt far more than I have clumsily expressed within these pages.

## Abstract

This thesis examines the effect of the International Criminal Court (ICC) on national criminal justice practices for core international crimes. It considers that the complementarity system of the ICC is firmly based upon the issues of admissibility established under Article 17 of the Rome Statute and that *positive* complementarity practices should remain coherent with and based upon that system. As such, the thesis is constructed to systematically analyse the legal requirements of ‘admissibility-proof’ criminal justice at the national level according to the law and early practices of the ICC.

Through analysis of the applicable sources of law available to the ICC, including its emerging jurisprudence on admissibility, the thesis demonstrates that the ICC provides much greater latitude to national criminal jurisdictions than has previously been accepted and that this profoundly affects the concept of positive complementarity, including its legal foundation, its definition as well as its implementation, through policy and practice. Through analysis of each of the issues of admissibility the thesis proves that the emphasis on legal reform of substantive and procedural criminal law is over-emphasised to the negligence of several other factors. These factors include quantitative restrictions, shaped by the objects of reference of the ICC’s own investigations and the ICC’s case selection criteria. Turning to the indicators of willingness and ability, the thesis establishes that the early practice of the ICC has demonstrated that the complementarity system functions within a plural legal order that does not require States to exercise their criminal jurisdiction as a form of mimicry of the ICC, but largely according to the national laws and practices in place at the time. Notwithstanding this, the thesis argues that legal reform may be advisable to ensure the removal the omissions or procedural bars that could render a case admissible to the ICC.

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## Chapter 1.

### ***In Search of the Goldilocks Zone: The Rome Statute's Effect on National Criminal Justice***

This thesis examines the effect of the International Criminal Court (ICC) on national criminal justice practices for core international crimes (genocide, crimes against humanity, war crimes, and eventually aggression) arguing that the admissibility regime of the ICC provides significant latitude to national criminal law frameworks and practices than has previously been accepted and which profoundly affects the concept of positive complementarity.

As the only permanent international court with jurisdiction over core international crimes, the ICC is expected to be complementary to national criminal jurisdictions in ensuring the effective prosecution of individuals who perpetrate these crimes. Its Statute establishes an admissibility regime whereby national justice systems are given priority to prosecute, unless the ICC considers them to be genuinely unwilling or unable to do so, according to criteria that must be assessed from the opening of a preliminary examination by the Office of the Prosecutor through to investigation and any eventual admissibility challenge or review. This process is supplemented with several information seeking-mechanisms and discretionary powers to establish partnerships in pursuit of its mandate.

Together, these mechanisms can be referred to as part of a system of complementarity, for the pursuit of the investigation, prosecution and adjudication of core international crimes, by the ICC and by States. Different organs of the ICC have acknowledged that this system of complementarity (also referred to as part of the ICC system of justice) requires measures to strengthen national criminal justice practices that were unforeseen in the Rome Statute. This led to the development of *positive* complementarity, a distinct aspect of complementarity, which aims to both catalyse and facilitate national compliance with the system of complementarity, largely, but not exclusively, through legal reform, capacity development and technical assistance activities.

However, the complementarity system in general and the text of the admissibility regime in particular, has been interpreted as requiring widely diverging national practices. At one extreme, it has been advocated that the standards and provisions of the ICC itself must be both adopted and evident in order for States to retain jurisdiction, to the other side of the spectrum, where it is argued that States simply need to follow their ordinary legal framework with good faith. With only a handful of decisions that address these issues, the first decade of the ICC has seen considerable uncertainty on what constitutes admissibility-proof criminal justice. Consequently, the possibility to develop a coherent policy of positive complementarity that is consistent to the Court's mandate has been restricted.

## **1. Argument**

This thesis critically examines the marketplace of complementarity models through the lens of the ICC's admissibility regime in order to identify and clarify what 'admissibility-proof' criminal justice looks like at the national level. It argues that the adoption of substantive and procedural laws and the consequential allocation of resources to ensure their effectiveness should be clearly connected to complementarity and the requirements that the ICC Statute imposes on States. Such an approach acknowledges the centrality of complementarity to the effectiveness of the ICC as an international criminal tribunal but also to the system of justice that its Statute established, in order to reduce impunity for the perpetration of conduct under its Statute. It considers that any models that claim to support this system of justice should be firmly located within the legal framework of the Rome Statute to guarantee legal certainty and equality of the Court's subjects. It also recognises the considerable allocation of resources that criminal adjudication for 'ICC' crimes imposes on States and considers that States must have the capacity to implement the legal frameworks that its legislature establishes. For almost all territorial States, the perpetration of ICC-level criminal conduct occurs in extraordinary circumstances, where the gravity of the crimes, their scale and the contextual circumstances in which they arise, imposes huge costs on society at large. This includes the national judicial system, which under the ICC system, is expected to ensure that its capacity to do so is sufficient. Within this national context, the importance of a clear threshold that national criminal justice practices must obtain in order to retain jurisdiction is key, both for national planning and policy but also for the legitimacy and coherence of the ICC itself.

This examination confirms that the admissibility regime of the ICC establishes a lower threshold of national criminal justice practice than has been widely recognised: that is, that the national criminal justice practices are obliged to meet far fewer legal requirements and standards than the various models of complementarity have suggested. The consequences of this are numerous and stimulating, however two fall within the scope of this thesis. The more tangential consequence is a comparative one within the sphere of international harmonisation. It requires reflection on the differing standards, rules and obligations required of States under different international treaties and their enforcing bodies, in light of the ICC's lower threshold requirements of national criminal justice procedures, but also in terms of the selection of cases and notions of the right to remedy. The more profound consequence is how this 'copper plated' system of national practice within the ICC system of complementarity affects national capacity to adjudicate core international crimes, and consequently, influences concept of positive complementarity, including its legal foundation, its definition as well as its implementation, through policy and practice. Despite the fascinating and complex issues that are raised by the concept of positive complementarity and its relationship (or otherwise) to the admissibility regime of the ICC, the constraints of logic and space have curtailed this expedition. First, in order to address the relationship between the practice of the admissibility regime and positive complementarity, it was necessary to establish, in depth, the admissibility law and practice of the Court. Without this strong foundation, the possibility to address the concept of positive complementarity in a detailed and rigorous way would have been limited. Therefore these issues are not addressed in the detail they deserve. They are however, confronted in section 5 of this Chapter, as an appraisal of the relationship between the ICC and positive complementarity, which serves as a summary of avenues for future research.

As such, the thesis is constructed to systematically analyse the legal requirements of 'admissibility-proof' criminal justice at the national level according to the law and early practices of the ICC.

### **1.1. Are the Complementarity Models Applicable to the System of Complementarity According to its Admissibility Component?**

Each of the models of complementarity examined in the literature review (Section 3) seek to influence the practices of the ICC, but most importantly they impose different expectations

upon States Parties of the ICC, most notably territorial States. Each model directly impacts the scale and qualities that national criminal justice systems can be expected or required to provide as members of the International Criminal Court and its Rome Statute, who operate within the system of complementarity and notably can satisfy the admissibility criteria. While each of the approaches aim to clarify a compelling and still somewhat ambiguous facet of jurisdictional allocation in international law, the diversity of views creates a number of problems. As early as 2002, the ILC Study Group on Fragmentation of International Law noted that: *'conflicting interpretations create two types of problem. First, they diminish legal security, [...] Second, it puts legal subjects in an unequal position vis-à-vis each other.'*<sup>1</sup>

Through contrasting the models of complementarity against the admissibility regime and the decisions on admissibility that have been issued between 2002 and 2013<sup>2</sup> this thesis shows that many models of complementarity have no reasonable basis according to the legal requirements of the admissibility regime. Instead, the substantive and procedural requirements that States must adhere to in law and in practice are significantly lower than the gold-standard justice that is written into the laws of the ICC.

## **1.2. To What Extent Does 'Admissibility-Proof' National Criminal Justice Comply With the Rules and Principles of Other International Obligations?**

One of the common errors or claims is that the ICC is required to impose or enforce the operational parts of the Rome Statute when assessing the admissibility of State practices, or that it is required to enforce external international treaty obligations, norms or standards that may form part of States' general international treaty obligations. In part this has been driven by use of Article 21, on the sources of applicable law, where the rules and principles derived from international law form part of the sources of law, in addition to a general 'human rights consistency' filter which requires that the interpretation and application of the ICC Statute must be consistent with internationally recognised human rights. However, this thesis finds

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<sup>1</sup> International Law Commission Study Group on Fragmentation and Martti Koskenniemi, 'Fragmentation of International Law: Topic (a): The Function and Scope of the Lex Specialis Rule and the Question of "Self Contained Regimes": An Outline' (2003) 55th Session, ILC 2.

<sup>2</sup> From 1 July 2002, when the ICC became operational until the Pre-Trial Chamber's (PTC) decisions in *Gaddafi* and *Al-Senussi*: the Appeal judgment in *Gaddafi*, issued on 21 May 2014 is considered in the conclusion.



that many models inaccurately apply or use Article 21 to justify their model, and that in fact, the ICC expects a standard of criminal justice that is markedly different from several core international obligations, most notably in due process rights. While many proponents of the mirror thesis may have sought to achieve a form of progressive realisation of broader global rights<sup>3</sup> the reality is that the ICC system, as it stands, does not support this, and in fact leads to a further fragmentation, or plurality, of States obligations through their international treaty membership.

### **1.3. Determining the Impact of Admissibility Law and Practice On State Capacity and Positive Complementarity**

While the fragmentation of international law has many important consequences on national legal practice and policy, its impact on national capacity to investigate, prosecute and adjudicate conduct proscribed by the ICC Statute is critical to the efficacy of the ICC's complementarity system. The diversity of international rules and standards that States are obliged or required to uphold, including possible contradictions or differences between the expectations of international regimes places considerable resource challenges on States: in adopting differing rules and standards to its international or regional counterparts, the ICC inadvertently adds to this burden. The replication of differing rules and standards has received some critical attention in the context of the debate on UN treaty body reform and the centralisation or streamlining of States the reporting obligations.<sup>4</sup> Arguably, those advocating that national practices under the ICC system of justice to adhere to 'higher' or broader standards than the Court itself will consider, could argue that the adoption of the higher standard would reduce duplication and the possibilities of human rights-based complaints for

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<sup>3</sup> See for example M Cherif Bassiouni, *Chicago Principles of Post Conflict Justice* (International Human Rights Law Institute 2007); Open Society Justice Initiative, 'International Crimes, Local Justice: A Handbook for Rule of Law Policymakers, Donors, and Implementers' (Open Society Foundations 2011); UN Secretary General, 'United Nations Approach to Transitional Justice: Guidance Note of the Secretary General' (2010).

<sup>4</sup> See for example, Christen Broecker and Micheal O'Flaherty, 'THE OUTCOME OF THE GENERAL ASSEMBLY'S TREATY BODY STRENGTHENING PROCESS: An Important Milestone on a Longer Journey' (Universal Rights Group 2014); M O'Flaherty and Claire O'Brien, 'Reform of UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7 Human Rights Law Review 141; Michael O'Flaherty, 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10 Human Rights Law Review 319; John Mojin, 'REFORMING UNITED NATIONS HUMAN RIGHTS TREATY MONITORING REFORM' 58 Netherlands International Law Review 295.

ICC-related cases to international or regional human rights bodies.<sup>5</sup> Megret and others have argued that this exercise of 'uplifting' national practices to mirror international counterparts is not strictly part of the ICC's mandate or its complementarity regime,<sup>6</sup> while the 2011 World Development Report drew out the broader and longer term costs of conflict on national development, including the legal and political measures for accountability and restoration.<sup>7</sup> Little systematic attention has been dedicated to assessing the implications of multiple international standards on the capacity of domestic jurisdictions and the consequential qualities of criminal justice, nor of the additional resources that may be necessary to enable such practice, most notably in those States emerging from or enduring sustained conflict.

Turning to *positive* complementarity, it is clear that the emergent tensions of fragmentation, as well as the expressions of divergent preferences extend into the core of its conceptual basis, including its legal foundation, definition and implementation. I assert that the concept of *positive* complementarity as well as its application should be aligned to its judicial counterpart. This means that the legal regime of Article 17 should remain at the epicentre of its design and implementation, informed by the mandate and objectives of the ICC, where any activities go beyond the requirements of the ICC admissibility regime should be clearly distinguished as separate or additional to the ICC minimum requirements. Having emerged from the ICC in connection to its mechanism to allocate jurisdiction between States and the ICC, the concept of *positive* complementarity is inherently derived from the functions of the ICC, and so to divorce it from the ICC or to segregate it from the trajectory of the ICC's powers would be a fundamental repurposing of the concept and hence its form of reference.

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<sup>5</sup> See for example, Christopher Keith Hall, 'Developing and Implementing an Effective Positive Complementarity Strategy', *The Emerging Practice of the International Criminal Court*, vol 48 (Martinus Nijhoff 2009); Christine Bjork and Juanita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya' (2011) 14 *Yale Human Rights & Development Law Journal* 205.

<sup>6</sup> Frédéric Mégret, 'Too Much of a Good Thing? Implementation and the Uses of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011).

<sup>7</sup> World Bank, 'World Development Report 2011: Conflict, Security, and Development' (2011) <<http://wdr2011.worldbank.org/fulltext>>; Jake Sherman, 'Criminal Justice: Security and Justice Thematic Paper' [2011] Background Paper, World Development Report. See also the background paper contribution by Pablo de Greiff to this report, 'Transitional Justice, Security and Development' October 29, 2010.

## 2. Methodology

In order to answer these questions, this thesis adopts a doctrinal methodology, placing the rules of the Statute at its epicentre. It starts from the sources of applicable law available to the ICC for the application and interpretation of the statutory provisions on complementarity and admissibility and moves through the issues identified by the various models of complementarity, analysing the various assumptions of the complementarity models according to the sources provided for by the Statute. This of course entails detailed review of the emerging practice of the ICC through its admissibility proceedings, where it identifies and evaluates the tests and rules that have sprung from the first decade of the Court's decisions on the admissibility of its cases. The conclusion switches to a normative mode, to review the outcomes of the doctrinal analysis against the definition and purpose of positive complementarity, to propose a framework that adheres to the object and purpose of the ICC.

Following the UN Security Council referral of Libya to the ICC, the admissibility of cases finally moved from general considerations of the activity of national justice systems and definitions of the parameters of a 'case,' into more detailed and contested analysis of the meaning of willingness and ability. This unfolded in the final phases of this PhD thesis, providing a satisfying verification of many of the conclusions of the thesis, while it finally introduced the importance of national capacity to adjudicate, as part of the admissibility evaluations. The substantive part of this thesis however, includes only the Pre-Trial Chambers jurisprudence in *Gaddafi* and *Al-Senussi*. The fascinating and slightly divided Appeals Chamber decision in *Gaddafi* was issued in the final days of this thesis, and is analysed in the conclusion. The Appeals Chamber Decision in *Al-Senussi* was issued delivered after the submission of this thesis and has not been reviewed herein.

## 3. Literature Review

Legal research and policy analysis of complementarity, admissibility and positive complementarity has largely treated the three issues as distinct and unconnected topics: complementarity and admissibility research has largely focused on the formal requirements that the ICC or States should apply with some attention to comparative practices of other international criminal courts. The literature on positive complementarity has largely sought to justify the concept and to propose activities, without questioning its legal or formal basis: put

simply it hasn't inquired into what needs to be catalysed or facilitated in order to satisfy the complementarity system and consequently, any admissibility procedure.

The ICC has been relatively slow to establish jurisprudence on issues of complementarity and admissibility, and prefers to make case-specific analysis<sup>8</sup> rather than providing authoritative interpretations on the standards or practice that it requires of States. Combined with certain textual ambiguities, and in the shadows of law, publicists, policy makers, development agencies and non-governmental organisations (NGOs) have established a vibrant marketplace of 'complementarity-proof' models based on their interpretation of the rules. Early analysis of complementarity sought to review its history in international criminal law<sup>9</sup> or to consider its impact on national criminal jurisdictions<sup>10</sup> while collected volumes have addressed isolated contemporary and practical challenges,<sup>11</sup> as well as niche features of its *positive* dimensions,<sup>12</sup> drawing on public international law, but primarily through its sub-disciplines of international criminal law and international human rights law as well as international relations, transitional justice, and slowly, development studies and legal anthropology.

### **3.1. The Mirror Thesis Models: National Legal Frameworks and Practices Should Be Harmonised With The Rome Statute**

A great deal of literature has focused, erroneously in my view, on the vertical harmonisation of national laws and practices with those of the ICC, as well as the horizontal transplantation of practice from the two Ad-hoc Tribunals to the ICC. This view has been a dominant and persuasive force, during the Rome Conference negotiations and in the years following the adoption of the Statute, in academia, in policy and diplomacy, and to an extent, through State

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<sup>8</sup> See Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)(The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Situation in Democratic Republic of the Congo) 2009 [ICC-01/04-01/07-1213] 24., page 28.

<sup>9</sup> Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008).

<sup>10</sup> Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers 2008); Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (First, Oxford University Press 2008).

<sup>11</sup> Carsten Stahn and Mohamed M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court*, vol. 48 (Martinus Nijhoff 2009), Legal Aspects of International Organisations

<sup>12</sup> Morten Bergsmo (ed), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher 2011);

legislative practices. Under this view, which Mégret calls the 'mirror thesis' and Teitel and Howse refer to as 'ultra-compliance,'<sup>13</sup> admissibility-proof State practice is frequently equated to implementation of the substantive and procedural elements of the Rome Statute, reform of institutions and training of the criminal justice sector to ensure that the new legal framework will be operative. It is a reform driven, upward trajectory that requires '*States to develop an ability to exercise certain forms of jurisdiction which they may not have had from the start*'<sup>14</sup> by harmonising their legal framework and practice not only with the ICC's own activities, but also often with international human rights law, and partially adopts the frameworks of rule of law reform and state building.<sup>15</sup>

Many NGOs have argued that States must adapt the legal frameworks to comply with the ICC's own fair trial provisions,<sup>16</sup> arguing that the jurisdictional element of complementarity '*gives preference to domestic courts if they are capable of conducting fair trials*'<sup>17</sup> meaning that States will be '*forced to ensure that their domestic judicial systems incorporate and adhere to principles of due process recognized by international law.*' Others have insisted that States need to include broader procedural protections including witness and victims protection although this has received far less attention than it ought to given the wording of Article 17(3), which requires proof that the State has the ability to obtain testimony.<sup>18</sup> Checklists, manuals and model laws have sought to insert broader international and regional substantive and procedural rules as pre-requisites of the system of complementarity and have

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<sup>13</sup> Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 Global Policy Journal 127.

<sup>14</sup> Héctor Olásolo and Enrique Carnero-Rojo, 'The Application of the Principle of Complementarity to the Decision of Where to Open an Investigation: The Admissibility of Situations' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011), p 374

<sup>15</sup> See for example Bassiouni, *Chicago Principles of Post Conflict Justice* (n 3); Open Society Justice Initiative (n 3). For a critique see Nehal C Bhuta, 'State Building, Democratization and "Politics as Technology"' in Hilary Charlesworth, Brett Bowden and Jeremy Farrall (eds), *Great Expectations: The Role of International Law in Restructuring Societies After Conflict* (Cambridge University Press 2008).

<sup>16</sup> Mark S Ellis, 'International Criminal Court and Its Implication for Domestic Law and National Capacity Building, The' (2002) 15 Florida Journal of International Law 215; Federica Gioia, 'State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 Leiden Journal of International Law 1095; L Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) 4 Chinese Journal of International Law 121; Jonathan O'Donohue and Sophie Rigney, 'The ICC Must Consider Fair Trial Concerns in Determining Libya's Application to Prosecute Saif Al-Islam Gaddafi Nationally'; Amnesty International, 'International Criminal Court: Updated Checklist for Effective Implementation' (2010) IOR 53/009/2010.

<sup>17</sup> Ellis (n 14) 222.

<sup>18</sup> See Open Society Justice Initiative (n 3) 102; UN Secretary General (n 3) 6; Bassiouni, *Chicago Principles of Post Conflict Justice* (n 3).

encouraged donors and policy makers address national criminal justice under the ICC system as being consistent with international human rights treaties and rule of law standards.<sup>19</sup>

As part of its Memorandum of Association with the ICC, the Commonwealth Secretariat adopted a revised *Model Law To Implement the Rome Statute of the International Criminal Court*, to provide guidance and technical assistance to the 19 Commonwealth countries yet to join to ICC and approximately half of its members who are yet to implement the Rome Statute.<sup>20</sup> Revised by diplomats with extensive involvement in the adoption of the Rome Statute and with observers drawn from the ICC, its Assembly of States Parties Secretariat, the ICRC, NGO's and academics,<sup>21</sup> the Model Law offers a clear and influential example of Mégret's *Hard Mirror Thesis*, arguably promoted by the ICC through the Memorandum, whereby the substantive dimensions of the Rome Statute, notably crimes, penalties, liabilities and defences are provided with equal weight as the obligations of the Statute.<sup>22</sup> The level of support behind the adoption of this particular Model Law<sup>23</sup> arguably provides an indication of the drive towards a more effect-based model of State practice under complementarity, rather than the stricter, rule-based version proposed by Mégret.

Despite the absence of an express obligation to implement the substantive parts of the Statute into domestic law, almost as many States have done so, as have implemented the explicit obligation to cooperate with the ICC.<sup>24</sup> Overwhelmingly, it has been considered an imperative action that States capture, define and apply international crime nomenclature as completely as possible.<sup>25</sup> One of the most prolific publicists on national legal frameworks for

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<sup>19</sup> Amnesty International (n 14); Commonwealth Secretariat, 'Model Law: To Implement the Rome Statute of the International Criminal Court, Adopted at the Meeting of Commonwealth Law Ministers and Senior Officials, 14 July 2011' (2011) LMM(11)17 [Provisional].

<sup>20</sup> See also Akande (n 20).

<sup>21</sup> Including Parliamentarians for Global Action and the British Red Cross, and comments received from Dapo Akande. See Annex A, Commonwealth Expert Group on Review of the Implementing Legislation for the Rome Statute, report from the Chair, 23-25 February 2011, paragraphs 1-2.

<sup>22</sup> the incorporation of offences against the administration of justice and the provision of cooperation and judicial assistance. Parts II-V, as well as enforcement of ICC sentences and the Agreement of Privileges and Immunities, in parts VIII and IX, Model Law.

<sup>23</sup> A handful of Model Laws were issued by regional bodies in the immediate aftermath of the entry into force of the Rome Statute, including the Commonwealth Secretariat Model, the Arab League Model, as aids to States Parties.

<sup>24</sup> Olympia Bekou, 'Crimes at Crossroads Incorporating International Crimes at the National Level' (2012) 10 *Journal of International Criminal Justice* 677.

<sup>25</sup> See Commonwealth Secretariat (n 17); Ellis (n 14) 229; Katherine L Doherty and Timothy LH McCormack, 'Complementarity' as a Catalyst for Comprehensive Domestic Penal Legislation' (2009) 5 *U.C Davis Journal of International Law and Policy* 147., Human Rights Watch, *Making the International Criminal Court Work: A*

core international crimes in the ICC era, Olympia Bekou has consistently prioritised the adoption of substantive parts of the ICC Statute, as part of the complementarity deal: 'States are given the opportunity to investigate or prosecute nationally. In order to be able to do this, they would need to have provisions incorporating the core ICC crimes, the general principles of liability as well as the defenses found in the Statute.'<sup>26</sup> The assertion of what States need in order to conduct effective prosecutions, as opposed to what they are obliged or required to do, occurs frequently and is commonly justified as a protection mechanism against the Court's potential interest in their caseload, thereby linking their argument back to the admissibility component of complementarity. Some have also used the customary status of many of the Rome Statute's substantive and procedural provisions<sup>27</sup> to legitimize the incorporation of the operative parts of the ICC Statute into national law<sup>28</sup> where the customary status of individual rules become equally binding upon States as upon the Court.<sup>29</sup> However, there is a considerable leap between the fact of repetition, whereby the Rome Statute repeats rules, rights, duties and obligations already enshrined in international treaties or embodied in custom, and the assumption that the repetition itself generates legally binding obligations upon States Parties, with the effects of enforceability by the ICC.<sup>30</sup> In addition to customary international law, the principle of *Pacta Sunt Servanda* was also adopted in early normative arguments for broad inclusion of the Rome Statute's substantive provisions into domestic laws. Measures of good faith have also been put forward to establish that States must performed to the best of their ability and resources, as well as to the letter and spirit of

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*Handbook for Implementing the Rome Statute*, 2001,13:4, International Centre for Criminal Law Reform, *International Criminal Court: Manual for the Ratification and the Implementation of the Rome Statute*, 2008, 3<sup>rd</sup> edition,

<sup>26</sup> Olympia Bekou, 'In the Hands of the State: Implementing Legislation and Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 839.

<sup>27</sup> In the case of crimes against humanity, and the laws of non-international armed conflict (NIAC), the Rome Statute is accepted as a formalization of customary international law, with some small innovations. Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (*International Review of the Red Cross*, March 2005) 177.

<sup>28</sup> Noora Johanna Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (European University Institute 2011).

<sup>29</sup> Mark Eugen Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (M Nijhoff; Distributors for the US and Canada, Kluwer Academic 1985) 289–306.

<sup>30</sup> Writing in 1992, Cherif Bassiouni cautioned human rights advocates against overlooking the 'important legal distinctions and attempt the de jure condendo extrapolation of legal rights or binding obligations from international instruments which do not have legally binding effects.' M Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1992) 3 *Duke Journal of Comparative & International Law* 235.

the ICC Statute,<sup>31</sup> which some consider to include complementarity and cooperation<sup>32</sup> and others as a good faith requirement according to the letter of the Statute.

Finally, many authors promoting the mirror thesis acknowledge the normative nature of their enterprise, but seek to ground their claims in broader rule of law tropes, including the interests of justice,<sup>33</sup> fight against impunity<sup>34</sup> the importance of institution or state building, of broader coherence with international law, and obligations that may be held or monitored by other regimes.<sup>35</sup> This blurring of treaty limits with rule of law tropes seems to conform to a *'tendency towards vagueness'*<sup>36</sup> where the need to comply with established rules of international law is stressed without precisely defining or elaborating on the precise content of the legal requirements, or the specific body to which the obligation is 'enforced' mostly to stress the sovereign discretion of States but also to allow the most pertinent areas of a newly established international law to become obvious.

In one of the more authoritative and clinical examinations of the scope of complementarity, Jo Stigen has cautioned against simplistic adoption of the Rome Statute, which requires resources and thoroughness that will far exceed national qualities: *'the ICC standard cannot reasonably be expected to be matched by national resources.'*<sup>37</sup> Others have seen the pragmatic imperative of adopting the substantive parts of the Statute in order to demonstrate that the State has the ability to proceed<sup>38</sup> while others have gone further, linking legal reform with *'capacity-orientated assistance'* in order to demonstrate States capability to prevent admissibility and provide *'internationally acceptable criminal justice.'*<sup>39</sup> This reform-driven

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<sup>31</sup> See Andre de Hoogh, 'The Relationship between National Law and International Law in the Report of the Georgia Fact-Finding Mission'; *Libya Article 19 Request (Gaddafi)* [2012] Pre Trial Chamber I ICC-01/11-01/11.

<sup>32</sup> International Centre for Criminal Law Reform and Criminal Justice Policy, 'International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute' (2008) ISBN: 978-0-9730432-6-6 11.

<sup>33</sup> Triffterer (n 4).

<sup>34</sup> Bekou, 'In the Hands of the State: Implementing Legislation and Complementarity' (n 20) 839.

<sup>35</sup> Jan Kleffner, 'The Impact of Complementarity on National Implementation of Substantive Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86, 78.

<sup>36</sup> Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *The Yale Law Journal* 2537, 2551.

<sup>37</sup> Stigen (n 8) Chapter 6.

<sup>38</sup> See for example Edoardo Greppi, 'Inability to Investigate and Prosecute under Article 17', *The International Criminal Court and national jurisdictions* (Ashgate 2008) 69.

<sup>39</sup> Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Göttingen Journal of International Law* 791.



and harmonising approach builds on the various Complementarity Resolutions and Reports adopted by the Assembly of States Parties.<sup>40</sup>

### 3.2. Critiques Of The Mirror Thesis Models

The harmonising or unifying effect of these approaches has been critiqued by those advocating for pluralism, as having largely disregarded the admissibility criteria, as *'part of a universalising drive that overstates the homogenising requirements of the struggle against impunity beyond and even in contradiction with complementarity.'*<sup>41</sup> In developing a critique of the mirror thesis proponents, Mégret argues that they falsely insist on incorporation of the Rome Statute in four ways: (i) by abusively transposing ICC-specific features onto states, by, for example, insisting that States abolish immunities of all foreign heads of States for ICC crimes, including incumbent figureheads;<sup>42</sup> (ii) by mandating what is currently optional, such as excluding the death penalty from the sentencing structure for ICC prohibited crimes;<sup>43</sup> (iii) requiring implementation of issues that are not connected to complementarity, including fair trial standards;<sup>44</sup> and (iv) requiring too much identity with the Rome Statute, by for example faithfully reflecting the ICC regime by adopting ICC crimes, liabilities and general parts of international criminal law.<sup>45</sup> A fifth enlargement or exaggeration also occurs, he suggests, where proponents push beyond the Rome Statute, to 'correct' the compromises of the negotiation process, in accordance to other international obligations, norms or standards, as a form of progressive realisation to broader global rights objectives.<sup>46</sup>

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<sup>40</sup> Bureau of the ICC Assembly of States Parties, 'Report of the Bureau on Complementarity' ICC-ASP/9/26, 17 November 2010; ICC Assembly of States Parties, 'Report of the Bureau on Stocktaking: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap' (International Criminal Court) ICC-ASP/8/51, 18 March 2010; Informal summary by the focal points, 'Stocktaking of International Criminal Justice. Taking Stock of the Principle of Complementarity: Bridging the Immunity Gap.' RC-11-Annex V.c (Previously issued as RC/ST/CM/1.) June 2010; Review Conference of the Rome Statute, 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' RC/ST/CM/INF.2, 30 May 2012; Review Conference of the Rome Statute, 'Resolution RC/Res.1, Complementarity' (International Criminal Court) Adopted at the 9th plenary meeting, 08 June 2010.

<sup>41</sup> Frédéric Mégret, 'Too Much of a Good Thing? Implementation and the Uses of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 363.

<sup>42</sup> Ibid 368–369. Contrast with Amnesty International (n 14); Commonwealth Secretariat (n 17).

<sup>43</sup> Mégret (n 35) 370–371. Contrast to Amnesty International (n 14).

<sup>44</sup> Mégret (n 35) 371–372. .

<sup>45</sup> Ibid 373–375.

<sup>46</sup> For example, those proposed by Open Society Justice Initiative (n 3); UN Secretary General (n 3); Bassiouni, *Chicago Principles of Post Conflict Justice* (n 3).

A second critique occurs in a re-appraisal of the dominance of compliance studies in International Law, by Robert Howse and Ruti Teitel.<sup>47</sup> They argue that the process of creating new international treaties or norms generates a shift in decision making, from one set of elite actors to another (such as from diplomats or military planners, to legal professionals) and that the legal professionalization of the new treaty or norm may generate three types of compliance: under compliance, increased compliance or 'ultra-compliance' where 'ultra-compliance' is an attempt to capture the effects of legal professionalization, which may go '*beyond what is desired from the perspective of the objectives of the legal regime.*'<sup>48</sup> They go on to consider examples of compliance and ultra-compliance in the context of the evolution of State practices following membership of the ICC and its Statute. In their view, compliance includes the symbolic commitment to the norms enshrined within the text through the act of signing and ratifying the Statute, through to the incorporation of its norms into domestic law, cooperation with the ICC or with other countries to transfer or extradite persons, as well as opening prosecutions.<sup>49</sup>

### **3.3. Strict Interpretation or Pluralism Models: The Rome Statute Should Have Minimal Effect On National Legal Frameworks and Practices**

Instead, Mégret points to the absence of express obligations of States to implement the crimes and liabilities of the Rome Statute, to assert that states have only to exercise jurisdiction according to whatever laws they have in place at the time, without the need for updated or revised legislation but through 'equivalent' legal standards.<sup>50</sup> In critiquing the surge of literature and lobbying to justify the harmonization of domestic law with the ICC, Mégret claims that '*complementarity should be a device to manage diversity and pluralism in international criminal law.*'<sup>51</sup> He captures the tension of the complementarity regime as one between the exercise of jurisdiction of States using *whatever* laws that they have, in a way that is willing and able, and undergoing a sophisticated legal re-engineering to exercise

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<sup>47</sup> Howse and Teitel (n 11).

<sup>48</sup> Ibid 132.

<sup>49</sup> Ibid 127.

<sup>50</sup> Frederic Mégret, 'Too much of a good thing? Implementation and the uses of complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011)

<sup>51</sup> Ibid 369.

certain forms of jurisdiction that are favoured by the ICC.<sup>52</sup> In seeking to establish a middle ground for legal pluralism<sup>53</sup> he points to the difficulties that legal transplants bring to domestic practice, particularly international law transplants, where 'new and alien' concepts prove problematic to implement, or generate 'international bubbles' within the domestic legal system, where inequity can creep in.<sup>54</sup>

Legal pluralism has also been advocated through concepts of *polymorphic repression*,<sup>55</sup> or 'sentencing theory of complementarity',<sup>56</sup> where Diane Bernard and Kevin Jon Heller consider that the text of the Statute enables '*flexibility regarding the legal basis and forms of the fight against impunity*' so long as national measures are concluded with rigid sentencing (where the person is convicted). Under this view, the Court's admissibility determinations must be outcome driven and overlook any procedural irregularities or violations that may trigger other international treaty bodies, and look only for the possibility of prison sentences, ideally long ones.<sup>57</sup> Bernard has argued that this outcome model of criminal justice is supported by the Statute, where '*adequate and good faith implementation of the Statute is indispensable to the concrete application of complementarity [...] States are encouraged [...] but are not legally bound by a specific form of action or to a particular formalism.*'<sup>58</sup> Others have sought to view the ICC complementarity system through the lens of global governance, as a '*comprehensive, multileveled, polycentric and actor-open enforcement regime of international criminal law*'<sup>59</sup> where global governance principles can rationalise an '*all-too often irrational division of labour, material resources, information and expertise between these centres of gravity.*'<sup>60</sup>

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<sup>52</sup> Ibid 378.

<sup>53</sup> Paul Berman, 'Global Legal Pluralism' (2007) 80 Southern California Law Review 1155.

<sup>54</sup> Andy Aitchison, *Making the Transition: International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina* (Intersentia 2011); Eszter Kirs, 'Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina' (2011) 3 Göttingen Journal of International Law 397.

<sup>55</sup> Diane Bernard, 'What Does the Rome Statute Require from States? Penal Rigidity and Formal Flexibility in the Struggle Against Impunity', *Droit international pénal: précis* (2nd edition, Helbing Lichtenhahn 2012) 311.

<sup>56</sup> Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 Harvard International Law Journal 85.

<sup>57</sup> One problem with the approach of Bernard, and also of Heller, both of whom insist that the ICC is entirely punitive and requires States to exert heavy sentences is that there is nothing in the Statute that indicates this, and nor does it reflect the ICC's own sentencing limitations.

<sup>58</sup> Bernard (n 49) 311.

<sup>59</sup> Christoph Burchard, 'Complementarity as Global Governance' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 167.

<sup>60</sup> Ibid 175.

In one of the game-changing articles on the scope of the complementarity system, Kevin Jon Heller systematically dismantled the claim that the admissibility regime requires States to protect all due process rights of suspects.<sup>61</sup> Entitled *The Shadow Side of Complementarity*, Heller rejected the possibility that the ICC can seize jurisdiction from States on grounds of fair trial abuses, unless the abuse protects the accused from criminal justice, arguing that ICC judges are prevented from seizing jurisdiction where abuse of due process by national judicial actors has restricted the rights of an accused<sup>62</sup> This approach has been reiterated by others, notably Rob Cryer, Hakan Friman, Darryl Williams and Elizabeth Wilmshurt who argue that *'the principle of complementarity addresses the particular aspects of the proceedings which are referred to in Article 17, whereas more general human rights considerations about the conduct of national prosecutions are more properly addressed by human rights treaty bodies.'*<sup>63</sup> The separation of responsibilities between international tribunals and treaty bodies on such clearly connected issues requires attention and cooperation between the different international bodies, in reactive circumstances but also within the context of positive complementarity.

### **3.4. Horizontal Mirroring: The Relevance of The Rules, Principles and Practices of the Ad-Hoc International Criminal Tribunals**

A further tranche of literature has engaged with what I call horizontal mirroring, where the experiences, practices and standards of the adhoc tribunal, notably the International Criminal Tribunal for the former Yugoslavia (ICTY), and to a lesser extent, the non-Hague based international tribunals, including the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) are proposed as fundamental practices to be integrated into the ICC's own practice. Many have done so through recourse to the sources of applicable law under the ICC Statute, where rules and principles of international law can be applied or provide interpretive value, but largely, this has been done by an almost hypnotic

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<sup>61</sup> Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 255; Heller, 'A Sentence-Based Theory of Complementarity' (n 50); Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 8); Olásolo and Carnero-Rojo (n 12).

<sup>62</sup> See Heller, 'The Shadow Side of Complementarity' (n 55).

<sup>63</sup> Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd ed, Cambridge University Press 2010) 151.

assumption of the inherent importance of the ICTY/R's work, most notably connected to its completion strategy, and an assumption that the institutions are mirror images of one another, despite the significant distinctions of their mandates and powers. A rejection of horizontal mirroring has also occurred, as ICC professionals and some academics reappraised the relevance of ICTY/R experiences in light of their different mandates, and some ICC judgments sought to restrict the applicability of ICTY/R experiences.

From the strict interpretation of national due process requirements made by Heller, or the call for pluralism made by Mégret, to expectations of 'ultra-compliance' with the substantive parts of the Rome Statute, put forward by Bekou, Kleffner and Stigen and critiqued by Howse and Teitel, the diversity of views reviewed here, are without exception, rule-based, that is, they seek to identify the correct effect of the Rome Statute on national criminal law frameworks and practice, has been referred to as source-based ascertainment of rules.<sup>64</sup>

### 3.5. 'Positive' Complementarity

The concept of a more *positive*,<sup>65</sup> constructive<sup>66</sup> 'pro-active'<sup>67</sup> or active<sup>68</sup> style of engagement between the ICC and State criminal justice institutions was born in the first operational days of the ICC, following the acceptance speech of the first ICC Prosecutor in 2003<sup>69</sup> and the

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<sup>64</sup> Jean d' Aspremont, *Formalism and the Sources of International Law* (Oxford University Press 2011).

<sup>65</sup> William W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59; Hitomi Takemura, 'A Critical Analysis of Positive Complementarity' (2007); Bergsmo (n 10); Sylvia Arbia and Giovanni Bassu, 'Proactive Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Bergsmo, Bekou and Jones (n 33); William W Burke-White, 'Reframing Positive Complementarity: Reflections on the First Decade and Insights from the UC Federal Criminal Justice System' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice' (2008) 49 *Harvard International Law Journal*; Christopher Keith Hall, 'Developing and Implementing an Effective Positive Complementarity Strategy', *The Emerging Practice of the International Criminal Court*, vol 48 (Martinus Nijhoff 2009); Florian Jessberger, 'Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in Germany' in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer Berlin Heidelberg); Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67; Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87; Bergsmo, Bekou and Jones (n 33); Christopher Keith Hall, 'Positive Complementarity in Action' in Mohamed M El Zeidy and Carsten Stahn (eds) (2011).

<sup>66</sup> Robinson (n 59).

<sup>67</sup> Burke-White, 'Proactive Complementarity' (n 59); Arbia and Bassu (n 59).

<sup>68</sup> Bergsmo (n 10).

<sup>69</sup> Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, 'Election of the Prosecutor, Statement by Mr. Luis Moreno Ocampo' (International Criminal Court 2003) Press Release ICC-OTP-20030502-10.

publishing of an informal expert paper by his Office<sup>70</sup> and has become established within the ICC through its Review Conference in 2010,<sup>71</sup> its judicial and diplomatic language<sup>72</sup> as well as the statements, reports and activities of its Assembly of States Parties. Regardless of the moniker adopted, there has been little variation in the narrative of the purpose of *positive* complementarity, and little effort to connect it to the admissibility requirements of complementarity. Understood as part of the complementarity system, the *positive* dimension was developed to address and develop national criminal justice capacity to investigate, prosecute and adjudicate crimes under the Rome Statute.

The OTP has described its use of positive complementarity as a tool to catalyse and enable effective criminal justice at the national level, while the concept has entered into as part of the Court's wider mandate.<sup>73</sup> From the outset, certain conditions have been attached, attesting to the qualitative standards of national criminal jurisdictions, namely that 'national systems are expected to maintain and enforce adherence to international standards.'<sup>74</sup> There has been no attempt however to connect or locate positive complementarity with the admissibility requirements or to the complementarity models introduced above: the capacity requirements that the complementarity models impose onto national criminal justice systems remains unexplored territory.

#### 4. Chapter Synopsis

In the children's fairy-tale, *Goldilocks and the Three Bears*, a young golden-haired girl walking in a forest comes across an empty house, with three steaming-hot bowls of porridge

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<sup>70</sup> ICC Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (International Criminal Court 2003)

<sup>71</sup> ICC Assembly of States Parties, 'Report of the Bureau on Stocktaking: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap' (n 34); ASP Bureau Focal Points on Stocktaking Complementarity, 'Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes' (Review Conference of the Rome Statute 2010) RC-ST-CM-INF.2-ENG-30052010; ICC Review Conference, 'Stocktaking of the ICC: Complementarity' (Plenary session, Kampala, Uganda, 3 June 2010); ICC Assembly of States Parties, 'ICC/ASP/8/Res.9 Review Conference' (International Criminal Court 2010) Resolution ICC-ASP/8/Res.9; Review Conference of the Rome Statute, 'Resolution RC/Res.1, Complementarity' (n 34).

<sup>72</sup> Judge Song ICC President, 'Eighteenth Diplomatic Briefing' (International Criminal Court 2010); Judge Song ICC President, 'Remarks at Ceremony on the Occasion of Signing the Memorandum of Understanding between the International Criminal Court and the Commonwealth on Cooperation' (2011).

<sup>73</sup> ICC Assembly of States Parties, 'Report of the Bureau on Stocktaking: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap' (n 34); Bureau of the Assembly of States Parties, 'Report of the Bureau on Complementarity (9th ASP)' (International Criminal Court 2010) ICC-ASP/9/26.

<sup>74</sup> ICC Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor' (International Criminal Court 2003). page 2

made earlier by three bears who live in the house.<sup>75</sup> Whether hungry, greedy, or lacking in manners, Goldilocks enters the house to eat the porridge: the first bowl she tries is too hot, so she moves to the second bowl, which is too cold. Finally, she tries the third bowl of porridge, which she declares to be 'just right.' Subsequently, astronomers have adopted Goldilocks' quest for the bowl of porridge that was 'just right' in order to define the zone of a star's orbit where conditions enable life to occur.<sup>76</sup> This thesis is a voyage to discover that third and final bowl of porridge, of national criminal justice practices within the International Criminal Court System that are neither too ambitious nor too limited.

**Chapter 2** addresses the contention that, while the majority of complementarity models aim to establish acceptable thresholds of national criminal justice practices for States who fall under the ICC's jurisdiction, they rarely adopt the process that governs the application and interpretation of the sources of law to which the Court is bound to, and rarely do so in a coherent or consistent way. The chapter aims to address this methodological shortcoming, in order to more coherently interpret the substantive and procedural scope of ICC admissibility-proof national criminal justice practices, by reviewing the methodology created by the sources of applicable law described in Article 21 and identifying the laws, principles and rules that are most relevant to determinations of the willingness and ability of States to provide effective criminal justice at the national level for those persons responsible for ICC crimes.

**Chapter 3** then turns to the complementarity system, to assess the models of complementarity against the emerging rules and tests that have emerged from judicial evaluation of Article 17(1). It seeks to correct or redress the ambiguity of the first paragraph of the admissibility regime and confront several models of national criminal justice which have sought to expand the effect of the operational parts of the Statute onto the legal frameworks and practices of States, through the application of Article 21, including the practice of the Court, which has adopted a series of tests that largely shatters these aspirations. It confirms the emergence of four core tests of the features of complementarity:

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<sup>75</sup> Joseph Jacobs, 'The Story of the Three Bears', *English Fairy Tales* (David Nutt 1890).

<sup>76</sup> The Goldilocks Zone (or habitable zone) is an astronomical term to define planets that fall within the habitable zone of a star, where it is neither too far or too close to the star to eliminate the possibility of liquid water being present. NASA: Science News, 'The Goldilocks Zone' (2 October 2003); Kim Meeri, 'Earth-Size "Goldilocks-Zone" Planet Found in Distant Solar System' *Washington Post* (17 April 2014).

(i) that admissibility should be determined in real-time and that the State must be active; (ii) admissibility assessments should be restricted to preliminary examination, investigation and admissibility challenges; (iii) that the evidence must demonstrate that the States is taking concrete and progressive steps and (iv) that the objects of reference should reflect the stage of proceedings and be restricted to the situation or cases under scrutiny by the Court.

**Chapter 4** considers the impact of the selection of cases by the ICC on national criminal justice institutions and policy-making. Defined in the Statute under Article 17(1)(d) as a requirement that cases be of a sufficient gravity to be admissible before the ICC, three criteria inform the selection of cases by the ICC: (i) the gravity of the crimes; (ii) the most responsible groups or persons and (iii) the interests of justice as a countervailing measure. Through review of the Prosecution's Policy on selection criteria, as well as reports and jurisprudence from the Pre-Trial and Appeals Chambers, the chapter argues that the practice of case selection can inform the exercise of national criminal justice in post-atrocity countries, including national case selection strategies, the adoption of alternative or other justice measures as well as the allocation of resources to criminal accountability.

**Chapter 5** then turns to Article 17(2), to the first of the two admissibility criteria and returns to the hotly-disputed question on whether States Parties are required to uphold international due process protections over their domestic criminal investigations or prosecutions, when they are under examination or investigation by the ICC. It reviews the due process debate through the sources of applicable law as defined by Article 21, drawing on the recent jurisprudence from the ICC in the admissibility decisions in the cases of *Gaddafi* and *Al Senussi* and ICC policies, in order to identify whether any reliable rules concerning national due process requirements of ICC-scrutinised investigations or cases have emerged. In particular, it finds the overwhelming attention to the scope of the due process standard of Article 17(2) to have been misplaced, overlooking the importance of more foreseeable due process requirements of the admissibility regime, such as the requirement of witness protection schemes to ensure that necessary testimony can be obtained.

**Chapter 6** moves sequentially to the ability of States to investigate, prosecute and adjudicate conduct listed in the Rome Statute, as it is defined in Article 17(3). The genuine ability of a State to prosecute perpetrators of the criminal acts listed in the Rome Statute has beguiled



and tantalised the concept of complementarity from the earliest moments of the Court, where concerns were raised that the judicial machinery of developing or post-conflict countries would be subjected to harsh assessment from the ICC through to expectations that the ICC could catalyse national efforts or help develop capacity of national justice mechanisms through the development of a *positive* dimension of complementarity. This Chapter reviews the litigation of these features through the two Admissibility Challenges in the cases of *Gaddafi* and *Al-Senussi*, and reviews the framework of inability in light of the recent admissibility challenges, briefly revisiting the relevance of the due process debate as part of the general assessment of ability or as a more qualified part of the specific requirements, before reviewing in turn, the emergence of indicators on the ability or status of the national justice system and its three specific requirements, of the ability to obtain testimony, to obtain testimony and evidence or to otherwise carry out its proceedings.

**Chapter 7** concludes the thesis by reviewing the framework or threshold of ‘admissibility-proof’ national criminal justice practices as derived from the law and practice of the ICC since it became functional until 21 May 2014 when Admissibility Appeal Judgment in *Gaddafi* was released. Due to the proximity of the judgment and the submission of this thesis, the *Gaddafi* Appeal is considered only in the conclusion, to help re-focus or affirm the tests and rules that have emerged when considering the admissibility of cases and situations before the ICC. This Chapter also considers the emergent tensions and contradictions between these tests and principles and international human rights treaties and treaty bodies.

## **5. The ICC and Positive Complementarity: Limits of Research and Avenues for Future Research**

While this thesis addresses the subject matter of its subtitle, it does so in recognition of the potential impact that the admissibility law and practices will have on the ICC’s role in the implementation of the concept of positive complementarity and consequently on national capacities to operate in accordance to the ICC system. This thesis considers that the concept of positive complementarity is inherently derived from the legal apparatus of the Rome Statute, including the Statute, its rules, procedures and emergent jurisprudence. As an ‘action driven concept, the absence of a clear framework of the minimal formal requirements that State practice under the ICC needs to adhere to is problematic, as *positive complementarity*

activities can be conducted without any clear understanding of the formal limitations that the Rome Statute imposes on its judiciary during admissibility deliberations and of its similitude or otherwise, to the requirements imposed on States from other applicable international treaties. It considers that efforts to segregate positive complementarity from the trajectory of the Court's powers would remove its connection to, or origins within the legal framework of the ICC, and would in effect become detached from the ICC's system of justice. While I assert that the concept should remain grounded within the legal framework of the ICC, it does not follow that the ICC should or must retain control over every aspect of its design and implementation, and indeed I would tentatively argue against this. However, my interest remains largely focused on defining the role of the ICC and its organs with the concept and practice of positive complementarity.

### **5.1. Applying Managerial Compliance Models to Positive Complementarity**

Having considered that positive complementarity should remain grounded within the framework of the Rome Statute, the author considers that managerial forms of compliance may provide a suitable framework from which to clarify the concept of positive complementarity and its relationship to the ICC, notably to address questions of its legal, institutional and policy framework. The objectives as well as methods of implementation that positive complementarity appears to establish have been understood as a second, less coercive and more managerial form of treaty compliance as far back as 1996, ably elaborated by Chayes and Chayes as the notion of *managerial* compliance.<sup>1</sup> While the concept of managerial compliance developed rapidly in social sciences, as a method and set of tools to enable greater conformity to international law,<sup>2</sup> as part of a reconceptualization of States performance as members of international treaties<sup>3</sup> and as a (critiqued) concept to understand the effects and significance of international law.<sup>4</sup>

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<sup>1</sup> Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47 *International Organization* 175; Abram Chayes and Antonia Handler Chayes, 'A Theory of Compliance', *The New Sovereignty: Compliance with International Regulatory Regimes*, vol 47 (Harvard University Press 1995).

<sup>2</sup> Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823; Peter M Haas, 'Choosing to Comply: Theorizing from International Relations and Comparative Politics' in Dinah Shelton (ed), *Commitment and Compliance: the role of non-binding norms in the international legal system* (Oxford University Press 2000); George W Downs and Andrea Trento, 'Conceptual Issues Surrounding the Compliance Gap' in Edward C Luck and Michael W Doyle (eds), *International Law and organization: closing the compliance gap* (Rowman & Littlefield Publishers 2004).

<sup>3</sup> Kai Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Larknaes (ed) (2002); Jonas Tallberg, 'Paths to Compliance: Enforcement, Management and the European Union' (2002) 56 *International Organization* 609; Celeste Montoya, 'The European Union, Capacity Building,

Compliance models, whether they are managerial or coercive, are methods to ensure that member states adhere to the rules, principles and provisions of the treaties that constitute the organisation, or which are produced by it. While this thesis is overwhelmingly concerned with the impact of the operative part of the ICC Statute on domestic jurisdictions, evidenced through its admissibility law and practice, the explicit obligation of States Parties is to cooperate with the ICC and to ensure that it has a sufficient legal framework to do so. As such, managerial compliance, or positive complementarity models should also respond to capacity needs or limitations in the sphere of cooperation and judicial assistance.

As a less coercive and more constructive method to enable compliance, the tools that are commonly adopted as part of managerial methods include capacity building, technical assistance, networks and partnerships as well as outreach programmes. They have informed the provision of such compliance-driven services by specialised units or divisions of many international organisations in support of and adherence to the their respective mandates. This practice is not so clearly consolidated within international criminal tribunals and little effort has been given to locate the praxis of managerial compliance as part of the inherent powers of international criminal tribunals, despite their adoption of many tools that form part of its repertoire.<sup>5</sup>

Consideration of managerial compliance mechanisms should not be made to the exclusion of more coercive or sanction driven incentives that may be particular to the ICC system, including the incentives that OTP preliminary examinations and investigations may have on encouraging or catalysing States to engage its domestic jurisdiction, the possibilities of

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and Transnational Networks: Combating Violence Against Women Through the Daphne Program' (2008) 62 International Organization 359.

<sup>4</sup> Benedict Kingsbury, 'Concept of Compliance as a Function of Competing Conceptions of International Law, The' (1997) 19 Michigan Journal of International Law 345, 346; Eric A Posner (ed), *Economies of Public International Law*, p 1117; Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 Global Policy Journal 127.

<sup>5</sup> Previous international criminal tribunals such as the temporary tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were compelled to conduct capacity building activities with the States under their jurisdiction, as part of their completion strategies, forming responsive programmes, in partnership with other international organisations. ICTY and UNICRI, 'ICTY Manual on Developed Practices'; ICTY, OSCE/ODHIR and UNICRI, 'Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer: Final Report' (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2009). ICTY, 'ICTY Outreach: Capacity Building' (*ICTY*) <<http://www.icty.org/sections/Outreach/CapacityBuilding>> accessed 3 November 2010. Alejandro Chehtman and Ruth Mackenzie, 'Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice' DOMAC/2, September 2009.

sequencing cases and the challenges that may be posed by competing requests, as well as the monitoring powers that the OTP following decisions of inadmissibility. Research should also extend into the core of the cooperation regime, and the significant challenges facing non-cooperation, particularly in light of the Security Council referred cases of non-States Parties.

## 5.2. Definitions of Positive Complementarity

From the outset, there is little agreement on the suitability of the choice of adjective to define this component of complementarity. Although the *positive*<sup>6</sup> label emerged first, authors have also argued that this form of complementarity may be better defined as a *constructive*,<sup>7</sup> *pro-active*<sup>8</sup> or *active*<sup>9</sup> style of engagement between the ICC and State criminal justice institutions. Regardless of the moniker adopted, there is little variation in the narrative of the purpose of *positive* complementarity, and little effort to connect it to the admissibility requirements of complementarity. Largely understood as part of the complementarity system, the common features of the different proposals invoke the encouragement and strengthening of States capacity to exercise criminal jurisdiction over the perpetrators of crimes that fall under the jurisdiction of the ICC as well as to cooperate with the ICC, in the context of the Court's own investigative and judicial activities.

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<sup>6</sup> William W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59; Hitomi Takemura, 'A Critical Analysis of Positive Complementarity' (2007); Morten Bergsmo (ed), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher 2011); Sylvia Arbia and Giovanni Bassu, 'Proactive Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Göttingen Journal of International Law* 791; William W Burke-White, 'Reframing Positive Complementarity: Reflections on the First Decade and Insights from the UC Federal Criminal Justice System' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice' (2008) 49 *Harvard International Law Journal*; Hall, 'Developing and Implementing an Effective Positive Complementarity Strategy' (n 2); Florian Jessberger, 'Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in Germany' in Wolfgang Kaleck and others (eds), *International Prosecution of Human Rights Crimes* (Springer Berlin Heidelberg); Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67; Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87; Bergsmo, Bekou and Jones; Christopher Keith Hall, 'Positive Complementarity in Action' in Mohamed M El Zeidy and Carsten Stahn (eds) (2011).

<sup>7</sup> Robinson (n 5).

<sup>8</sup> Burke-White, 'Proactive Complementarity' (n 5); Arbia and Bassu (n 5).

<sup>9</sup> Bergsmo (n 5).

Within the ICC's organs, four definitions or descriptions of positive complementarity can be determined. The first occurred within the Office of the Prosecutor in 2003, where *positive* dimensions of complementarity were explored through informal, expert-led papers, which considered that the effective implementation of the principle of complementarity provided 'a mechanism to encourage and facilitate compliance of States with their primary responsibility to investigate and prosecute core crimes'<sup>10</sup> that could be informed by guiding principles of *partnership*<sup>11</sup> and *vigilance*.<sup>12</sup> The second definition also emerged from the OTP, in 2006, thereby revising the first, to clarify that it 'encourages genuine national proceedings where possible, relies on national and international networks and participates in a system of international cooperation.'<sup>13</sup> The third definition by the OTP significantly reduces its direct engagement with positive complementarity, clarifying that the OTP would not be involved directly in the provision of capacity building or technical assistance but would instead encourage genuine national proceedings and rely on its networks of cooperation,<sup>14</sup> while reference to positive complementarity activities by the OTP has been removed from the current prosecutorial strategy.<sup>15</sup>

Consequently, the fourth definition of positive complementarity, issued by the Bureau of the Assembly of States Parties in 2010 remains the only active definition by an organ of the ICC. It describes positive complementarity as:

*'all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Statute.'*<sup>16</sup>

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<sup>10</sup> ICC Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (n 28) 3.

<sup>11</sup> The paper proposed two strands of 'partnership' that are reminiscent of managerial compliance: (a) encouraging national action, with States, through international fora and with judicial institutions and (b) providing direct assistance and advice, through the provision of information and evidence under Article 93(10) requests (the so-called reverse cooperation), provision of technical advice, training and the brokering of assistance.

<sup>12</sup> Their caution on vigilance was however, not connected to critiques of managerial compliance, but of the legal interpretation of complementarity, largely contained within Article 17(1), moving from the status of inaction as opposed to unwillingness and inability, on the requirement of genuine proceedings and on the implications of different phases of ICC proceedings on the application of the admissibility criteria.

<sup>13</sup> Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, 'Seventh Diplomatic Briefing' (International Criminal Court 2006) Statement; ICC Office of the Prosecutor, 'Report on the Activities Performed during the First Three Years (June 2003 – June 2006)' (n 35); ICC Office of the Prosecutor, 'Report on Prosecutorial Strategy' (n 33).

<sup>14</sup> ICC Office of the Prosecutor, 'Prosecutorial Strategy 2009-2012' (n 61) 5.

<sup>15</sup> ICC Office of the Prosecutor, 'OTP Strategic Plan: June 2012-2015' (International Criminal Court 2013).

<sup>16</sup> *Taking stock of the principle of complementarity: bridging the gap*, and an annex of example capacity building projects. See ASP Bureau Focal Points on Stocktaking Complementarity (n 11).

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Each of these definitions, or statements of activity, requires an understanding of what is being strengthened and logically, to what standard or legal requirement *it* is being strengthened to. To guarantee equality, this requires the existence of a framework of the minimum standards or requirements.

### **5.3. Legal Framework**

This thesis does not delve deeply into legal analysis of the powers of the ICC to engage in or with *positive* complementarity, nor of the value or benefit of doing so. However, it considers that through the ICC Statute, and its powers as in inter-governmental organisation, the legal basis as well as a normative rationale for the ICC to be engaged in the design, construction and implementation of a positive complementarity framework should be explored. In addition to the inherent powers of the ICC as an international judicial organisation, four provisions appear to provide the basis for the ICC to establish cooperation agreements or partnerships with relevant international intergovernmental organisations as well as non-governmental agencies, to enable the ICC to engage with positive complementarity activities.

#### ***Cooperation with the United Nations***

Article 2 of the Rome Statute and the ensuing *Negotiated Agreement*<sup>17</sup> appears to support the possibility for partnership between the ICC and the UN for the purpose of *positive* complementarity programmes. Based on the international legal personality<sup>18</sup> of both organisations, the *Negotiated Agreement* establishes a general provision of cooperation, allowing the UN, its programmes, funds or offices to provide other forms of cooperation and assistance not included within the *Negotiated Agreement*, where it is compatible with the Charter and the ICC Statute provisions.<sup>19</sup> The UN currently provides legal technical assistance through the UN Office of Legal Affairs as well as UN agencies and specialised bodies on themes directly applicable to the substantive and procedural dimensions of national criminal justice for crimes within the jurisdiction of the ICC. This includes areas covering child soldiers, crime prevention and criminal justice reform, human rights, and institutional

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<sup>17</sup> Article 2, 'Rome Statute of the International Criminal Court' and UN General Assembly Resolution 58/79, 09 December 2003

<sup>18</sup> Article 1 and 4, Rome Statute and Article 2 of the Negotiated Agreement.

<sup>19</sup> Article 15(2) 'Negotiated Relationship Agreement between the International Criminal Court and the United Nations'

development, as well as counter-terrorism<sup>20</sup> albeit according to the standards and requirements established under UN treaties, standards and principles.

### ***General Provisions for Cooperation***

Article 87 establishes the general grounds for cooperation requests, and authorises the Court to conclude cooperation and assistance agreements with intergovernmental organisations that are consistent with its mandate or competence.<sup>21</sup> The provision distinguishes between the provision of material assistance – documents, materials and information – and ‘other forms of cooperation and assistance,’ which gives the Court some leeway to interpret its scope, so long as it is in accordance with its competence or mandate.<sup>22</sup> In the context of strengthening national criminal justice systems and practices, the ICC concluded a ‘Memorandum of Understanding’<sup>23</sup> with the Commonwealth Secretariat (ComSec)<sup>24</sup> in 2011. It is the first example where the ICC has entered into an explicit commitment to conduct capacity building activities with an intergovernmental organisation for the purpose of strengthening national capacity to exercise criminal jurisdiction, as well as to strengthen national ability to cooperate with the ICC.<sup>25</sup> The agreement allows the ICC and Commonwealth Secretariat to cooperate in order to develop training and assistance programmes for judges, prosecutors, officials and counsel in work related to the Court and to ‘foster the professionalism required of national actors’ for the effective functioning of the complementarity regime. This directly confronts the human and legal capacities of Commonwealth member States who are yet to incorporate

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<sup>20</sup> Office for Drug-Control and Crime Prevention: Centre for International Crime Prevention (ODCCP/CICP), Office of the High Commissioner for Human Rights (OHCHR), Office of Legal Affairs Codification Division (OLA/COD), United Nations Children's Fund (UNICEF), Office for the Coordination of Humanitarian Affairs (OCHA) while UNDP and national mandated offices of the UN also engage directly in the thematic areas of the Rome Statute. See Edward Luck, 'Tackling Terrorism' 96-100 in David Malone, *The UN Security Council: from the Cold War to the 21st century* (Lynne Rienner Publishers 2004); Eric Rosand, 'Resolution 1373 and the Counter Terrorism Committee: The Security Council's Capacity Building' in Giuseppe Nesi (ed), *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Ashgate 2006)

<sup>21</sup> Article 87(6) 'Rome Statute of the International Criminal Court'

<sup>22</sup> This requires the Court to assess if the other international organisation would be acting ultra vires by entering into the agreement, based on the Court's own evaluation of the mandate or competence of the other organisation's mandate, even though this decision should be based on the internal law of the partner organisation, in keeping with its international legal personality.

<sup>23</sup> The press release of the ICC refers to the signing of a cooperation agreement between the ICC and the Commonwealth Secretariat. The titles of the remarks given by both the ICC President and the Commonwealth Secretariat General Secretary refer to a Memorandum of Understanding between the two organisations, while the content of the remarks refer to a cooperation agreement. Without further clarification from the Court or ComSec, it will be referred to as a cooperation agreement. ICC Press Office (n 20).

<sup>24</sup> Ibid.

<sup>25</sup> See Article 8 of the ComSec Agreement.

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either their obligations to cooperate with the Court or to introduce definitions of core international crimes into their domestic laws, and is understood to include further assistance measures including advice and assistance on legislative drafting, which would address legal capacity issues, in addition to human capacity.<sup>26</sup>

Various 'promotional' clauses, to promote and disseminate the principles and values enshrined in the Statute<sup>27</sup> can be found in this and other agreements, including the *Framework Cooperation Arrangement with the Organization of American States (OAS)*<sup>28</sup> the *Memorandum of Understanding between the International Criminal Court and the Asian-African Legal Consultative Organisation*<sup>29</sup> and the *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance*.<sup>30</sup>

The *EU Agreement on Cooperation and Assistance* includes a direct reference to the EU's support for capacity building activities. In addition to the general commitment to promote the values of the Statute, the EU Agreement establishes EU support for the development of training and assistance for judges, prosecutors, officials and counsel, in work related to the Court.<sup>31</sup> However, it does not do so in collaboration with the Court, but separately through a range of global or bilateral donor mechanisms, as well as through its current direct sponsorship of the ICC's Legal Tools Project as well as previous sponsorship of the Visiting Scholar and Internship programmes of the ICC.

### ***Other Forms of Cooperation***

Under Article 93(10), States are entitled to request assistance or cooperation from the International Criminal Court when they are conducting investigations or trials into crimes where the conduct falls under an ICC crime, or a serious crime at the national level.<sup>32</sup> Formed

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<sup>26</sup> 'ICC signs cooperation agreement with Commonwealth to jointly support States implementing international criminal law' (International Criminal Court July 13, 2011)

<sup>27</sup> inserting a special focus of such promotion to the norms of international humanitarian law.

<sup>28</sup> Article 1(i) and (ii) Exchange of Letters Between the International Criminal Court and the General Secretariat of the Organization of American State for the Establishment of a Framework Cooperation Agreement 2011 (ICC-PRES/08-02-11).

<sup>29</sup> Article 2.2, Memorandum of Understanding between the International Criminal Court and the Asian-African Legal Consultative Organization 2008 (ICC-PRES/05-01-08).

<sup>30</sup> Article 6, Agreement between the International Criminal Court and the European Union on Cooperation and Assistance 2006 (ICC-PRES/01-01-06).

<sup>31</sup> Article 16, Ibid.

<sup>32</sup> Article 93(10), 'Rome Statute of the International Criminal Court'



as part a broad provision that elaborates on the ‘other forms of assistance’ to be provided by States to the Court, it is the only statutory provision that reverses the direction of the requesting and requested entities. Whereas the ICC’s Cooperation regime focuses primarily on the obligation of States towards the Court in the functioning of the Court’s duties Article 93(10) is the only measure that requires the Court to consider States’ requests for support or assistance towards their own endeavours to investigate and prosecute the perpetrators of crimes under the ICC statute, albeit ‘discretionary’<sup>33</sup> in nature.<sup>34</sup> As the provision is ‘in-exhaustive’<sup>35</sup> in its scope, it clearly provides considerable interpretive discretion on behalf of the Court in deciding whether to provide assistance, and also to States, in the formulation of their request to the Court. While the scope of Article 93(10) can clearly support a request for capacity building by a State, the provision entitles them to do so only where they have initiated an investigation or trial in respect of conduct that is prohibited under the Statute.

### ***Powers of the Prosecutor to Form Agreements with Respect to Investigations***

Article 54(3) (c) and (d) on the *Duties and Powers of the Prosecutor with Respect of Investigations*, entitles the Prosecutor to conclude cooperation arrangements and agreements with international organisations, in accordance with its respective competence and/or mandate<sup>36</sup> in order to facilitate the conduct of investigations by the Prosecutor. This could be used to respond to any noted capacity inefficiencies or deficiencies of States relevant to any ICC investigation, in order to enable the State to better execute its responsibilities, both domestically but, significantly, in regard to the Court’s own investigation. This supplements the general obligation to cooperate in Part IX of the Statute, by providing the Prosecutor with their own independent power to form cooperation or assistance agreements for the execution of the function of the OTP.

Taken together, the four provisions would appear to establish ample opportunities for the ICC to establish cooperation agreements with relevant organisations in pursuit of positive

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<sup>33</sup> Claus Kress and Kimberly Prost, ‘Article 93: Other Forms of Cooperation’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article* (Nomos 2008) 1586

<sup>34</sup> While the Rules of the Court indicate that the request should be submitted to Registrar, they are required to transmit the request to the Office of the Prosecutor, for the parts of the request that relate to the pre-trial stage, or to the relevant Chamber, in the circumstances that the request relates to proceedings already underway. Rule 194(2) Rules of Procedure and Evidence 2002 (ICC-ASP/1/3) 94.

<sup>35</sup> Gioia (n 27); *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd ed, Beck 2008).

<sup>36</sup> Article 54(3), *ibid.*

complementarity activities. Whereas the admissibility regime of the Statute establishes a range of (indirect) coercive compliance mechanisms, it appears that there may be sufficient legal basis for the Court to engage in what can be considered as managerial compliance mechanisms. As I have stated previously, I am firmly of the opinion that positive complementarity should remain connected to the judicial outputs of the ICC and that through collaboration or cooperation, it is within its legal powers to do so. The extent to which the ICC should do so, as well as its institutional competences should be interrogated, and as this short section has shown, there is considerable difference in the policies and views of the differing organs of the ICC.

#### 5.4. Institutional Framework

Despite the apparent legal basis for the ICC to engage in positive complementarity, the ICC may not itself provide an acceptable institutional basis: this remains a worthy area of further research. While historically, the OTP and ASP have dominated policy discussions on the scope and application of positive complementarity, other organs, such as the Registry and the Victims Trust Fund may also have applicable roles to play in the development of positive complementarity policies and strategies. While early policy dimensions of the OTP's 'complementarity in practice' envisaged a form of burden sharing, where the ICC would restrict its own adjudicatory work to prosecute 'the most responsible leaders',<sup>37</sup> where the OTP could *encourage* national prosecution of lower ranking perpetrators,<sup>38</sup> this model met some resistance from States Party donors who commented on the need for budgetary constraint as well as practical information on the implementation of the OTP approach.<sup>39</sup> Subsequently, the ASP attempted to curtail the Court's efforts to provide or facilitate capacity building, asserting its view that the Court should limit its activities to what it defines as its 'core judicial function.'<sup>40</sup>

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<sup>37</sup> A formula that has been rejected by the Chambers and revised in the policies of the OTP

<sup>38</sup> ICC Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (n 28).

<sup>39</sup> ICC Office of the Prosecutor, 'Annex to the Three Year Report and the Report on the Prosecutorial Strategy' (International Criminal Court 2006) para 7(a) <[http://www.icc-cpi.int/NR/rdonlyres/9960BBE1-C1E2-4986-BA8C-F6E20742641A/0/OTP\\_ProsecutorialStrategyAnnex\\_En.pdf](http://www.icc-cpi.int/NR/rdonlyres/9960BBE1-C1E2-4986-BA8C-F6E20742641A/0/OTP_ProsecutorialStrategyAnnex_En.pdf)>.

<sup>40</sup> ICC Assembly of States Parties, 'ICC/ASP/10/Res.5 Strengthening the International Criminal Court and the Assembly of States Parties' (n 45); *ibid* 59.

Within this ‘core judicial function’ the OTP has pursued the development of collaborative cooperation networks, which serve a dual function to support the investigations of the OTP while also strengthening national capacities. Using the prosecutorial powers to establish cooperation programmes with international organisations as well as other entities, the OTP has developed a collaborative dimension of positive complementarity, constructing professional networks and exchanges. These currently include the ICC’s *Legal Tools Project*, an online legal information platform that emerged from the OTP;<sup>41</sup> the *Law Enforcement Network*, an OTP initiated network to involve officials, experts and lawyers from situation countries in OTP investigative and prosecutorial activities; and a project with INTERPOL to establish cooperation amongst national war crimes units.<sup>42</sup>

In an unusual move for an international organisation, the ASP has sought to limit the role that the Court should play in ensuring that States Parties are able to comply with its treaty, in favour of promoting bilateral support between States, such as the *Justice Rapid Response*<sup>43</sup> or between other international agencies, notably development agencies. Without due consideration of the differing mandates of external agencies, this may be problematic, most notably concerning the difference in rules, principles and standards required by other bodies. In aiming to limit the role of the Court to an indirect actor, the ASP appear to have overlooked the importance of positive complementarity to the core functions of the ICC, as well as its essential institution functions, such as outreach. This may be an oversight that fails to fully consider the importance of involving the ICC in the design and implementation of positive complementarity mechanisms that are consistent with the ‘Goldilocks Zone’ of national criminal justice under the ICC, and it can further weaken the legitimacy and authority of the Court. By reducing the prominence of positive complementarity to voluntary bilateral mechanisms between States rather than as a component of the Court’s complementarity regime, the ASP risks reducing the transparency and certainty of the ICC, by allowing the complementarity marketplace to set their own standards of ‘necessary law and practice.’

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<sup>41</sup> ICC Office of the Prosecutor, ‘Report on the Activities Performed during the First Three Years (June 2003 – June 2006)’ (n 35) 32; Bergsmo (n 5).

<sup>42</sup> ICC Prosecutor, ‘Fifteenth Diplomatic Briefing of the International Criminal Court’ (International Criminal Court 2009) Statement 9. ICC Office of the Prosecutor and Interpol, ‘Co-Operation Agreement between the Office of the Prosecutor of the ICC and INTERPOL, 22 December 2004’.

<sup>43</sup> ‘Prosecutorial Strategy 2009-2012’ (n 104) 61; ICC Assembly of States Parties, ‘ICC/ASP/8/Res.2 Cooperation’ (n 89).

## 5.5. Policy Framework

While this thesis argues that the laws and practice of the Court under Article 17 challenges should form the epicentre of Positive Complementarity, this is not a commonly held view. Several publicists have recognised the 'managerial' possibilities of positive complementarity,<sup>44</sup> some have sought to strip the concept down to essential characteristics of domestic capacity building and legal empowerment,<sup>45</sup> others have encouraged its expansion into components of outreach programmes and systematic domestic capacity building,<sup>46</sup> while others have considered that positive complementarity should be unchained from the jurisdictional constraints of Article 17 and the admissibility criteria to become a broader tool to combat impunity.<sup>47</sup>

From the outset of the ICC, there has been a tendency to attach certain conditions attesting to the qualitative standards of national criminal jurisdictions, namely that 'national systems are expected to maintain and enforce adherence to international standards.'<sup>48</sup> Equally, through its plan of action to achieve universality and full implementation of the Rome Statute annual Resolutions on Universality, the Assembly of States Parties (ASP) repeat calls for 'full and effective implementation' of the Rome Statute' which go beyond calls for compliance with the obligation to cooperate, and:

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<sup>44</sup>Stahn (n 5); Burke-White, 'Proactive Complementarity' (n 5); Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (n 5); Christoph Burchard, 'Complementarity as Global Governance' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (First, Oxford University Press 2008) 311–313 and 327–330.

<sup>45</sup> See the preface by Morten Bergsmo in Bergsmo (n 5). This is elaborated further in Bergsmo, Bekou and Jones (n 5).

<sup>46</sup> This includes the relevance of ICTY experiences in building capacity, as well as efforts to assert a positive complementarity paradox in countries that are under preliminary examination or investigation. Jane Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 Hague Journal on the Rule of Law 87; David Tolbert and Aleksandar Kotic, 'The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts and Lessons for the ICC', *The Emerging Practice of the International Criminal Court*, vol 48 (Martinus Nijhoff 2009); Tarik Abdulhak, 'Building Sustainable Capacities – From an International Tribunal to a Domestic War Crimes Chamber for Bosnia and Herzegovina' (2009) 9 International Criminal Law Review 333; Bjork and Goebertus (n 2).

<sup>47</sup> Lisa J LaPlante, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence' (2009) 43 John Marshall Law Review 635.

<sup>48</sup> ICC Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor' (International Criminal Court 2003). page 2

*‘Encourages States, particularly in view of the fundamental principle of complementarity, to include the crimes set out in articles 6, 7 and 8 of the Rome Statute as punishable offences under their national laws, to establish jurisdiction for these crimes, and to ensure effective enforcement of those laws.’*<sup>49</sup>

However, the capacity requirements that the complementarity models impose onto national criminal justice systems also remains unexplored territory.

The Stocktaking Report and Resolution conceded that *positive* complementarity formed a functional element of the complementarity principle, as a tool to aid the reduction of vertical and horizontal impunity gaps within the ICC system of justice.<sup>50</sup> Unlike the OTP, which had sought to establish positive complementarity as a two-way process, that supported both the functioning of the OTP and the delivery of criminal justice by national jurisdictions, the Bureau affirmed its view that positive complementarity exists for the purpose of strengthening national jurisdictions.

The Bureau follows contemporary dimensions of capacity building, identifying the capacity needs of national criminal justice institutions as consisting of *human capacities*, such as the skills and knowledge of police, investigators, prosecutors, judges and defence counsel; *organisational capacities* including witness and victim protection schemes, forensic programmes, the construction and sustainable operation of courthouses and prison facilities and *institutional/legal capacities* to ensure that legislation is enacted to implement the Rome Statute into domestic legislation.<sup>51</sup> While this largely reflects the factual and legal indicators that consist of the admissibility criteria of *ability*<sup>52</sup> the Report considered positive complementarity to be applicable as a preventative measure, in advance of any future cause

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<sup>49</sup> ICC Assembly of States Parties, ‘ICC/ASP/8/Res.3 Strengthening the International Criminal Court and the Assembly of States Parties’ (n 43) 4; ICC Assembly of States Parties, ‘ICC-ASP/9/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties’ ICC-ASP/9/Res.3, 10 December 2010 para 4; ICC Assembly of States Parties, ‘ICC/ASP/10/Res.5 Strengthening the International Criminal Court and the Assembly of States Parties’ Resolution Resolution ICC-ASP/10/Res.5 para 72; ICC Assembly of States Parties, ‘ICC-ASP/11/Res.6, Complementarity’ ICC-ASP/11/20, 21 November 2012 para 4; ICC Assembly of States Parties, ‘ICC-ASP/12/Res.4, Complementarity’ ICC-ASP/12/Res.4, 27 November 2013 para 4.

<sup>50</sup> Here it defines horizontal gaps as impunity that may emerge *between* those situations investigated by the Court and those that aren’t, while vertical gap occur *within* a situation, between those who are brought before the Court and those perpetrators who aren’t. para 14. ICC Assembly of States Parties, ‘Report of the Bureau on Stocktaking: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap’ (n 11).

<sup>51</sup> Ibid 17.

<sup>52</sup> See Chapter 5

to apply such laws as well as infrastructural and human capacities<sup>53</sup> as well as serving the catalytic features recognised by the OTP, to include all jurisdictions where Rome Statute crimes may have been committed, regardless of their status before the OTP. Here the ASP accept that positive complementarity can serve as a catalyst for domestic proceedings as well as readying all relevant States to provide the relevant cooperation required for investigations at either the international or national forum.<sup>54</sup> The Report also considered that positive complementarity could be effective in responsive scenarios, at any stage following the triggering of the Court's jurisdiction, where capacity building could be beneficial both to the Court's own operations, for example to assist in arrest and surrender mechanisms, witness and victim participation and other cooperation mechanisms, but also to support national systems for their own domestic proceedings.<sup>55</sup> Positive complementarity was also envisaged at the conclusion of the ICC's investigations or prosecution, to prevent vertical impunity within the State and support any on-going judicial activities in territorial jurisdictions.<sup>56</sup>

Finally, before returning to the main questions of this thesis, I consider that it is essential to the legitimacy of the ICC as well as the legal security and equality of the ICC system, that positive complementarity remains coherent to the ICC Statute. While this thesis acknowledges the absence of critical engagement on the legal capacity requirements of the different models of complementarity it does not address it in the detail that it deserves. Instead, it recognises the distinction that exists between notions of 'best practice' that the ICC Statute is understood to require of its organs, drawn from international and regional treaties and practices on the one hand and 'admissibility proof' national criminal justice on the other hand, while somewhere in between, a 'good enough' threshold can balance admissibility-proof practices, national ownership, legal familiarity and resources while recognising broader international obligations. This thesis confronts the common conclusion that domestic legal orders should ensure that their legal infrastructure complies with the ICC statute: *'it is in the*

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<sup>53</sup> ICC Assembly of States Parties, 'Report of the Bureau on Stocktaking: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap' (n 11) 20–21.

<sup>54</sup> Ibid 22–23.

<sup>55</sup> Ibid 24–25.

<sup>56</sup> Ibid 26–27.

*interests of justice and the States, that the latter already have or create ... regulations in their domestic legal systems, which are in accordance with the law to be applied by the Court.*<sup>57</sup>

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<sup>57</sup> Otto Triffterer, 'Legal and Political Implications of Domestic Ratification and Implementation Processes' in Claus Kress and Flavia Lattanzi (eds), *The Rome Statute and domestic legal orders* (Nomos ; Il Sirente 2000). 16.





## Chapter 2

### *Interpreting Complementarity: The Sources of Applicable Law Available to the ICC*

Almost all of the models summarised in the Chapter 1 are interpretations of the effect of the Rome Statute on national practices, and what States must do in order to ‘satisfy complementarity’ or remain ‘admissibility proof.’ They establish and respond to propositions of acceptable thresholds of national criminal justice practices for States who fall under the ICC’s jurisdiction and yet they rarely adopt the process that governs the application and interpretation of the sources of law to which the Court is bound to, and rarely do so in a coherent or consistent way. Notwithstanding the latitude for permissible interpretive variation, a more consistent application of Article 21 to the questions over the scope of national criminal justice practices that have been raised by the two divergent approaches may help to narrow the spectrum and provide a more balanced representation of the admissibility regime.<sup>1</sup>

This chapter aims to address this methodological shortcoming, in order to more coherently interpret the substantive and procedural scope of ICC admissibility-proof national criminal justice practices, by reviewing the methodology created by the sources of applicable law described in Article 21 and identifying the laws, principles and rules that are most relevant to determinations of the willingness and ability of States to provide effective criminal justice at the national level for those persons responsible for ICC crimes.

#### **1. Sources of Applicable Law: A Sequential Methodology With A Human Rights Twist**

Article 21 instructs the ICC Judges to respond to the indeterminacy of the Statute, its gaps and ambiguities, as well as unforeseen contingencies,<sup>2</sup> through three sequential groups of internal and external laws, rules and principles and a consistency filter that reinforces the

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<sup>1</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 303–320.

<sup>2</sup> Margaret de Guzman, ‘Article 21: Applicable Law’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd ed, Beck 2008); Jan Klabbers, *An Introduction to International Institutional Law* (Second, Cambridge University Press 2009) 58.

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importance of human rights to the application and interpretation of law by the ICC. Its similitude to Article 38 of the Statute of the International Court of Justice (herein ICJ Statute) has been noted,<sup>3</sup> and yet it has also been described as a '*tissue of imperfectly defined sources*'.<sup>4</sup>

### **1.1. In The First Place: Internal Sources of Law, Principles and Rules of ICC**

#### **Decisions**

Described as a 'beautiful pyramid' of internal legal sources, the Statute presides over the subsidiary sources of the Elements of Crimes (EoC), Rules of Procedure and Evidence (RoPE) in forming the first set of sources of law that the Court must apply.<sup>5</sup> While Article 21 does not establish this hierarchy, the EoC and RoPE derive their authority from the Statute,<sup>6</sup> which includes instructions on the use of the Elements of Crimes, which '*shall assist the Court in the interpretation and application*'<sup>7</sup> of the Statute, while where any conflict arises between the application of the Statute and the Rules of Procedure and Evidence, the Statute must prevail.<sup>8</sup> Additionally, the preamble offers authoritative and contextual interpretive value<sup>9</sup> to the object and purpose of the ICC. Finally, the principles and rules derived from previous decisions of the Court can also be applied,<sup>10</sup> and although this remains discretionary Judges have done so with some regularity across the Chambers, particularly in the context of admissibility considerations.<sup>11</sup>

Where the internal legal regime fails to provide sufficient or satisfactory rules to address the questions before the Court, where ambiguity remains, or where the application of internal

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<sup>3</sup> George E Edwards, 'International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy' (2001) 26 *Yale Journal of International Law* 323, 369; Sergey Vasiliev, 'Applicability of International Fair Trial Standards in International Criminal Proceedings: Between Universalism and Contextuality', *Toodag Seminar* (2008) 210.

<sup>4</sup> Alan Pellet, 'Applicable Law' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Oxford University Press 2002), page 1053.

<sup>5</sup> Article 21(1) 'The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.' Rome Statute of the International Criminal Court 1998 (A/CONF183/9).

<sup>6</sup> See Pellet, 'Applicable Law' (n 75) 1055.

<sup>7</sup> Article 9, *Rome Statute* (n 76).

<sup>8</sup> See Gilbert Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC' in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court*, vol 48 (Martinus Nijhoff 2009) 287–290.

<sup>9</sup> United Nations, 'Vienna Convention on the Law of Treaties' (United Nations 1969). Article 31(2).

<sup>10</sup> Article 21(2), *Rome Statute* (n 76).

<sup>11</sup> Bitti, (note 8) 293.

rules would, in the circumstances, ‘lead to a result which is manifestly absurd or unreasonable’<sup>12</sup> recourse to external laws is possible.

## 1.2. In The Second Place: International Principles, Rules and Treaties Including Principles of the International Law of Armed Conflict

The second group of legal sources moves horizontally outside of the Court to the *applicable* treaties, principles and rules of the international legal sphere, with specific reference of the principles of armed conflict as established under international law.<sup>13</sup> With the exception of reference to the ‘laws of armed conflict’ the Statute does not elaborate these external sources, requiring the Chambers to do so.<sup>14</sup> In the absence of a definitive list of applicable sources, there has been some debate on the scope of laws and which model of inquiry to adopt, in order to determine the applicable sources of an international nature.

During the negotiations, the choice of adjective moved between *relevant* and *applicable*, causing some initial controversy by those who preferred greater discretion to be afforded to the ICC judges to apply the confluence of legal disciplines that makes up its practice. Others appeared to accept that the distinction between ‘applicable’ laws and ‘relevant’ laws could be measured by whether the ICC Statute directly referred to a treaty, or if it directly replicated the text of an external treaty: if it did, then the treaty should be considered applicable,<sup>15</sup> if not, it could serve only as an interpretive aid. The adoption of such a strict *in concreto* model of inquiry would have excluded pertinent treaties, including the Vienna Convention on the Law of Treaties as a valid source<sup>16</sup> as well as the UN Convention Against Torture<sup>17</sup> by

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<sup>12</sup> VCLT (n 9) Article 32(b).

<sup>13</sup> Article 21(1) The Court shall apply: ‘(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.’ *Rome Statute* (n 76).

<sup>14</sup> Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Cambridge University Press 2006), on the tactics of negative reference, see I Brownlie, ‘Some Questions Concerning the Applicable Law in International Tribunals.’ [1996] Skubiszewski collection 768.

<sup>15</sup> Per Saland, ‘International Criminal Law Principles’ in Roy S Lee (ed), *The International Criminal Court: the making of the Rome Statute--issues, negotiations, results* (Kluwer Law International 1999) 215.

<sup>16</sup> The VCLT was expressly accepted as a source of law in Pre Trial Chamber I, *Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58*, in Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, para 42; Appeals Chamber, Situation, Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006,

requiring the exact repetition of external treaty texts, rather than the more accepted *in concreto* requirement for an identical normative formulation or identical legal elements.<sup>18</sup> This method of inquiry may be more appropriate in the consideration of defenses, liabilities and the definition of crimes, to respect the principle of legality, specifically the principle of *nullum crimen sine lege* and the prohibition against the extension by analogy.<sup>19</sup> For other purposes the *in abstracto* method appears to be more compelling, whereby substantial similarity of the elements, rules or norms would be required, understood by Edwards, as all treaties 'with provisions that address issues that might also be addressed by the ICC.'<sup>20</sup>

But the debate over whether the Court should have access to *relevant* or *applicable* treaties is somewhat neutralized by the granularity of Article 21(1)(b) which extends applicable international sources to the 'rules and principles of international law.' Reflecting Article 38(1)(d) of the ICJ Statute, this allows judges to apply provisions of international treaties as well as previous decisions of external tribunals and even customary international law, where they confirm a principle or rule of international law.<sup>21</sup>

The applicability of the rules and the jurisprudence of the preceding adhoc and internationalized criminal tribunals has also been challenged by authors affiliated to the ICC, while their jurisprudence has not been used as a buttress to the ICC's newly established permanence that it was expected to provide.<sup>22</sup> Volker Nerlich, a Legal Officer in the ICC Appeals Chamber has argued that it is 'self evident' that the statutes as well as the rules of procedure of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as well as other tribunals, cannot be considered as law directly applicable before the ICC, given that the limited jurisdiction of the adhoc tribunals, established under the UN through the Security Council does not extend to the ICC, an independent international legal entity with separate

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ICC-/04-011°6-772, para. 34. See also analysis in Joe Verhoeven, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law' (2002) 33 Netherlands Yearbook of International Law 3, 294.

<sup>17</sup> Saland (n 86) 215.

<sup>18</sup> Bassiouni, 'Human Rights in the Context of Criminal Justice' (n 24) 247–248.

<sup>19</sup> Article 22, *Rome Statute* (n 76).

<sup>20</sup> Edwards (n 74) 390.

<sup>21</sup> de Guzman (n 73). Leila Nadya Sadat, 'Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute' (1999) 49 DePaul Law Review 909.

<sup>22</sup> David Tolbert and Aleksandar Kontic, 'The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts and Lessons for the ICC', *The Emerging Practice of the International Criminal Court*, vol 48 (Martinus Nijhoff 2009).

legal personality from the UN.<sup>23</sup> He forcefully argues that in order for the jurisprudence of the preceding international tribunals to be applicable, the legal rules that underpin the jurisprudence must be similar or even identical to the ICC:<sup>24</sup> where that is so, jurisprudence would be acceptable as a ‘subsidiary means for the determination of rules of law’, valuable in order to determine the existence of a principle or rule of international law.<sup>25</sup>

### **1.3. Failing That: General Principles of National Laws of the World Including Jurisdictional States**

The third and final group of sources of law introduces two equal groupings of national laws: cited first are the general principles that are derived from the laws of the legal systems of the world, with the national laws of States that would normally exercise jurisdiction listed second. Notwithstanding the methodological challenges to identify such general principles that are posed by this grouping of legal sources, the principles must be consistent *both* with international law *and* internationally recognized norms and standards.<sup>26</sup> The subparagraph thus introduces two routes towards identifying general principles of law without specifying the value to be accorded to each: a meta-level of principles derived from ‘systems of the world’ and a smaller sample drawn from States with jurisdiction over the crimes, although both sources must first be vetted for consistency with all international law as well as internationally recognized norms and standards. In effect, general principles of national laws can only become applicable where they consistent with international law and international standards, limiting the efficacy of this source of law to all but a handful of legal systems, perhaps with the exception of fair trial rights.<sup>27</sup>

By drawing the distinction between general principles that may be recognized from this subgroup of legal systems, and from general principles derived from a global revision, the

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<sup>23</sup> Volker Nerlich, ‘The Status of ICTY and ICTR Precedent in Proceedings before the ICC’ in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court*, vol 48 (Martinus Nijhoff 2009) 316.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* 313.

<sup>26</sup> Article 21(1) The Court shall apply: ‘(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.’ *Rome Statute* (n 76).

<sup>27</sup> Bassiouni, ‘Human Rights in the Context of Criminal Justice’ (n 24).

Rome Statute seems to give equal weight to the two sample groups: while this may not alter the outcome where both samples 'agree' or 'disagree' on a particular principle, the order of preference will need to be resolved where competing or contradictory principles are identified. In these circumstances, the Statute seems to have two requirements: first, in the context of the definition of crimes and changes to applicable law, the Court is directed to interpret the definition that favours the person being investigated, prosecuted or convicted.<sup>28</sup> Second, seen through the lens of complementarity, the 'interests of justice' may prioritize the general principles derived from the ordinary jurisdictions.

In addressing the quantitative aspect of Article 21(1)(c), attention is needed in order ensure that fair representation of the legal systems of the world is made. Unlike its counterpart provision within the ICJ Statute, which refers to general principles of law recognized by *civilized* nations,<sup>29</sup> the ICC is instead required to consider the *legal systems of the world*, without any reference to their status or grouping. The corollary method of deriving general principles from the *major legal systems of the world* is also not strictly required.<sup>30</sup> In removing the subjective element of *civilized* nations from the sources of general principles, or reference to *major legal systems*, the text of the Statute neutralizes and expands the practice of determining general principles. But Volker Nerlich considers that it continues to impose a subjective methodology over the sources of law, due to what he considers to be an inevitable selection process:

*“a survey of all municipal jurisdictions of the world is infeasible and thus the decision maker will have to determine which jurisdictions to include in his or her*

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<sup>28</sup> Article 22 (1), *nullum crimen sine lege*. This approach is reinforced by Article 24(2), which requires that, where a change of law occurs during trial, the version that is favourable to the accused person will prevail. The requirement of Article 21(3) that rules and principles be applied consistently with internationally recognized human rights may generally favour the person being prosecuted, but this is also balanced with the right to remedy for the victims of offences. See for example, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 (60/147).

<sup>29</sup> Article 38(1)(c), see Alan Pellet, 'Article 38' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, Incorporated 2006).

<sup>30</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publications 1987); Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (M Nijhoff Pub 2008); H Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006); Bassiouni, 'Human Rights in the Context of Criminal Justice' (n 24).

*survey and how much weight to afford to each of these jurisdictions for the 'distillation' of the general principle.*<sup>31</sup>

Falling back to this methodological dilemma is an obvious reaction to the magnitude of the requirement: the act of surveying all municipal jurisdictions of the world is undoubtedly a weighty, laborious and time-consuming endeavor, and despite the advent of contemporary research tools,<sup>32</sup> the distillation of general principles of law from a dataset that includes *all* applicable municipal legislation remains out of reach.<sup>33</sup>

Lawyers like Bassiouni and Raimondi<sup>34</sup> have sought out different methodologies to reduce the subjectivity that is woven into the pursuit of general principles of law. Writing in 1992, Cherif Bassiouni championed the inductive approach that Nerlich seems to struggle with, whereby general principles can be 'extracted' from domestic legal principles or norms contained within the largest possible sample of national legal systems. In searching for the repetition of rights in international instruments as well as their legal recognition in national constitutions, the purpose of Bassiouni's comparative exercise was to gather evidence of which procedural protections could be defined as general principles of international law, rather than to determine their application or use in society.<sup>35</sup> He did this by reviewing the Constitutions of 139 countries, identifying eleven clusters of rights defined in international law as well as national constitutions and recording how many countries protected such rights-clusters within their national constitution.<sup>36</sup> The troublesome issue of 'weighting' is bypassed due to the large sample size, and although Bassiouni did aim to identify major legal families, in-keeping with the ICJ Statute, greater deference was instead given to those principles that appear more frequently within national constitutions.<sup>37</sup>

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<sup>31</sup> Nerlich (n 94) 314.

<sup>32</sup> E.g. the National Implementing Legislation Database (NILD) of the ICC's Legal Tools Project, available at <http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database/>

<sup>33</sup> Researchers face restricted access to laws, as many States do not publish new legislation in official gazettes, either in paper form or electronically. Furthermore, linguistic and semantic obstacles must be given sufficient research attention. Despite the advent in digital resources, the investment of time and resources required to overcome these limits remains obscure.

<sup>34</sup> Raimondo (n 101).

<sup>35</sup> He goes on to acknowledge that 'the existence of a right in a national constitution does not necessarily mean that it is protected in practice or uniformly and effectively observed' and that 'the only way to determine the extent to which each of the articulated rights is actually protected is to scrutinise the actual practices of criminal law enforcement' the specificity of which is not required for the purpose of identifying general principles of law. Bassiouni (n 18) 252-253

<sup>36</sup> See Annex 2 in Bassiouni, 'Human Rights in the Context of Criminal Justice' (n 24).

<sup>37</sup> *Ibid*, 243-245.

#### 1.4. Normative Consistency With Internationally Recognized Human Rights

The final paragraph of Article 21<sup>38</sup> demands that the application and interpretation of all formal sources of law be consistent with 'internationally recognized human rights' and without discrimination, in what Allan Pellet refers to as 'super-legality,' a subject-matter hierarchy between the norms that must be applied by the Court, that supersedes the formal sources determined in Article 21(1).<sup>39</sup> By referring to 'internationally recognized human rights' rather than 'international human rights law' the rule gives Judges considerable latitude in the choice of human rights-related sources, which can include emerging norms and standards that have yet to be formalized into treaty law, vastly expanding the sources to which the judges can turn.<sup>40</sup> The exact implications of this clause upon the application and interpretation of the three groups of legal sources has been understood in contrasting ways, which require clarification.

Some have considered that Article 21(3) creates a subject-orientated 'super-legality,'<sup>41</sup> elevating a wide panoply of human rights to a materially 'superior status'<sup>42</sup> above the interpretation and application of all formal sources of law, including the Statute, where the Court would be within its competence to strike down an internal source of law where it would infringe on an international human right.<sup>43</sup> Others, including the chairperson of the drafting committee for the Article, have rejected this, instead claiming that it provides nothing more than a 'general consistency test' to ensure that the ICC develops its jurisprudence in conformity with evolving human rights standards while maintaining a prohibition on adverse discrimination.<sup>44</sup>

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<sup>38</sup> Article 21(3) The application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

<sup>39</sup> Pellet, 'Applicable Law' (n 75), page 1079

<sup>40</sup> Bassiouni, 'Human Rights in the Context of Criminal Justice' (n 24); International Commission of Jurists and International Commission of Jurists, 'Human Rights Standards: Learning from Experience' (International Council on Human Rights Policy 2006).

<sup>41</sup> Pellet, 'Applicable Law' (n 75).

<sup>42</sup> Bitti (n 79) 302.

<sup>43</sup> Erika De Wet and Jure Vidmar, *Hierarchy in International Law The Place of Human Rights* (Oxford University Press 2012) 13–16.

<sup>44</sup> Saland (n 86) 215; Gerhard Hafner and Christina Binder, 'Interpretation of Article 21 (3) ICC Statute Opinion Reviewed, The' (2004) 9 *Austrian Review of International and European Law* 163; Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International Law* 22, 29., Arsanjani undercuts the plain text of the Statute by ignoring the requirement of Article 21(3) that the application of the Statute be consistent with IRHR, and refers only to interpretation.



The argument that Article 21(3) provides direct effect to internationally recognized human rights would be attractive to those pursuing ultra-compliance, but ultimately it remains unconvincing. Rather it requires that the Court ensures that its application and interpretation of all rules, principles and norms be in accordance with these material norms, so long as they have been recognized at the international domain. It does not require that international human rights norms be applied directly but that the interpretation and application of laws must not be contrary to them. Whereas the second and third sources of law should only be applied in case of gaps or ambiguities in the primary sources, the outcome of every exercise of interpretation and application must be consistent with internationally recognized human rights, regardless of the sources being consulted.<sup>45</sup> The Appeals Chamber has reinforced this interpretation of Article 21(3), making it clear that applicable law must be ‘interpreted, and more importantly, applied in accordance with internationally recognized human rights’<sup>46</sup> while Pre Trial Chamber I has reiterated its link to the sources of law listed in Article 21(1): ‘*prior to undertaking the analysis required by article 21(3) of the Statute, the Chamber must find a provision, rule or principle that, under article 21(1)(a) to (c) of the Statute, could be applicable to the issue at hand*’<sup>47</sup>

In conclusion, where omissions or gaps in the regulatory requirements of the admissibility regime occurs, in comparison to other international treaties or accepted obligations, it is possible that the consistency test of Article 21(3) would require the ICC to respond positively. Where this is not possible, i.e. where the perceived omission can be reconciled as being consistent to internationally recognized human rights, any remedy or response to the

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<sup>45</sup> Pre Trial Chamber I, *Decision on the Prosecutor’s Application for a Warrant of Arrest, A58*, in Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, paras 10-12; Sergey Vasiliev, ‘Proofing the Ban on ‘Witness Proofing’: Did the ICC Get It Right?’ (2009) 20 Criminal Law Forum 193, 212.

<sup>46</sup> *Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006* ICC Appeals Chamber ICC-01/04- 01/06 (OA4), 14 December 2006, [37].

<sup>47</sup> *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the Practices of Witness Familiarisation and Witness Proofing (Witness-Proofing Decision: Lubanga)* [2006] ICC Pre-Trial Chamber I ICC-01/04-01/06-679, 08 November 2006.

outcome would remain extraneous to the enforceable mechanisms of the ICC, and would instead require remedy through other international mechanisms.

## 2. A Sequential Order of Invocation

The first four words of each sub-paragraph of Article 21(1) creates a division between the internal laws of the Court, including the discretionary application of principles and norms of its previous decisions,<sup>48</sup> and those subsidiary external sources. They instruct judges that, *in the first place* they should apply its internal law, *in the second place* applicable treaties, principles and rules of international law, and *failing that*, the general principles derived from national legal systems.

This has been described as an 'ambiguous'<sup>49</sup> hierarchy<sup>50</sup> where the Statute and its other 'proper' sources preside over a descending hierarchy of international law and general principles of national law as subsidiary sources of law<sup>51</sup> although the accuracy of these assessments is questionable.<sup>52</sup> While the text of Article 21(1) may appear in a hierarchical list, it is in fact a sequential order, where *'[t]he Court is instructed to begin with the first-listed source and proceed to a lower-ranked source only if the first source proves inadequate, until the Court identifies the appropriate law to resolve the issue at hand.'*<sup>53</sup> Similarly, Verhoeven dismisses any notion of a hierarchy of sources in Article 21, rejecting any superiority of the internal rules over the external ones, asserting instead that *'the mention of 'second place' only means that such treaties, principles or rules only apply to issues that are not settled by the first category rules, either because the Statute is incomplete in certain respects, or because the point at stake is not as such concerned with its provisions.'*<sup>54</sup> This view has been definitively adopted by the Appeals Chamber who has asserted that *'[I]f a matter is exhaustively dealt with by its [Statute's] text or that of the Rules of Procedure and*

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<sup>48</sup> Saland (n 86).

<sup>49</sup> Pellet, 'Applicable Law' (n 75) 1077.

<sup>50</sup> Bitti (n 79) 287–291; Saland (n 86) 213–214; Pellet, 'Applicable Law' (n 75); de Guzman (n 73); Edwards (n 74) 5; Hafner and Binder (n 115); Vasiliev, 'Applicability of International Fair Trial Standards in International Criminal Proceedings: Between Universalism and Contextuality' (n 74); Nerlich (n 94).

<sup>51</sup> Bitti (n 79) 294; Pellet, 'Applicable Law' (n 75) 1067–1077.

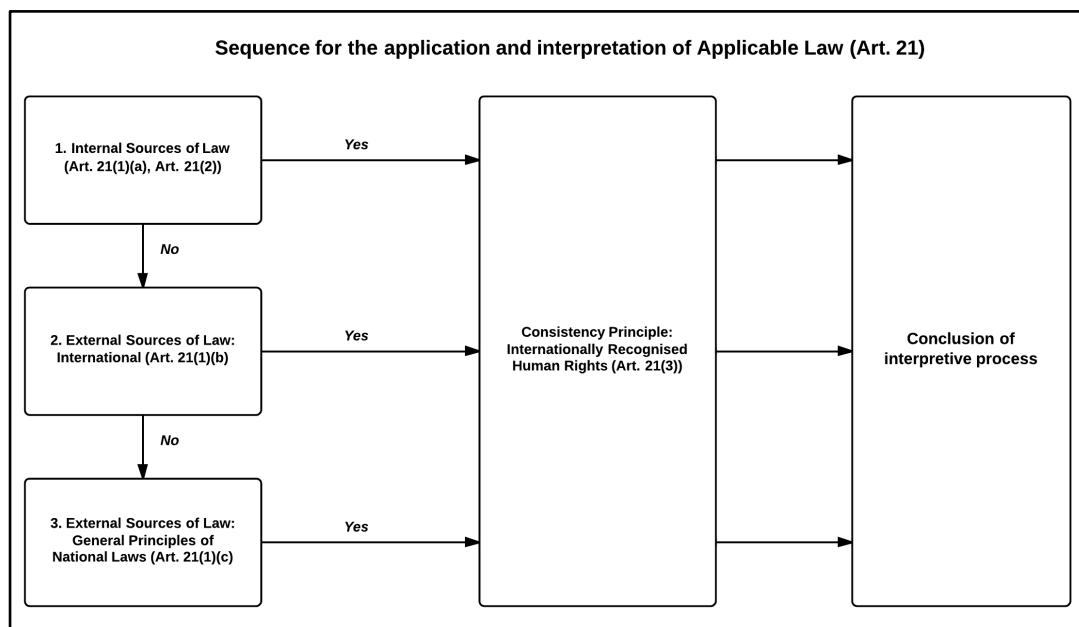
<sup>52</sup> Verhoeven (n 87) 11.

<sup>53</sup> Edwards (n 74); Vasiliev, 'Applicability of International Fair Trial Standards in International Criminal Proceedings: Between Universalism and Contextuality' (n 74) 212.

<sup>54</sup> Verhoeven (n 87) 11.

*Evidence, ... no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject.*<sup>55</sup>

The use of Article 21 in its entirety can be described by the flow chart in Table 1: the sources of law described in Article 21(1) and 21(2) must be used in turn, one after the other until the matter at hand has been exhaustively dealt with. Once the matter is resolved, it must then go through the human rights consistency filter, to ensure that the application and interpretation of the preceding laws or rules is consistent with international human rights. It is only once this filter has removed any possible human rights based infractions that the process is complete.



By dismissing the hierarchical presumptions directed towards Article 21, its purpose can instead be clarified as an order of invocation. Where internal rules, principles or provisions are unclear, ambiguous, contradictory or would lead to a manifestly absurd outcome, resort to external sources becomes necessary. Where the internal sources are definitive, recourse to external sources as applicable law is excluded. That is not to say that principles and rules of international law or general principles of law may not be considered as interpretive aids or as

<sup>55</sup> *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006* (n 117) [34]; Christophe Paulussen, *Male Captus Bene Detentus?: Surrendering Suspects to the International Criminal Court* (Intersentia 2010).

material evidence of the internal rules, but that they do not have the force of applicable law, when considered within the domain of the primary sources.

### 3. Addressing Semantic Values in Comparative Research Methodologies

The identification of applicable treaties, rules and principles, as well as internationally recognized human rights requires the Court to address a number of methodological challenges inherent in comparative legal research. One common methodological challenge is the semantic value that should be afforded to external sources, be they international or national, from different legal systems and or languages.<sup>56</sup> Briefly alluded to in **Section 1.2**, the judges may choose to adopt both *in concreto* and *in abstracto* models of inquiry in order to identify the 'sameness' between laws, rules or principles, depending on the issue under deliberation. The method of *in concreto* comparison would require sameness to be defined as either an identical normative formulation, or identical legal elements, whereas an *in abstracto* inquiry would require substantial similarity of norms or elements.<sup>57</sup> Depending on the specific issue, the semantic granularity between the texts would need to be defined and followed, in order to be able to identify the whether the external rule or principle is applicable or not.<sup>58</sup> Similar methods have been adopted by the Legal Tools Project of the International Criminal Court,<sup>59</sup> through the creation of comprehensive taxonomy of the ICC legal texts, which provides an index of keywords covering substantive and procedural keywords contained within the ICC Statute and adopted by the Court as operational terms,<sup>60</sup> as well as an internal 'codebook' of comparative keywords, which maps the similitude between ICC

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<sup>56</sup> A second common challenge occurs, once the sources have been identified, in order to determine the order of application or the choice of sources.

<sup>57</sup> Bassiouni (n 18) 247–248 .

<sup>58</sup> An *in concreto* methodology would appear to satisfy the strict principle of legality established in the Statute in the context where defenses, liabilities and defenses are under interpretation, given that Article 22(2) requires that the definition of a crime must be construed strictly, and must not be extended by analogy. However, the second sentence provides its own interpretive solution, namely, that where ambiguity occurs, the definition must be interpreted in favour of the suspect / accused / convicted person. This would require that the application and interpretation of any external sources would not be used to increase the penalties or punitive consequence of the criminal process. In light of this qualification, the *in abstracto* method will be adopted, as it appears to be a more compelling and comprehensive reflection of the interplay between different legal systems, be they international or national.

<sup>59</sup> International Criminal Court, 'Legal Tools' (*Legal Tools Project of the International Criminal Court*) <<http://www.legal-tools.org/en/overview-of-the-tools/>> accessed 2 March 2010.

<sup>60</sup> Franziska C Ecklemans, 'Taxonomy by Consensus: The ICC Keywords List of the Legal Tools' in Morten Bergsmo (ed), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher 2011) 143.

keywords, and those found in other major legal systems, including national peculiarities, as well as their use and relationship to other similar keywords.<sup>61</sup>

Notwithstanding the importance of semantic value and comparative research in the general application of legal sources before the ICC, the significance of comparative legal research skills in the pursuit of admissibility determinations and the assessment of national judicial practices will continue to grow. This will become apparent in the following Chapters, where early ICC jurisprudence has placed national legal frameworks in the foreground of admissibility determinations. Equally, the semantic value of ICC legal classifications will continue to influence national criminal justice policies in situation countries, where national criminal justice actors seek to balance the admissibility rules and practices of the ICC and its case selection practices, with their own national criminal laws and practices as well as justice and peace concerns.

Returning to the methodology established in Article 21, this Chapter has established the framework of sources of law available to the ICC during admissibility procedures. It has confirmed that Article 21 establishes a sequential methodology, moving from the internal sources of law to external sources of international law and then external sources of law derived from general principles of national laws, where each interpretive act must be assessed against a ‘human rights consistency principle’ to ensure that the outcome remains consistent with internationally recognised human rights. As a sequence of sources of law, Article 21 reinforces or elevates the subject matter of international human rights law but fails to superimpose such rights, their rules or principles onto the practices of the ICC in the absence of a provision, rule or principle of the ICC that would contravene them. As such, the power of the human rights consistency principle is significantly weaker than those pursuing the mirror-thesis would prefer. The consequences of Article 21 on the development or application of *positive* complementarity would appear to be three-fold: the sequential order of invocation will place greater emphasis on the internal sources of the ICC and will restrict the relevance of the practices, principles and experiences of external tribunals and treaty bodies; this will raise the value of ICC jurisprudence in informing national practices of the legal

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<sup>61</sup> Olympia Bekou, ‘Building Databases for the ICC Legal Tools Project: Data Structures and the National Implementing Legislation Database’ in Morten Bergsmo (ed), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher 2011).

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frameworks and resources that it will require in order to retain jurisdiction (or to cede it);<sup>62</sup> and it appears to reduce the centrality or 'super-legality' of internationally recognised human rights to the exercise of national criminal jurisdiction over crimes within the jurisdiction of the ICC.

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<sup>62</sup> Although it may by no means reduce the importance or relevance of the Ad-Hoc Tribunals and their relationship with their jurisdictional states in informing the development of policies and practices at the national level.

## **Chapter 3**

### ***Complementarity Between National Investigation, Prosecution and Adjudication and the ICC***

The heart of the complementarity regime of the ICC beats within the text of Article 17: consisting of three paragraphs it establishes the complementarity of judicial efforts between States and the ICC in its first paragraph, as well as the grounds for admissibility of situations and cases in its second and third paragraphs.<sup>1</sup> The first paragraph, which forms the subject of the next two chapters largely defines the judicial activity that States must meet, influencing the choice of accountability measures and legal frameworks that may be adopted, as well as a threshold of cases that the ICC will take a prosecutorial or judicial interest in (see Chapter 5).<sup>2</sup>

The first paragraph of Article 17 provides the framework upon which the second paragraph on unwillingness (Chapter 4) and third paragraph on ability (Chapter 6) operate. In its entirety, Article 17(1) is as follows:

‘1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

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

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

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

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<sup>1</sup> The Pre-Trial Chambers have also noted the relevance of Articles 19, 21, 90 and 95 of the Statute and rules 58-59 of the Rules of Procedure and Evidence, which could be considered as the arteries of complementarity. See *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* [2013] ICC Pre-Trial Chamber I ICC-01/11-01/11, 31 May 2013 [56].

<sup>2</sup> Markus Benzing, ‘International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity’ (2003) 7 *Max Planck Yearbook of United Nations Law* 591, 594.

(d) The case is not of sufficient gravity to justify further action by the Court.<sup>3</sup>

While several models of national criminal justice under the mirror thesis have sought to expand the effect of the operational parts of the Statute onto the legal frameworks and practices of States, notably the crimes as defined under Article 5-8 and the general principles and liabilities established in Part 3, the practice of the Court has adopted a series of tests that largely shatters these aspirations. These tests have established four core features of complementarity: admissibility should be determined in real-time (Section 2) Admissibility should be restricted to the pre-trial phases of preliminary examination and investigation and to admissibility challenges (Section 3) the evidence must demonstrate concrete and progressive steps (section 4) States must be active (Section 5) and that the objects of reference should reflect the stage of proceedings and be restricted to the situation or cases under scrutiny by the Court (section 5-6).

### **1. Real-time Assessments: Admissibility Is An On-going Process Throughout the Pre-trial Phase**

In 2009, the Pre-Trial Chambers utilized the *proprio motu* powers enshrined to it under Article 19(1) to review of the admissibility of the case against Joseph Kony *et al* in light of the development of a government policy to adopt a national judicial mechanism to address war crimes and crimes against humanity committed within the context of the conflict that Uganda had referred to the ICC.<sup>4</sup> The Ugandan Policy included the establishment of a *Special Division* within the High Court, which would have jurisdiction over war crimes through its Geneva Conventions Act of 1964, as well as the creation of War Crimes Unit within the Director of Public Prosecutions. The policy included the allocation of judges and judicial staff, as well as prosecutors and investigators, who, at the time of the proprio-motu assessment, all of whom were due to undertake training in different dimensions of

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<sup>3</sup> Article 17(1), Rome Statute of the International Criminal Court 1998 (A/CONF183/9).

<sup>4</sup> *Decision on the admissibility of the case under article 19(1) of the Statute (Kony Admissibility Decision)* [2009] ICC Pre Trial Chamber II, ICC-02/04-01/05-379, 10 March 2009 [14–19; 33–43]; *Judgement on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19(1) of the Statute' (Kony Admissibility Appeal Judgment)* [2009] ICC Appeals Chamber, ICC-02/04-01/05-OA3, 16 September 2009.



adjudication of international crimes.<sup>5</sup> The Government of Uganda had, in the eyes of the PTC, been ambiguous in confirming whether the ICD would seek to assert jurisdiction over the cases before the ICC, or would defer to the ICC<sup>6</sup> and indeed when the Court would be established and ready to take on cases. The PTC felt that this process was of heightened relevance, as the adoption of a national adjudicatory mechanism could represent a change of circumstances, and that *'the Statute does not rule out the possibility that multiple determinations of admissibility may be made in a given case.'*<sup>7</sup>

Using Article 18(7) and 19 which establish the framework for challenging the admissibility of a case before the ICC, the PTC established that *'[b]y its very nature, the determination of the admissibility of a case is subject to change as a consequence of a change in circumstances. This idea underlies the whole regime of complementarity at the pre-trial stage.'*<sup>8</sup> The Judges went on to consider that:

*'the corpus of these provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario.'*<sup>9</sup>

As such, the PTC concluded that the issue of admissibility may be assessed more than once in the course of the proceedings, either through challenges brought by the various entitled parties, or through the Chamber exercising its proprio motu power under Article 19(1).<sup>10</sup>

Following on from its legal analysis that admissibility may be challenged or reviewed multiples of times, it considered that it would be inappropriate to engage in hypothetical judicial decision-making, on the basis that the envisaged Special Division and its legal framework had yet to be established, and that:

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<sup>5</sup> This Division was subsequently established, Court facilities were built and judicial and prosecutorial staff have been assigned to the Division, which has been renamed as the International Crimes Division. However, only one case has gone before the High Court to date, that of Thomas Kwoyelo, which is under appeal at the Supreme Court in light of the national amnesty programme, as the accused argues that he is eligible for amnesty. See for example, Human Rights Watch, 'Justice for Serious Crimes before National Courts: Uganda's International Crimes Division' (2012).

<sup>6</sup> *Kony Admissibility Decision*, (n 4) [42-48].

<sup>7</sup> *Ibid* [25]

<sup>8</sup> *Ibid* [27]

<sup>9</sup> *Ibid* [28]

<sup>10</sup> *Ibid* [29]

*'Pending the adoption of all relevant legal texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.'*<sup>11</sup>

Although the Admissibility Decision was appealed, this line of argumentation was not addressed or over-turned and remains an active guide to admissibility determinations.<sup>12</sup>

### ***Timeliness of Preliminary Examinations***

The PTC also inquired into the preliminary examinations being conducted by the ICC Prosecutor in the context of the timeliness of its inquiries into the circumstances of the self-referral made by the Central African Republic. On 22 December 2004 the government of the Central African Republic (CAR) referred its conflict to the ICC: on 07 January 2005 the Prosecutor announced that he would analyse the information received<sup>13</sup> although a period of two and a half years elapsed before the Prosecutor opened an investigation, on 22 May 2007.<sup>14</sup> The investigation was opened following intervention from the Registry<sup>15</sup> and an ensuing Decision from the Chambers, requesting information on the status of the Prosecutor's preliminary examination.<sup>16</sup> In its Request for Information, the Pre Trial Chambers challenged the Prosecutor on the length of the preliminary examination and the absence of information on its status. In doing so, they compared the relatively short timeframes of preliminary examination into the situations in the Democratic Republic of Congo and Uganda, which took between two to six months, with the 22-month preliminary examination in the situation of the CAR, reinforcing their displeasure with the duration and silence of the Preliminary

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<sup>11</sup> Ibid [51-53]

<sup>12</sup> *Kony Admissibility Appeal Judgment (n 4)*

<sup>13</sup> ICC Office of the Prosecutor, 'Prosecutor Receives Referral Concerning Central African Republic' [2005] Press Release, ICC/OTP/2005.39-EN, 07 January 2005 para 4.

<sup>14</sup> ICC Office of the Prosecutor, 'Background: Situation in the Central African Republic' (2007) ICC-OTP-BN-20070522-220-A\_EN.

<sup>15</sup> ICC Registry, 'Transmission Par Le Greffier D'une Requête Aux Kins de Saisine de La Chambre Préliminaire de La Cour Pénale Internationale et Annexes Jointes' [2006] ICC-OI/05-5-Conf, 27 September 2006.

<sup>16</sup> *Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic (30 November 2006 Decision)* [2006] ICC Pre-Trial Chamber III ICC-01/05-6, 30 November 2006.

Examination, with a review of the Rome Statute provisions and rules which embrace a standard of ‘reasonable time.’<sup>17</sup>

In his response, the Prosecutor sharply defended the duration of the examination, which he sought to justify due to the gradual manner in which important information became available, the declining security in CAR and the limited resources of the parties who had provided information, pursuant to Article 15.<sup>18</sup> Furthermore, unlike his comparative analysis of gravity in his decision not to investigate alleged crimes in Iraq, the Prosecutor sought to establish the unique concerns and realities of each situation and therefore to reject the Chambers comparisons with the relative speed of the preliminary examinations in Uganda and the DRC.

## 2. Other Pre-Trial Measures Where Admissibility Has Been Examined

Despite the ‘lean’ wording of Article 17, or perhaps because of it, its application to pre-trial procedures before the Court as well as within national proceedings has been somewhat experimental, where it has been considered that its sole limit ‘*appears to be that proceedings must have reached the stage of a case*’ rather than the preceding stage, where the Prosecutor has opened an investigation pursuant to Article 53.<sup>19</sup> Yet Article 53 itself refers the Prosecutor to considerations of Article 17, when determining whether to pursue an investigation.

### 2.1. Preliminary Examination

The Office of the Prosecutor also evaluates the conditions of Article 17(1) during the pre-investigation phase of any referral or communication, which is defined under the Regulations of the Office of the Prosecutor (OTP Regulations) as a *preliminary examination*. The OTP Regulations require the Prosecutor to open such an examination for all of the referral mechanisms, including those from States Parties and non-States Parties,<sup>20</sup> the UN Security

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<sup>17</sup> Referencing articles 61(1) and (3), 64 (2), 67 (1) (c) and 82 (1) (d), and rules 24 (2) (b), 49 (1), 101 (1), 106 (1), 114 (1), 118 (1), 121(1) and (6) and 132 (1). See *Ibid* 4.

<sup>18</sup> *Prosecution’s Report Pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic* [2006] Office of the Prosecutor ICC-01/05-7, 15 December 2006 6.

<sup>19</sup> *Kony Admissibility Decision* (n 4) [14]

<sup>20</sup> States Parties through Article 13(a) and pursuant to Article 14, Non-States Parties through a declaration under Article 12(3) commonly referred to as ‘self-referral.’ Antonio Marchesi, ‘Article 14: Referral of a Situation by a State Party’ in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International*

Council<sup>21</sup> as well as communications<sup>22</sup> of alleged violations received by international organisations, NGO's, affected communities and individuals.<sup>23</sup>

According to its *Draft Policy on Preliminary Examination*, the evaluation of referrals and communications are conducted to the standard of a reasonable basis (see Section 4.1 below),<sup>24</sup> according to the criteria established in Article 53, and is pursued in four phases: the first two ensure that the communication or referral satisfies the material,<sup>25</sup> temporal<sup>26</sup> and geographical/personal jurisdiction requirements.<sup>27</sup> In phase three, admissibility is analysed, according to Article 17(1), comprising of the presence of relevance domestic criminal investigations or prosecutions,<sup>28</sup> willingness,<sup>29</sup> ability<sup>30</sup> and gravity.<sup>31</sup> At the final, fourth phase, the admissible alleged violations undergo examination of whether pursuit of the situation by the ICC would be in the interests of justice.<sup>32</sup> The OTP Regulations also require the Prosecutor to produce an internal report which analyses the seriousness of the information according to each of the Article 53 criteria pursued in phases one to four and to conclude with

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Criminal Court: Observers' Notes, Article by Article (2nd ed, Beck 2008); Payam Akhavan, 'International Criminal Justice in the Era of Failed States: The ICC and the Self-Referral Debate' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Andreas Th Müller and Ignaz Stegmiller, 'Self-Referrals on Trial' (2010) 8 *Journal of International Criminal Justice* 1267.

<sup>21</sup> Article 12(b). See Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333; Luigi Condorelli and Annalisa Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC' (2005) 3 *Journal of International Criminal Justice* 590; Antonio Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 *Journal of International Criminal Justice* 434; Christopher Gosnell, 'The Request for an Arrest Warrant in Al Bashir' (2008) 6 *Journal of International Criminal Justice* 841.

<sup>22</sup> Article 13(c) and pursuant to Article 15 on the power of the Prosecutor to initiate proprio motu investigations and to receive information. See *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Kenya Article 15 Decision)* [2010] ICC Pre Trial Chamber II ICC-01/09, 31 March 2010; *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 (Article 15 Decision: Côte d'Ivoire)* [2011] ICC Pre Trial Chamber III ICC-02/11, 03 October 2011; Morten Bergsmo and Jelena Pejić, 'Article 15: Prosecutor' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed, Beck 2008).

<sup>23</sup> Regulation 25, Regulations of the Office of the Prosecutor 2009 (ICC-BD/05-01-09) 28; ICC Office of the Prosecutor, 'Draft Policy Paper on Preliminary Examinations' (International Criminal Court 2010).

<sup>24</sup> ICC Office of the Prosecutor, 'Draft Policy Paper on Preliminary Examinations' (n 23) 86.

<sup>25</sup> Article 5, *Rome Statute* (n 3).

<sup>26</sup> Article 11, *Ibid.*

<sup>27</sup> Article 12, *Ibid.*

<sup>28</sup> ICC Office of the Prosecutor, 'Draft Policy Paper on Preliminary Examinations' (n 23) 55.

<sup>29</sup> *Ibid* [56-57; 60-66]

<sup>30</sup> *Ibid* [58-59]

<sup>31</sup> *Ibid* [67-72]

<sup>32</sup> *Ibid* [73-75]

a recommendation on whether there is a reasonable basis to initiate an investigation.<sup>33</sup> Since 2010, this has resulted in the publication of an Annual Report on preliminary examination, which includes an abbreviated summary of each preliminary examination, and on occasion it has published public reports on country specific examinations. Although judicial oversight of the preliminary examination phase is not strictly foreseen under the Statute, PTC-I requested information on the status of the examination in the situation of the Central African Republic, following a 30-month period without any public information released on the Prosecutor's inquiry.<sup>34</sup>

Once the ICC Prosecutor has decided that there is a reasonable basis to begin an investigation into the conduct of ICC crimes, they are required to notify all States Parties and States that may ordinarily exercise jurisdiction of their decision. Within one month of this notice, States are invited to inform the Court that it is investigating or has investigated its nationals, or others within its jurisdiction, with respect to prohibited conduct relevant to the information provided by the Prosecutor, and to request the ICC to defer to their activities.

Following a deferral request, the Prosecutor can apply to the Pre Trial Chambers for a preliminary ruling on admissibility, or, should the Court be so inclined, it can initiate its own preliminary ruling, sidestepping these two requirements.<sup>35</sup> Here the admissibility considerations of the Pre Trial Chamber would be directed to apply Article 17 towards the 'investigation' being conducted by the ICC Prosecutor, based on the scope of the investigation described in the information provided to States, and its relevance to the activity of the State claiming jurisdiction, even though neither party may have reached the stage of defining a specific 'case', as referred to in Article 17.<sup>36</sup>

## 2.2. Proprio Motu Article 15 Requests and Decisions

As a protection against reluctant States or a recalcitrant Security Council, the Prosecutor can also initiate investigations on the basis of information of crimes within the jurisdiction of the

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<sup>33</sup> *Regulations of the Office of the Prosecutor* (n 23).

<sup>34</sup> *Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic (30 November 2006 Decision)* (n 16).

<sup>35</sup> Article 18(1)-(2), *Rome Statute* (n 3).

<sup>36</sup> Daniel D Ntanda Nsereko, 'Article 18: Preliminary Rulings Regarding Admissibility' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed, Beck 2008) 632.

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Court.<sup>37</sup> Article 15 requires the Prosecutor to analyse the seriousness of the information received, by seeking further information from a wide range of sources, including States, UN organs, intergovernmental organisations, non-governmental organisations or other reliable sources, before concluding whether there is a reasonable basis to proceed,<sup>38</sup> according to the conditions established in Article 53(1). Where an affirmative conclusion is reached, the Prosecutor must request the Pre-Trial Chambers to authorize an investigation and should include any supporting material (Article 15 Request). Consequently, the Pre-Trial Chambers must examine the request and supporting material and decide whether to authorize an investigation, on the basis that the materials appear to fall within the jurisdiction of the Court (Article 15 Decision).<sup>39</sup> If the Prosecutor concludes that there isn't a reasonable basis to proceed, they are required to inform those who provided information, while the negative decision does not preclude a subsequent reconsideration, on the basis of new facts or evidence.<sup>40</sup> This procedure provides an opportunity to review prosecutorial and judicial application of Article 17(1) at this early preliminary phase.

### 2.3. Arrest Warrants or Summonses to Appear

The Requests for Warrant of Arrest is established in Article 58, which imposes two substantive requirements: first, there must be reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court<sup>41</sup> and second that the arrest of the named person(s) must be necessary to either ensure their appearance at trial, or to ensure the person doesn't obstruct or endanger the case, or to prevent continuing commission of crimes.<sup>42</sup> In submitting requests for the issuance of an arrest warrant, the Prosecutor is instructed with a list of five requirements: (a) the name and identifying features, (b) references to the alleged crimes, (c) a concise statement of facts, (d) a summary of evidence and (e) reasons why the arrest of a person is necessary. In its first decisions ordering the warrants of arrest for *Kony et al.*,<sup>43</sup> Darfur,<sup>44</sup> *Lubanga and Ntaganda* as well as *Katanga and*

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<sup>37</sup> Article 15(1), *Rome Statute* (n 3).

<sup>38</sup> Article 15(2), *Ibid.*

<sup>39</sup> Article 15(4), *Ibid.*

<sup>40</sup> Article 15(6), *Ibid.*

<sup>41</sup> Article 58(1)(a), *Ibid.*

<sup>42</sup> Article 58(1)(b), *Ibid.*

<sup>43</sup> *Decision on the Prosecutor's Warrants for Arrest under Article 58, (Arrest Warrant Decision: Kony, Otti Lukwiya, Odhiambo, Ongwen)* [2005] ICC Pre Trial Chamber II ICC-02/04-01/05-1-US-EXP, Unsealed pursuant to Decision no. ICC-02-04/01/05-53) dated 13 October 2005.

*Chui*<sup>45</sup> various Pre-Trial Chambers adopted its proprio-motu powers, albeit in ‘varying degrees in scope and depth’ to assess the admissibility of the alleged criminal conduct. However, in *Ntaganda* the Appeals Chambers took a close textual reading of the requirements for the warrant of arrest,<sup>46</sup> to inform the lower chambers and the Prosecutor that it does not consider the arrest warrant procedure to be an appropriate forum for the consideration of Article 17 requirements,<sup>47</sup> although the Prosecutor continues to submit analysis on these criteria within the Requests for Warrants of Arrest.<sup>48</sup>

## 2.4. Confirmation of Charges

The PTC have described the purpose of the Confirmation of Charges procedure as a mechanism to protect the rights of the accused ‘*against wrongful and unfounded charges*’ by ensuring that commits to trial ‘*only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought*’.<sup>49</sup> The Confirmation of Charges hearing and the subsequent final written submissions is intended to enable the PTC to determine whether there is ‘*sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged*’.<sup>50</sup> There are three possible outcomes: (i) to confirm the charges as established during the procedure; (ii) decline to confirm the charges on the basis of insufficient evidence;<sup>51</sup> or (iii) adjourn the hearing to request either that the Prosecutor provide further evidence or investigation in respect to a particular charge

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<sup>44</sup> *Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, *Decision on the Prosecution Application under Article 58(7) of the Statute (Article 58 Decision: Ahmad Harun, Ali Kushayb)* ICC Pre-Trial Chamber I ICC- 02/05-01/07-1-Corr, 27 April 2007.

<sup>45</sup> *Kony Admissibility Decision*, (n 4) [16]

<sup>46</sup> The Article 58 procedure does not refer to gravity, the interests of justice or the level of responsibility of the person, but requires the Prosecutor to provide a concise statement of facts that constitute the alleged crime and a summary of evidence and other information which establish reasonable grounds to believe that the person(s) committed the crimes.

<sup>47</sup> *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58' (Arrest Warrant Appeal Judgment: Lubanga and Ntaganda)* ICC Appeals Chamber, ICC-01/04-169-US-Exp, 13 July 2006 [33].

<sup>48</sup> *Article 58 Decision: Ahmad Harun, Ali Kushayb (n 44)* [251-267]

<sup>49</sup> *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (Gbagbo Confirmation of Charges Adjournment Decision)* [2013] ICC Pre-Trial Chamber I ICC-02/11-01/11, 03 June 2013 [18]; *Prosecutor v Bahar Idriss Abu Garda, Decision on the Confirmation Charges (Confirmation of Charges Decision: Abu Garda)* ICC Pre-Trial Chamber I ICC/02/05-02-/09-243-Red, 08 February 2010 [39].

<sup>50</sup> Article 61(7), Rome Statute (n 3), *Confirmation of Charges Decision: Abu Garda (n 49)* [35]

<sup>51</sup> Article 61(7)(b), Rome Statute (n 3), *Confirmation of Charges Decision: Abu Garda (n 49)* [42]

or to amend the charge on the basis that the evidence appears to establish a different crime.<sup>52</sup> To decline charges, the evidence needs to be *'irrelevant or insufficient to a degree that merits declining to confirm the charges'*<sup>53</sup> whereas the process may be adjourned under Article 61(7)(c)(i) where *'the Prosecutor's evidence, viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges.'*<sup>54</sup>

### 3. Evidence and Sources

The evidentiary requirements for admissibility challenges operates under a distinct framework from the other pre-trial phases before the ICC, including those where the Article 17 criteria are reviewed as part of the Article 53 procedure to open an investigation.

#### 3.1. The 'Reasonable Basis' Threshold During Preliminary Examination

The Pre-Trial Chambers have confirmed that the lower evidentiary threshold of 'a reasonable basis' during the preliminary examination is a logical requirement of the stage of investigation, where *'the information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive," if compared to evidence gathered during the investigation.'*<sup>55</sup> Pre-Trial Chambers have also resorted to Article 21(3) in their interpretation of the reasonable basis threshold, to acknowledge that it must be consistent with international recognized human rights. Accordingly, the PTC has acknowledged the 'reasonable suspicion' standard of the European Court of Human Rights, where *"the existence of some facts of information which would satisfy an objective observer that the person concerned may have committed the offence"* forms the requirement of the standard<sup>56</sup>

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<sup>52</sup> Article 61(7)(c). For decisions to provide further evidence, see Pre-Trial Chamber I, *Gbagbo Confirmation of Charges Adjudgment Decision* (n 49) and for decisions requesting amendment of charges, *Prosecutor v Jean-Pierre Bemba Gombo, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(cii), (Article 61(7)(c)(ii) hearing (Bemba))* [2009] ICC Pre-Trial Chamber III ICC-01/05-01/08-388, 03 March 2009.

<sup>53</sup> *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (Article 61(7)(a) and (b) Decision: Bemba)* [2009] ICC Pre-Trial Chamber III ICC-01/05-01/08-424, 15 June 2009 [16].

<sup>54</sup> *Gbagbo Confirmation of Charges Adjudgment Decision* (n 49) [15].

<sup>55</sup> *Kenya Article 15 Decision* (n 22) [27]

<sup>56</sup> *Decision on the Prosecutor's Application under Article 58 (Second Warrant of Arrest: Ntaganda)* ICC Pre-Trial Chamber II ICC-01/04-02/06-36-Red, 13 July 2012 [16] citing Article 5(1)(c) of the European Convention of Human Rights and ECHR decisions in *Fox, Campbell and Hartley v. United Kingdom*, "Judgment", 30 August 1990 [32]; *K.-F. v. Germany*, Judgment, 27 November 1997, [57]; *Labita v. Italy*, "Judgment", 06 April 2000, [155]; *Berktaç v. Turkey*, "Judgment", 01 March 2001, [199], *O'Hara v. United Kingdom*, "Judgment", 16 October 2001 [34]; . **See also** *Prosecutor v Omar Hassan Ahmad Al Bashir Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar*



as well as the Inter-American Court of Human Rights jurisprudence, elaborating the right to liberty.<sup>57</sup>

In addition to the lower threshold of evidence, the OTP has amplified the latitude of its preliminary examination materials, by stressing that *'for the purposes of the investigation and the development of the proceedings, it is neither bound by its submissions, with regard to the different acts alleged in its Article 15 application, nor by the incidents and persons identified therein, and accordingly may, upon investigation, take further procedural steps in respect of these or other acts, incidents or persons, subject to the parameters of the authorised situation.'*<sup>58</sup> In short, the breadth and depth of information used to assess preliminary examinations, including the Article 17(1) criteria, needn't be exhaustive or stand to the rigor of criminal adjudication, and that any subsequent authorized investigation needn't be restricted to or confined by the acts, incidents or persons identified in the course of the preliminary examination.

### 3.2. Sources to Determine Admissibility During Preliminary Examination

It is clear that the Prosecutor can rely heavily on public documents for its preliminary examinations, not only to analyse the seriousness of the information received<sup>59</sup> through the seeking of additional information from States, UN organs, intergovernmental or non-governmental organisations or 'other reliable sources' but also as sources of facts and information in the determination of jurisdiction, admissibility and gravity.

In the Kenya Request, a list of ten public documents formed the basis of the external supporting materials, including the Commission of Inquiry into Post-Election Violence

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*Hassan Ahmad Al Bashir*' ICC Appeals Chamber ICC-02/05-01/09-OA, 03 February 2010 [31–39]; *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (Article 61(7)(a) and (b) Decision: Bemba* (n 53) [24].

<sup>57</sup> *Second Warrant of Arrest: Ntaganda* (n 56) citing Article 7, American Convention of Human Rights, elaborated in IACHR, *Bamaca Velasquez v. Guatemala*, "Judgment", 25 November 2000, [138-144]; *Loayza-Tamayo v. Peru*, "Judgment", 17 September 1997, [49-55]; *Gangaram Panday v. Surinam*, "Judgment", 21 January 1994, [46-51]; *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, Warrant of Arrest, (Warrant of Arrest Decision: Lubanga)* [2006] ICC Pre-Trial Chamber I ICC-01/04-01/06, 10 February 2006 5 [12].

<sup>58</sup> *Situation in the Republic of Côte d'Ivoire, Request for Authorisation of an Investigation pursuant to Article 15 (Article 15 Request: Côte d'Ivoire)* [2011] ICC Office of the Prosecutor ICC-02/11-3, 23 June 2011 [23].

<sup>59</sup> Article 15(2), *Rome Statute* (n 3)

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(CIPEV / Waki Commission),<sup>60</sup> the Kenyan National Commission on Human Rights (KNCHR Report)<sup>61</sup> several UN agencies (the Office of the High Commissioner for Human Rights,<sup>62</sup> UNICEF, UNFPA, UNIFEM<sup>63</sup>) UN Special Procedures mandate holders (UN Special Rapporteur on extrajudicial, summary or arbitrary execution<sup>64</sup>) and NGO's (the Christian Children's Fund, Oscar Foundation,<sup>65</sup> the Federation of Women Lawyers,<sup>66</sup> the Centre for Rights Education and Awareness,<sup>67</sup> Human Rights Watch<sup>68</sup> and the International Crisis Group<sup>69</sup>). The PTC accepted the range of documents cited by the Prosecutor, and used them extensively in its own Decision.

Similarly, in the *Ivory Coast Request*, the Prosecutor submitted a breadth of public documents, using them interchangeably to support their analysis of the seriousness of the information received and as sources of facts and information. This included UN press releases and reports of the United Nations Operation in Côte d'Ivoire (UNOCI),<sup>70</sup> Report of the Independent Commission of Inquiry on Côte d'Ivoire established under Resolution 16/25 of the Security Council, progress reports of the United Nations Secretary-General (UNSG) on the situation in Côte d'Ivoire, two reports from the United Nations High Commissioner for Human Rights and reports from Office for the Coordination of Humanitarian Affairs (OCHA)<sup>71</sup> as well as NGO reports, drawn primarily from Human Rights Watch (HRW), Amnesty International (AI) and the International Federation for Human Rights (FIDH) and finally, press reports and releases, with preference given to BBC, Reuters, AFP and RFI as well as specialized outlets such as Jeune Afrique and Africa Confidential. While the sources continue to be similar, the Request develops from its Kenyan counterpart, by including

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<sup>60</sup> Final Report, 16 October 2008

<sup>61</sup> "On the Brink of the Precipice: a Human Rights Account of Kenya's Post-2007 Election Violence." 26 August 2008

<sup>62</sup> Office of the High Commissioner for Human Rights (OHCHR), "Report from OHCHR Fact-finding Mission to Kenya" (6-28 February 2008)

<sup>63</sup> UNICEF, UNFPA, UNIFEM and Christian Children's Fund, "A Rapid Assessment of Gender-Based Violence (GBV) during the post-election violence in Kenya" (Jan-Feb 08)

<sup>64</sup> Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions "Mission to Kenya" (26 May 09)

<sup>65</sup> Oscar Foundation (Oscar), "Ethnicity and a Failed Democracy" (February 2008)

<sup>66</sup> Federation of Women Lawyers (FIDA-K), "Submission to the CIPEV on behalf of the Inter Agency Gender Based Violence (GBV)" (11 September 2008)

<sup>67</sup> Centre for Rights Education and Awareness (CREAW), "Women Paid the Price" (2008)

<sup>68</sup> Human Rights Watch, "From Ballots to Bullets" (March 2008)

<sup>69</sup> International Crisis Group (ICG), "Kenya in Crisis," (21 Feb 08)

<sup>70</sup> UNOCI, Compte rendu du point de presse hebdomadaire du 24 mars 2011 : CIV-OTP-0002-0983.

<sup>71</sup> *Article 15 Request: Côte d'Ivoire (n 58)* [23-30]

greater explanation and analysis of the rigor and methodology adopted by the external bodies in the construction of their reports. The PTC again accepted the use of sources and itself referred frequently to UN and NGO reports.<sup>72</sup>

The use and acceptance of public sources as analysis and evidence of facts and information has been largely accepted by the Pre-Trial Chambers when determining whether to authorise an investigation following a proprio motu request from the Prosecutor. However the use or reliance upon the anonymous hearsay included in the reports of the UN, NGOs and press articles has been heavily criticized during the confirmation of charges decision due to the absence of probative value of the materials and the failure of the materials to determine whether the perpetrators acted according to chapeau elements of crimes against humanity, namely acting pursuant to or in furtherance of a policy to attack a civilian population.<sup>73</sup>

### **3.3. Developing Evidentiary Standards in Admissibility Challenges: a Sufficient Degree of Specificity and Probative Value**

The Statute does not establish a standard of proof for the purpose of determining admissibility, although it does set out distinct standards of proof for the proceedings, from the commencement of an investigation (a reasonable basis),<sup>74</sup> to the issuance of warrants of arrest (reasonable grounds),<sup>75</sup> the confirmation of charges (sufficient evidence)<sup>76</sup> and the trial (beyond reasonable doubt).<sup>77</sup>

The PTC has considered that these standards do not apply to the admissibility determination however, as admissibility '*deals inter alia with the question as to whether domestic authorities are taking concrete and progressive steps to investigate or prosecute the same case that is before the Court.*'<sup>78</sup> The admissibility challenge submitted by the Government of Kenya allowed the ICC Chambers to clarify the specificity and probity of evidence required

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<sup>72</sup> *Corrigendum to - 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 (Article 15 Decision- Corrigendum: Côte d'Ivoire)* [2011] ICC Pre Trial Chamber III ICC-02/11, 15 November 2011 [36–41].

<sup>73</sup> Pre-Trial Chamber I, *Gbagbo Confirmation of Charges Adjournalment Decision* (n 49) [36].

<sup>74</sup> Article 53(1)(a), *Rome Statute* (n 3)

<sup>75</sup> Article 58(1)(b), *ibid*

<sup>76</sup> Article 61(7), *ibid*.

<sup>77</sup> Article 66(3), *ibid*.

<sup>78</sup> *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* ICC Pre-Trial Chamber I ICC-01/11-01/11-239, 07 December 2012 [10–11]. Pre Trial Chamber I, *Gadaffi Admissibility Decision* (n 1) [54]

to demonstrate that whether the case was admissible or not.<sup>79</sup> The Appeal Chamber determined that evidence must demonstrate a '*sufficient degree of specificity and probative value*' and that assertions of on going investigations is insufficient in respect of deferring cases to the State.

In the third admissibility challenge to be submitted before the ICC, the submission of the Government of Libya responded directly to the evidentiary requirements specified in the Kenya Admissibility Challenge Appeal, as well as each of the admissibility tests established to date. In responding to the requirement that the challenging State bears the burden of proof to show that the case is inadmissible, Libya submitted that it has provided '*substantial evidence – all of it having a substantive degree of specificity and probative value – to demonstrate that it is actually carrying out relevant investigations with respect to the same persons and same conduct.*'<sup>80</sup> Following the conclusion of the Admissibility hearing, the Pre-Trial Chambers disagreed, and chose to request further information from Libya, to clarify the doubt that had arisen on the genuineness of national investigations or prosecutions, and to request further information and evidence of a sufficient probative value.<sup>81</sup>

Third, the Appeals Chamber has exemplified the types of evidence that may demonstrate that an investigation is in progress, including witness interviews, suspect interview, collecting documentary evidence and conducting forensic analysis.<sup>82</sup> But beyond this, it has defined the concept of evidence within admissibility proceedings as '*all material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings.*' In the Gaddafi case, the PTC asserted that substantiating evidence could include:

*'directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the Libyan investigation of the case, to the extent that they demonstrate*

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<sup>79</sup> *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'* (Admissibility Appeal Judgment: Rut, Kosgey, Sang) ICC Appeals Chamber ICC-01/09-01/11-336, 30 August 2011 [61].

<sup>80</sup> *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute relating to Saif Al-Islam Gaddafi (Article 19 Application: Gaddafi)* Government of Libya ICC-01/11-01/11-130-Red, 01 May 2012 [90].

<sup>81</sup> ICC Pre-Trial Chamber I, *Request for further submissions*, (n 78)

<sup>82</sup> Pre Trial Chamber I, *Gadaffi Admissibility Decision* (n 1) [54]

*that the Libyan authorities are taking concrete and progressive steps to ascertain whether Mr Gaddafi is responsible for the conduct underlying the warrant of arrest issued by the Court.*<sup>83</sup>

In particular, the Appeal Chamber has confirmed the challenging State must submit clear evidence that establishes the specific investigative measures that it is or has undertaken, including police reports detailing the time and location of visits to crime scenes, or documentation that demonstrates that ICC suspects, as well as witnesses have been interviewed by the relevant authorities.<sup>84</sup>

It has become recognised practice that the burden of proof of any admissibility challenge lies with the entity that challenges admissibility.<sup>85</sup> where the challenging entity is a State, the PTC have required that *'the challenging State is expected to substantiate all aspects of its allegations to the extent required by the concrete circumstances of the case.'*<sup>86</sup> However, the Chambers have also acknowledged that the burden of proof that lies with the challenging State *'cannot be interpreted as an obligation to disprove any possible "doubts" raised by the opposing participants in the admissibility proceedings.'*<sup>87</sup>

#### **4. Admissibility Criteria Under Article 17(1): A Genuine National Investigation or Prosecution Must Exist**

Article 17(1) requires the ICC to inquire into each stage of national judicial activity before turning to the States genuine willingness or ability: from the moment a State initiates an investigation or prosecution (*'the case is being investigated or prosecuted by a State which has jurisdiction over it'*<sup>88</sup>) through to the conclusion of the investigation or prosecution, be that the conclusion of the trial (*'the person concerned has already been tried for conduct*

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<sup>83</sup> ICC Pre-Trial Chamber I, *Request for further submissions*, (n 78) [10-11]

<sup>84</sup> *Admissibility Appeal Judgment: Ruto, Kosgey, Sang* (n 79) [40,68] *Prosecutor v Francis Kirimia Muthuara and Uhuru Muigai Kenyatta, 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'* (*Admissibility Appeal Judgment: Muthuara and Kenyatta*) ICC Appeals Chamber ICC-01/09-01/11-274, 30 August 2011 [41,69].

<sup>85</sup> *Admissibility Appeal Judgment: Ruto, Kosgey, Sang* (n 79) [62] *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* (n 78) [9]; *Transcript of Hearing (Admissibility Hearing: Gaddafi, 10/10/13)* ICC Pre-Trial Chamber I ICC-01/11-01/11-T-3-Red-ENG, 10 October 2012 page 64, line 18 topage 65 line 1; *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* [2013] Pre-Trial Chamber I ICC-01/11-01/11-466-Red, 11 October 2013 [208].

<sup>86</sup> Pre Trial Chamber I, *Gaddafi Admissibility Decision* (n 1) [ 52]

<sup>87</sup> *Admissibility Decision: Al-Senussi* (n 85) [239]

<sup>88</sup> Article 17(1)(a), *Rome Statute* (n 3).

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*which is the subject of the complaint*<sup>89</sup>) as well as where a discretionary decision has been taken not to proceed (*'the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned'*<sup>90</sup>). To date, the ICC has only received admissibility challenged on cases that were under investigation within the national system, although several of its Preliminary Examination countries have ongoing cases that have reached trial phases as well as also having been concluded, which should be under review by the Office of the Prosecutor.

Through its early decisions, the Court has determined that inactive states will automatically lose jurisdiction to the ICC, where the inactivity reflects the investigation or case under consideration. In its proprio-motu deliberations of the admissibility of the case against Joseph Kony, the leader of the Lords Resistance Army, a rebel group fighting in Northern Uganda, Pre Trial Chamber II decided that it was a *'logical prerequisite'* to any evaluation of a State's willingness or ability that investigative, prosecutorial or adjudicative activity existed, from the first general phase of investigation, through to the specification of particular cases. Without leaving the comfort of the Statute, as the primary source of applicable law, the Pre-Trial Chamber considered that under the admissibility criteria elaborated in Article 17(1)(a)-(b) *"the paramount criterion for determining the admissibility of a case is the existence of a genuine investigation and prosecution at the national level in respect of the case."*<sup>91</sup>

The Chamber went on to decide that, whilst the Ugandan legal system had undergone significant formal reform, creating an International Crimes Division within its High Court to prosecute perpetrators of serious crimes committed during the conflict, the domestic authorities remained inactive, and important legislation governing the operation of the Special Division remained in draft form. Without the adoption of *'all relevant legal texts and the implementation of all practical steps'* the Chambers decided that there had been no change in the activity levels of the Ugandan criminal justice system and as such, the case remained admissible.<sup>92</sup>

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<sup>89</sup> Article 17(1), *Rome Statute* (n 3).

<sup>90</sup> Article 17(1), *ibid.*

<sup>91</sup> *Kony Admissibility Decision*, (n 4) [36]

<sup>92</sup> *Kony Admissibility Decision*, (n 4) [52]

In subsequent decisions, other Chambers have utilized the discretionary power of Article 21(2) to apply rules or principles from previous decisions, to adopt the inactivity threshold, showing the Courts willingness to develop the admissibility regime where the text is insufficient. The consequence of the rule of activity is that States are compelled to employ national criminal procedures in relevant situations or cases under consideration by the Court in order to render the Courts interest in their caseload inadmissible.

In the *Katanga* admissibility hearing the Chambers pursued the same rational, requiring the State to demonstrate its investigative activity through '*the existence of identifiable and meaningful investigative steps*' in relation to incidents or conduct that clearly constitute the scope of the investigation of the ICC Prosecutor.<sup>93</sup> The Appeals Chamber confirmed this approach in *Katanga*, developing the activity rule into two initial questions that must be answered in the affirmative before considering the questions of willingness and ability: (1) are ongoing investigations or prosecutions and (2) have there been investigations in the past, and the State having jurisdiction decided not to prosecute the person concerned.<sup>94</sup>

## 5. Objects of Reference: 'The' Investigation, 'The' Case, 'The' Suspect

One of the most striking aspects of Article 17 is its restriction to the analysis of definitive cases or complaints, rather than to general criminal prosecutions of ICC crime conduct undertaken by the State under investigation by the Court. In one of the seminal texts on Complementarity, Jan Kleffner concluded that the use of definite article 'the' rather than the indefinite article 'an' indicates that admissibility is tied to specific situations or cases, rather than to general analysis of all of the criminal investigations or prosecutions of ICC crime conduct.<sup>95</sup> This is congruent with the purpose of the ICC as a backstop or last resort to national criminal jurisdictions, and has been adopted by the ICC in all of its cases.

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<sup>93</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Transcript of hearing of the 'Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute' (Admissibility Hearing: Katanga)* ICC Pre-Trial Chamber II ICC-01/04-01/07-T-65-ENG, 01 June 2009 line 6–7.

<sup>94</sup> *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* (Admissibility Appeal Judgment: Katanga) ICC Appeals Chamber ICC-01/04-01/07-1497 OA8, 25 September 2009, [78]; *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 1) [58].

<sup>95</sup> Jan Kleffner, 'The Impact of Complementarity on National Implementation of Substantive Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86., page 103.

### 5.1. The Situation Phase: 'Likely Groups of Persons' and 'Likely Crimes'

The Court has also clarified the objects of reference for Article 17 assessments: the text refers to a 'case' and yet interpretation of the investigative and prosecutorial activities of States has been understood to encompass earlier phases of inquiry, where the dimensions of a case may yet have been defined. This was clarified in the Article 15 Decision in *Kenya* where the Pre-Trial Chambers declared that:

*'admissibility at the situation phase should be assessed against certain criteria defining a "potential case" such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).'<sup>96</sup>*

### 5.2. The Concept of a Case: the 'Same Person - Same Conduct' Test

Article 17(1) refers to a definitive case but doesn't explicitly specify its parameters or distinguish the ICC case from an ICC investigation. Elsewhere in the ICC Statute however, the transformation of an investigation into a case first occurs where a warrant of arrest is issued, as it is at this point that persons are named as allegedly bearing individually criminal responsibility for the conduct of ICC crimes. The Pre Trial Chamber clarified the concept of a case in its decision to issue the arrest warrant for Thomas Lubanga, declaring that a case consisted of *'specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.'*<sup>97</sup> It went on to clarify the two objects of reference, whereby the identified suspects of a national investigation or prosecution should be the same persons as those indicted by the ICC, and the conduct should also be the same, in what has become known as the 'same person - same conduct' test.<sup>98</sup> In their decision, Pre-Trial Chamber I considered unanimously that *"it is a*

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<sup>96</sup> *Kenya Article 15 Decision* (n 22) [59]

<sup>97</sup> *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Warrant of Arrest, (Warrant of Arrest Decision: Lubanga)* (n 57) [21].

<sup>98</sup> *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the confirmation of charges (public redacted version) (Confirmation of Charges Decision: Lubanga)* 157 [37–40]; *Situation on the Democratic Republic of Congo in the case of the Prosecutor v Bosco Ntaganda, Decision on the Prosecution Application for a Warrant of Arrest (First Warrant of Arrest Decision: Ntaganda)* [2006] ICC Pre-Trial Chamber I ICC-01/04-02/06-1-US-Exp-tEN; and Redacted version, 6 March 2007, ICC-01/04-02/06-1-tENG-Red, 22 August 2006 [38–41]; *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Germain Katanga, Decision on the evidence and information provided by the*



*condition sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.*”<sup>99</sup> The Appeal Chamber confirmed this test, tying admissibility challenges to specific cases, even though admissibility can be challenged at any point before the confirmation of charges: ‘*article 19 of the Statute relates to the admissibility of concrete cases. The cases are 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.*’<sup>100</sup>

### 5.3. The ‘Same Person’ Component

The requirement that admissibility *challenges* relates to named individuals has been relatively uncontroversial, particularly in contrast to the notion of the *same conduct*: Article 17(1)(b)-(c) refers to persons, where the decision is taken at the domestic level not to prosecute ‘the person concerned’ or where the ‘person concerned’ has already been tried for conduct which is the subject of the complaint. However, Article 17(1)(a) also refers to the investigative phase, where it is possible that the ‘concrete’ features of suspects and conduct may still be under investigation.

This has proven slightly more problematic in the context of preliminary examination and proprio motu requests, where the Prosecutor and Pre-Trial Chambers are required to assess the criteria of Article 17(1), where national investigations overlap with those pursued by the ICC. The Pre-Trial Chamber’s decision in the Kenya case, referred to above illuminates a distinction between admissibility at the situation phase and following an admissibility challenge, whereby during the situation phase (a synonym for preliminary examination or investigation) the activity of any national jurisdiction should be measured against ‘potential’

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*Prosecution for the issuance of a warrant of arrest for Germain Katanga* [2007] ICC Pre-Trial Chamber I ICC-01/04-01/07-4, 06 July 2007 [17–21]; *Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui* ICC Pre Trial Chamber I ICC-01/04- 02/07-3 (transferred to file of Prosecutor v Katanga and Ngudjolo as ICC-01/04-01/07-262), 6 July 2007 17–22; *Prosecutor v. Ahmad Muhammad Harun (‘Ahmad Harun’) and Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, *Decision on the Prosecution Application under Article 58(7) of the Statute (Article 58 Decision: Ahmad Harun, Ali Kushayb)* (n 44) [14, 18–25]; *Prosecutor v Jean-Pierre Bemba Gombo, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo (Arrest Warrant: Bemba)* [2008] ICC Pre-Trial Chamber III ICC-01/05-01/08-14-tENG, (translation notified 17 July 2006) 10 June 2008 [16, 21].

<sup>99</sup> *Warrant of Arrest Decision: Lubanga* (n 57) [31]

<sup>100</sup> *Admissibility Appeal Judgment: Muthuara and Kenyatta* (n 84)

rather than 'concrete' cases, including factors of the likely groups of persons and the likely crimes that may provide the focus of an investigation for the purpose of shaping future case(s).<sup>101</sup> The distinction between the situation phase and the case phase and its impact on investigation and case selection by the ICC is considered in more detail in Chapter 6.

#### 5.4. The 'Same Conduct' Component

As settled jurisprudence of the ICC,<sup>102</sup> the same conduct test ICC has been far more provocative and vigorously litigated. Two key objections have been raised: the first concerned the scope of its application or its parameters, with allegations that the test imposed 'de facto primacy' into the ICC's jurisdiction, while the second challenge has confronted the epicentre of the mirror thesis, namely whether ICC crimes need to be applied by the State.

##### *The Scope of Application of the "Same Conduct" Component*

The defence team of Germain Katanga vigorously litigated the validity of the 'same conduct.' They argued that the same conduct test construed by the Chambers defeated the object and purpose of complementarity, amounting to 'de-facto primacy.'<sup>103</sup> Instead, they argued that

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<sup>101</sup> ICC Pre-Trial Chamber, *Kenya Article 15 Decision* (n 22) [59]

<sup>102</sup> *Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), 'Prosecutor's Application under Article 58(7)' (Arrest Warrant Request: Ahmad Harun and Ali Kushayb)* ICC Pre-Trial Chamber I ICC-02/05-62-US-Exp, 27 February 2007 [24]; *Prosecutor v Omar Hassan Ahmad Al Bashir (Omar Al Bashir), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Arrest Warrant Decision: Al Bashir)* ICC Pre-Trial Chamber I ICC-02/05-01/09-3, 04 March 2009 [50]; *Prosecutor v Bahar Idriss Abu Garda, Decision on the Decision on the Prosecutor's Application under Article 58 (Arrest Warrant Decision: Abu Garda)* ICC Pre-Trial Chamber I ICC/02/05-02-/09-15-AnxA, 07 May 2009 [4]; *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Germain Katanga, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga* (n 98) [20]; *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Mathieu Ngudjolo Chui, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga* [2007] ICC Pre-Trial Chamber I ICC-01/04-01/07-262, 06 July 2007 [21].

The same approach was taken in *Decision on the admissibility of the case under article 19(1) of the Statute (Kony Admissibility Decision)* (n 4) [17–18]; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (Admissibility Decision: Muthuara, Kenyatta, Ali 'PNU Case')* [2011] ICC Pre Trial Chamber II ICC-01/09-01/11-96, 30 May 2011 [48]; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (Admissibility Decision: Ruto, Kosgey, Sang 'ODM Case')* [2011] ICC Pre Trial Chamber II ICC-01/09-01/11-101, 30 May 2011 [54]. Lastly, the same position was adopted in *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, (Article 61(7)(a) and (b) Decision: Bemba)* (n 53) [16]; *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 1) [74].

<sup>103</sup> *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Germain Katanga, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for*

‘comparative gravity’ or ‘comprehensive conduct’ would be more appropriate, thereby requiring that the national investigation be directed against the person, but allowing greater flexibility in terms of the conduct being investigated, and afford greater opportunity for the case to be declared inadmissible.

During the Confirmation of Charges hearing for Katanga, the Chambers confirmed that he would stand trial for the joint commission of three crimes against humanity (murder, sexual slavery and rape) and seven war crimes (conscription of children, deliberate attacks on civilian populations, willful killing, destruction of property, pillaging, sexual slavery and rape):<sup>104</sup> national investigations had been established, under the rubric of crimes against humanity allegedly committed by Katanga, in overlapping locations, including Bogoro village.<sup>105</sup> The overlap of investigations at one location (Bogoro village) with one of the charges (Crimes Against Humanity) was, the defence team argued, sufficient to satisfy the same conduct test. The Trial Chamber rejected the challenge, on grounds that the inactivity of the RDC to pursue the investigations amounted to unwillingness, thereby omitting to proceed to examine the ‘same conduct’ argument of the Bogoro attack.<sup>106</sup> Upon Appeal, the Appeals Chamber maintained the admissibility of the case, relying on the inactivity of DRC to pursue the investigations,<sup>107</sup> rendering the overlapping investigations of the attack on Bogoro village as mute as the national investigation had ceased without sufficient fulfillment of the admissibility criteria. Furthermore, the Appeals Chamber dismissed the alternative tests of

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*Germain Katanga* (n 98) [17–22]; Ben Batros, ‘The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC’ (2010) 23 *Leiden Journal of International Law* 343.

<sup>104</sup> The Confirmation of Charges established that Germain Katanga would stand trial for allegedly committing through other persons, within the meaning of article 25(3) (a) of the Rome Statute, three crimes against humanity: Murder under article 7(1) (a) of the Statute; sexual slavery and rape under article 7(1) (g) of the Statute. Seven war crimes: Using children under the age of 15 to take active part in hostilities under article 8(2)(b)(xxvi) of the Statute; deliberately directing an attack on a civilian population as such or against individual civilians or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i); willful killing under article 8(2)(a)(i) of the Statute; destruction of property under article 8(2)(b)(xiii) of the Statute; pillaging under article 8(2)(b)(xvi) of the Statute; sexual slavery and rape under article 8(2)(b)(xxii) of the Statute. *Decision on the confirmation of charges (public redacted version), Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* Pre Trial Chamber I ICC-01/04-01/07, 30 September 2008 [574].

<sup>105</sup> *Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute (The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Situation in Democratic Republic of the Congo)* [2009] 65 [14].

<sup>106</sup> *Situation in Democratic Republic of the Congo, The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)* [2009] ICC Trial Chamber II ICC-01/04-01/07-1213, 16 June 2009 [77].

<sup>107</sup> Batros (n 103); *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” (Admissibility Appeal Judgment: Katanga)* (n 94) [116].

conduct, preferring instead to confirm 'same conduct' test as the legitimate threshold for the consideration of case-level admissibility.

Interpretation of the scope of conduct or the degree of overlap in the conduct that forms the subject matter of the national investigation with the ICC's investigation was revisited in the Libya cases. In *Gaddafi*, the Government submitted that its national investigation should cover '*substantially the same conduct*' but should not be required to mirror the case before the Court, on evidentiary grounds that the State may have access to different evidence to that of the Court, but also according to the object and purpose of the ICC, where the mirroring of identical charges under national investigations is simply unnecessary for the purpose to bringing an end to impunity.<sup>108</sup> Furthermore, Libya challenged the scope of the ICC's own investigations and the expectation that Libya should focus its resources on exactly the same incidents, which it considered may not be the most serious crimes.<sup>109</sup> Instead, Libya proposed that the correct interpretation of the same conduct test would allow national investigations of 'substantially the same conduct' where this would involve overlap of incidents and underlying facts.<sup>110</sup>

In its Decision, the Pre-Trial Chamber largely accepted Libya's argument concerning the interpretation of 'substantially the same conduct' although it qualified this by asserting that its determination of this test will '*vary according to the concrete facts and circumstances of the case.*'<sup>111</sup> The PTC reiterated the Appeals Chambers definition of a *case* as those specific incidents where one or more crimes has been committed by one or more identified suspects, as well as its definition of *conduct* as being substantially the same as alleged in the proceedings before the Court.<sup>112</sup> With this in mind, the PTC determined that the conduct of

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<sup>108</sup> *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* Government of Libya ICC-01/11-01/11-285-Red2, 23 January 2013 [27].

<sup>109</sup> *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute relating to Saif Al-Islam Gaddafi (Article 19 Application: Gaddafi)* (n 80) [87].

<sup>110</sup> *Libyan Government's consolidated reply to the response of the Prosecution, OPCD and OPCV to its further submission on the admissibility of the case against Saif Al-Islam Gaddafi (Libya's Reply: Gaddafi Admissibility)* [2013] Pre Trial Chamber I ICC-01/11-01/11-293-Red2, 04 March 2013 [34].

<sup>111</sup> Pre Trial Chamber I, *Gaddafi Admissibility Decision* (n 1) [77]

<sup>112</sup> *Ibid* [76], citing *Prosecutor v. Francis Kirimia Muthuara and Uhuru Muigai Kenyatta, 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'* (*Admissibility Appeal Judgment: Muthuara and Kenyatta*) (n 84) 39; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the*

the national investigation should be compared to the conduct alleged in the ICCs Warrant of Arrest against Gaddafi, where broad acts of murder and persecution were alleged in Benghazi, Misrata, Tripoli and other cities, between 15 February and at least 28 February 2011.<sup>113</sup> The PTC considered that the Warrant of Arrest referred to more generic acts that resulted from the control that Gaddafi exerted over the Libyan Security forces, whereas in contrast, the Article 58 Decision included a longer, but still non-exhaustive list of the acts of murder and persecution within temporal and geographical parameters.

Despite the specificity of the acts described in the Article 58 Decision, the Chambers decided that they did not represent ‘unique manifestations’ of Gaddafi’s alleged criminality, but rather that they constituted ‘samples of a course of conduct.’<sup>114</sup> As such, the PTC concluded that the admissibility or otherwise of Libya’s investigation into Gaddafi should be assessed on the basis of similitude between the *underlying conduct* listed in the Warrant of Arrest and Article 58 Decision:

*‘it would not be appropriate to expect Libya’s investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision as constituting instances of Mr Gaddafi’s alleged course of conduct. Instead, the Chamber will assess, on the basis of the evidence provided by Libya, whether the alleged domestic investigation addresses the same conduct underlying the Warrant of Arrest and Article 58 Decision’*<sup>115</sup>

### ***The Legal Characterisation of Conduct: Confronting The Montague – Capulet Complex***

Unlike the international treaties upon which much of the Statute is based, the Rome Statute omits express requirements of States Parties concerning their domestic practices to repress its crimes and punish those who commit acts amounting to ICC crimes. While the Preamble affirms and recalls the duty of States to prosecute serious crime perpetrators, the substantive parts of the Statute are instructions to the ICC, and do not include similar instructions to States: indeed, as an example, Article 5, establishes the crimes within the jurisdiction of the

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*Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’ (Admissibility Appeal Judgment: Rut, Kosgey, Sang) (n 79) [40].*

<sup>113</sup> *The Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Arrest Warrant Decision: Gaddafi, Gaddafi, Al-Senussi) Pre Trial Chamber I ICC-01/11-1, 27 June 2011 6.*

<sup>114</sup> Pre Trial Chamber I, *Gaddafi Admissibility Decision* (n 1) [80-82]

<sup>115</sup> Pre Trial Chamber I, *Gaddafi Admissibility Decision* (n 1) [83]

*Court*, by providing jurisdiction to the *Court* to enforce the crimes of genocide, crimes against humanity, war crimes and aggression, in accordance to the Statute. The absence of expressly stated requirements or obligations of States Parties has been used to justify the strict interpretation thesis proposed by Heller, including the limits of the due process requirements of States within the context of ICC investigations<sup>116</sup> and the omission of a requirement to apply international crimes rather than ordinary crimes within the national criminal justice mechanisms of States Parties.<sup>117</sup> Kleffner has countered that no rule or principle that prohibits these implied obligations can be inferred from a treaty text, not least the Rome Statute, given its broader object and purpose.<sup>118</sup>

In contrast, the four Geneva Conventions establish four distinct requirements of States: the treaties must be *executed* through allocation of responsibilities to the Commanders in Chief to oversee the execution of the treaty requirements,<sup>119</sup> *disseminated* widely and incorporated into military study programmes,<sup>120</sup> *applied* through the adoption of laws and regulations that ensure the application of the treaty, and finally provision must be made for *effective penal sanction* through the adoption of legislation where necessary.<sup>121</sup> Similarly, the UN human rights treaties contain explicit instructions to States, along with the supervisory and monitoring mechanisms described above. The Convention on the Rights of the Child (CRC) for example, requires that States '*undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.*'<sup>122</sup> In issuing its authoritative interpretation of this obligation, the Committee of the Rights of the Child has declared that States are under an obligation to conduct '*a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with*

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<sup>116</sup> See Articles 55(2), 59(2), *Rome Statute* (n 3) concerning the rights during investigation, arrest and questioning, article 87(4) concerning well-being of victims and witnesses and article 99(1) on protection of national laws; and Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 255.

<sup>117</sup> Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 *Harvard International Law Journal* 85, 86.

<sup>118</sup> Kleffner (n 95) 90.

<sup>119</sup> Geneva Convention I, for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field 1949, article 45; Geneva Convention II, for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, article 46.

<sup>120</sup> *Geneva Convention (I)* (n 119), article 47; *Geneva Convention (II)* (n 119), article 48; Geneva Convention III, Relative to the Treatment of Prisoners of War 1949, article 127.

<sup>121</sup> *Geneva Convention (I)* (n 119), article 29; *Geneva Convention (II)* (n 119), article 50; *Geneva Convention (III)* (n 120), article 129; Geneva Convention IV, Relative to the Protection of Civilian Persons in Time of War 1949, article 146.

<sup>122</sup> Convention on the Rights of the Child 1989, article 4.

*the Convention*<sup>123</sup> and furthermore, that ‘effective remedies must be available to redress violations, a requirement that is implicit in the Convention and consistently referred to in the other six major international human rights treaties.’<sup>124</sup>

Those pursuing the mirror thesis, or advocating the necessity of incorporating ICC crimes into national law have suffered a setback following the ease in which the Pre-Trial Chambers have accepted that admissibility should be assessed according to the pre-existing applicable national legal framework and that the legal characterization of the conduct according to international crime labels is ‘not determinative of an admissibility challenge.’<sup>125</sup>

The admissibility criteria refers to the ‘conduct’ of the suspect or accused person/s who form the focus of the national investigation, prosecution or adjudication: Article 17(1)(c) and Article 20(3) exclude admissibility where a person has already been tried for ‘conduct’ which is the subject of the complaint, where the conduct concerns crimes within the jurisdiction of the Court.<sup>126</sup> The key difference in the meanings of *conduct* and *crime* is that conduct refers to the *de facto* acts that are committed whereas crime must refer to the *de jure* appraisal of the conduct and its taxonomy within a legal system, either the Rome Statute or the national criminal justice system. This Pre-Trial Chambers acknowledged this in *Gaddafi*, where they took the view that ‘assessment of domestic proceedings should focus on the alleged conduct and not its legal characterization.’<sup>127</sup> In linking the applicability of ordinary crimes to the subject matter of the ICC’s investigation or case, the PTC asserted that the application of ordinary crime charges would be sufficient ‘to the extent that the case covers the same conduct.’<sup>128</sup>

Notwithstanding the confirmation that there is no requirement for national level investigations to apply international crime charges within the same conduct test, the PTC raised concerns in the *Gaddafi* case over the applicability of specific elements of the charges that had been ascribed to the accused. Notably, under the Libyan criminal code, several

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<sup>123</sup> General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child 2003 (CRC/GC/2003/5) para 18.

<sup>124</sup> Ibid 24.

<sup>125</sup> Pre Trial Chamber I, *Gaddafi Admissibility Decision* (n 1) [85]

<sup>126</sup> *Rome Statute* (n 3), article 17(1)(c) and article 20(3)(a)

<sup>127</sup> Pre Trial Chamber I, *Gaddafi Admissibility Decision* (n 1) [87]

<sup>128</sup> Ibid [88]

charges that were potentially applicable to Gaddafi were restricted to those persons who served as 'public officers': as the accused did not hold a formal position within the Libyan state at the time of their alleged commission of the crimes, the possibility that he would be excluded from liability if his status could not be recognised as a public official could act as a procedural bar from securing conviction. However, Libya asserted that this element could be satisfied under domestic law, if sufficient evidence could be produced to demonstrate his *de facto* authority, which proved satisfactory to the PTC.<sup>129</sup> Turning to the other offences under the Libyan Criminal Code, the Chamber considered that while ordinary crime charges available to Libya did not cover all aspects of the offences contained within the ICC Arrest Warrant *charges*, they did nonetheless sufficiently capture the *conduct, and as such, they satisfied the same conduct test*.<sup>130</sup>

### ***Establishing Limits of the 'Same Conduct' Test***

In the Article 15 Request to open an investigation into the situation in Ivory Coast, the Prosecutor followed the activity tests, asserting that while national prosecutors from Abidjan, and Daloua, as well as the Military, are conducting investigations into crimes within the jurisdiction of the ICC, only one person under investigation by the Abidjan Prosecutor was on the list of most responsible persons developed by the ICC Prosecutor, and the suspect was under investigation within the domestic domain for crimes outside the jurisdiction of the ICC. Furthermore, the regional prosecutors seem to have adopted a policy of deferral or forum sharing, with each of the Prosecutors declaring that they do not intend to pursue those bearing the greatest responsibility, in apparent deference to the ICC investigation.<sup>131</sup>

Other admissibility challenges have also had to engage with the selection of crimes by national prosecutors, although in both cases, the charges adopted the nomenclature of international crimes. In deciding to issue the warrant of arrest for Thomas Lubanga Dyilo (Lubanga), as well as in the confirmation of charges decision, the Court had to address the previous detention of Lubanga in the DRC, on domestic charges of genocide, crimes against

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<sup>129</sup> Ibid [107-109]

<sup>130</sup> Ibid [112-113]

<sup>131</sup> *Situation in the Ivory Coast, Prosecutor's provision of additional information in relation to its request for authorisation of an investigation pursuant to Article 15*, ICC-02/11-7-Red, 16 August 2011, [11-22].



humanity, as well as murder, illegal detention and torture.<sup>132</sup> In the decision of the confirmation of charges, the Pre Trial Chamber accepted that the ICC held jurisdiction over two counts of the war crime of enlisting or conscripting child soldiers into the FPLC, the first as part of an international armed conflict, occurring between early September 2002 and 02 June 2003 and the second charge of conscription or enlistment as part of a non-international armed conflict, occurring between 02 June 2003 and 13 August 2003.<sup>133</sup> They did so on the basis that neither the national investigation nor the grounds for the provisional detention of Lubanga included the enlistment or conscription of children under the age of fifteen, and thereby that the same conduct was not under investigation by the territorial state. For States trying to evaluate the importance or need of implementing ICC crimes into national legislation, the Lubanga decisions provide no clarity or direction: the arresting State had already detained the suspect under a combination of international crime charges and ordinary crimes and had made some efforts at investigation, but the combination of its self-referral (an admission of unwillingness or inability) along with the narrow selection of charges outside of the national investigation rendered the case admissible, in the eyes of the majority of the Pre Trial Chambers. Instead, the confirmation of charges reinforced the doctrine of the ‘same person same conduct’ test, indicating to States that they will need to ensure that domestic investigations cover the same conduct established in the notification issued by the Office of the Prosecutor.

Through review of the rules and tests that have emerged from judicial evaluation of Article 17(1), sections 1 to 5 have largely confirmed that the models of complementarity that advocate the mirroring of the ICC’s substantive and procedural parts are largely unfounded during assessment of this first stage of admissibility determination. Furthermore, the ICC has established admissibility in the majority of admissibility challenges or proprio motu determinations at this stage, without proceeding to the more detailed assessment of their

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<sup>132</sup>The first arrest warrant of 19 March 2005 detailed charges of genocide and crimes against humanity under articles 164, 166-169 of the DRC Military Code, whereas the second arrest warrant of 29 March 2005, covered the domestic crimes of murder, illegal detention and torture. See *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Warrant of Arrest, (Warrant of Arrest Decision: Lubanga)* (n 57) [33], included as Annex 1 in *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* ICC Pre Trial Chamber I ICC-01/04-01/06, 24 February 2006 [65].

<sup>133</sup>Charged as co-perpetrators within the meaning of article 25(3)(a) of the Rome Statute for the war crime of enlisting or conscripting children under the age of fifteen in the context of an international armed conflict, proscribed in article 8(2)(b)(xxvi). *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on the confirmation of charges (public redacted version) (Confirmation of Charges Decision: Lubanga)* (n 98) [254, 410].

genuine willingness and or ability. Section 5 seemingly reduced the most popular dimension of the mirror thesis, that States must adopt the ICC crimes, by reviewing the ICC's jurisprudence on the 'same conduct' test, where it has established that the substantive parts of the Rome Statute will not be applicable to States undergoing admissibility determinations, and rather that admissibility will be assessed according to the national criminal laws and practices in place. In prioritising the conduct that underlies the legal characterisation, as well as the national definition ascribed or applied to such conduct, the ICC has elevated the significance of comparative legal analysis in its admissibility procedures, in order to fully determine if the national legal framework poses procedural bars or omissions in the availability of its laws to the acts and individuals that are the object of reference. Despite the pre-eminence afforded to existing national laws by the ICC, it may nonetheless remain preferential for States to revise its substantive and procedural laws in order to ensure that there are no procedural bars or omissions that may render its choices of crimes (and liabilities) as admissible to the ICC. But this preference is certainly not obligatory.

The absence of any obligations to revise the relevant national laws places the Rome Statute at odds with many of its counterpart treaties in international humanitarian law and international human rights law, where legal reform is required in order to bring the national legal framework into compliance with the international treaty. The absence of an obligation incumbent on States Parties to repress ICC crimes through criminal prosecution has been considered by Akhavan to be *'inconsistent with an effective system of complementarity.'*<sup>134</sup> By drawing comparison with other treaties - that have the status of applicable law before the ICC - Akhavan points to an absence of an express and enforceable obligation on States to use their criminal jurisdiction to repress international crimes, and proposes the adoption of an Optional Protocol to remove the discretionary nature of State primacy and make explicit the obligation for States to investigate, adjudicate and prosecute ICC crimes. While such a proposition has failed to stimulate discussion within the Assembly of States Parties, the gap between the obligations imposed by the Rome Statute and its international treaty counterparts will need to be addressed and acknowledged in the pursuit of positive complementarity. In short, the development of the same conduct test continues to reduce the weight behind those who advocate for substantial legal reform, including the ASP Resolutions on

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<sup>134</sup> Payam Akhavan, 'Whither National Courts? The Rome Statute's Missing Half' (2010) 8 Journal of International Criminal Justice 1245, 1246.

complementarity, and requires greater nuance and clarity to ensure that the distinction is made between the absolute requirements of the ICC and those that are aspirational or ideal. This will require that the cooperative models of positive complementarity proposed in Chapter 7 be designed and constructed in such a way as to be clear of the ‘obligation origin’ of each proposed legal reform.

The first phase of the admissibility procedure has also established that the dimensions of admissibility considerations will be restricted to specific investigations or particular cases consisting of the same person and conduct, and will not encompass a broad and sweeping review of all national criminal justice activities (although this approach is adopted during the preliminary examination of the Office of the Prosecutor, which will be addressed in Chapter 4). While subsequent Chapters will demonstrate the ICC’s practice in conducting broader reviews of national criminal justice laws and practices, for the purpose of establishing the contextual circumstances of the case at hand, this remains consistent with the legal personality of the ICC as an international criminal tribunal. There would certainly appear to be room for improved cooperation between the more general national reviews conducted by international human rights treaty bodies and the ICC within the context of admissibility considerations, in order to better support the identification of contextual circumstances. Finally, moving this issue into the domain of positive complementarity, it would seem prudent to observe that the restriction of admissibility assessments to the objects of reference of the ICC’s investigation should inform positive complementarity practices, combined with the case selection practices of the ICC, to which this thesis will now turn to.



## Chapter 4

### ***The Impact of Case Selection by the ICC on National Investigation, Prosecution and Adjudication***

The selection of cases by the ICC is intended to ensure the identification and pursuit of ‘*the most serious crimes committed within [a] situation*’<sup>1</sup> and to limit the Court from the pursuit of ‘*peripheral cases*’<sup>2</sup> that have nonetheless satisfied the jurisdictional requirements of the Statute. Defined in the Statute under Article 17(1)(d) as a requirement that cases be of a sufficient gravity to be admissible before the ICC and established in the Regulations of the Prosecutor to encompass Article 53 (1) to (c),<sup>3</sup> three criteria inform the selection of cases by the ICC: (i) the gravity of the crimes; (ii) the most responsible groups or persons and (iii) the interests of justice as a countervailing measure.<sup>4</sup> The statutory sources for the application and interpretation of each of the selection criteria are rather thin on the ground, but have formed the subject of a breadth of literature.<sup>5</sup>

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<sup>1</sup> Regulations of the Office of the Prosecutor (OTP Regulations) (ICC Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009) Regulation 33. Under Regulation 29(1) the OTP is also required to produce internal reports analyzing the seriousness of the information and considering the factors established in article 53(1). The Report must be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation. Alternatively, Pre-Trial Chamber I described the gravity threshold as a requirement whereby “particular features [...] render it [the conduct] especially grave.” *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* ICC Pre Trial Chamber I ICC-01/04-01/06, 24 February 2006 [45].

<sup>2</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Kenya Article 15 Decision) [2010] ICC Pre Trial Chamber II ICC-01/09, 31 March 2010 [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 (Article 15 Decision: Côte d’Ivoire) [2011] ICC Pre Trial Chamber III ICC-02/11, 03 October 2011 [201].

<sup>3</sup> OTP Regulations (n 1), Regulation 33

<sup>4</sup> For the purpose of brevity, the interests of justice has been omitted from this thesis.

<sup>5</sup> Article 53(1)(c) and 53(2)(c). See also Margaret de Guzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2009) 32 *Fordham International Law Journal* 1400; Mohamed M El Zeidy, ‘The Gravity Threshold Under the Statute of the International Criminal Court’ (2008) 19 *Criminal Law Forum* 35; Ray Murphy, ‘Gravity Issues and the International Criminal Court’ [2006] C 281; William A Schabas, ‘Prosecutorial Discretion and Gravity’, *The Emerging Practice of the International Criminal Court*, vol 48 (Martinus Nijhoff 2009); Ignaz Stegmiller, ‘The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda’ (2009) 9 *In* 547; Susana Sa Couto and Katherine Cleary, ‘The Gravity Threshold of the International Criminal Court’ (2008) 23 *American University International Law Review* 808; Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *Eur J Int Law* 481; Héctor Olásolo and Enrique Carnero-Rojo, ‘The Application of the Principle of Complementarity to the Decision of Where to Open an Investigation: The Admissibility of Situations’ in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*

The selection of core international crime cases is an (overlooked) reality within every international and national forum.<sup>6</sup> Notwithstanding the challenges underpinning the practice of selecting cases from those that already reach the subject matter jurisdiction of the ICC,<sup>7</sup> the rules and practice of case selection by the ICC is directly relevant to national criminal justice actors. It can help to identify the cases that the ICC can be expected to focus on, thereby informing the strategies of engagement with the ICC at each stage of its inquiries, as well as national adjudication strategies. Of particular importance, the practice of case selection can inform the exercise of national criminal justice in post-atrocity countries, including national case selection strategies, the adoption of alternative or other justice measures<sup>8</sup> as well as the allocation of resources to criminal accountability. This Chapter will review the sources, interpretation and application of the three selection criteria by the Office of the Prosecutor (OTP), the ICC Pre-Trial Chambers (PTC) and Appeals Chambers (AC), in order to identify whether sufficiently predictable rules or practice has emerged to inform national actors of the selection practices of the ICC.

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(Cambridge University Press 2011); Paul Seils, 'Making Complementarity Work: Maximising the Limited Role of the Prosecutor' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011).; W. A. Schabas, "Prosecutorial Discretion and Gravity", in C. Stahn and G. Sluiter (eds.). *The Emerging Practice of the International Criminal Court*, (Leiden, Boston: Martinus Nijhoff Publishers, 2009),

<sup>6</sup> Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press 2005); Jörg-Martin Jehle and Marianne Wade, *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power across Europe* (Springer 2006); Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Peace Research Institute Oslo 2009).

<sup>7</sup> See Bergsmo (n 5); Morten Bergsmo and others, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (Peace Research Institute Oslo 2009).

<sup>8</sup> As addressed elsewhere, States will remain in compliance with the Rome Statute if the cases that fall below the ICC's selection threshold are addressed through other accountability measures. See Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *J Int Criminal Justice* 695; Gregory S Gordon, 'Complementarity and Alternative Forms of Justice: A New Test for ICC Admissibility' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Forum for International Criminal and Humanitarian Law, 'Abbreviated Criminal Procedures for Core International Crimes'; Sonja Kotnik and others, 'The Emergence of a Abbreviated Criminal Procedure in the Field of Criminal Law', *Policing in Central and Eastern Europe: Dilemmas of Contemporary Criminal Justice* (Faculty of Criminal Justice, University of Maribor 2004); CH Brants-Langeraar, 'Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure' (2007) 11 *Electronic Journal of Comparative Law*.

## 1. The Selection of Cases

The inclusion of the *gravity of the cases* as a principle to enable the selection of incidents and cases for investigation and trial is one of the many innovations of the Rome Statute and as with the criteria of willingness and ability, the founding texts have provided *'little in the way of concrete guidance about how to undertake this assessment'*<sup>9</sup> with little relevant precedent from other applicable sources. The starting point for the identification of the selection criteria is Article 17(1)(d) which establishes the fourth and final reason that case may be declared inadmissible before the Court, where: *'the case is not of sufficient gravity to justify further action by the Court.'*<sup>10</sup>

The requirement of sufficient gravity is repeated in Article 53(1)(b) and (c) as factors that the Prosecutor must consider when deciding whether to initiate an investigation. First they must consider if a reasonable basis exists to believe that a crime within the jurisdiction of the Court has been committed and then:

*'(b) The case is or would be admissible under Article 17; and*

*(c) Taking into account **the gravity of the crime** and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.'*<sup>11</sup> (emphasis added)

The same formula is repeated in Article 53(2) which establishes the conditions upon which the Prosecutor can conclude that there is an insufficient basis to proceed, where factors concerning the perpetrator are inserted into the conditions of the interests of justice, including *'the age or infirmity of the alleged perpetrator, and his or her role on the alleged crime.'* Together, these articles provide the foundation for the selection criteria: the gravity of the case and the interests of justice. In order to determine the gravity of the case, the gravity of its constitutive parts must be identified – this has emerged as the gravity of the crimes (see Section 2) and the level of responsibility of the perpetrator (see Section 3).

Both the Office of the Prosecutor and the Chambers of the Court have sought to interpret the scant statutory requirements that instruct the selection of cases for investigation and trial

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<sup>9</sup> Beth Van Schaack, 'The Concept of Gravity Before International Criminal Courts' (2008) American Society of International Law Accountability: Newsletter of the International Criminal Law Interest Group of the American Society of International Law.

<sup>10</sup> Article 17(1)(d), Rome Statute of the International Criminal Court (Rome Statute) 1998 (A/CONF183/9).

<sup>11</sup> Article 53(1). Ibid Rome Statute (n 9)

before the ICC and to elaborate standardized tests. The Pre-Trial Chambers have found sufficient guidance from the Statute to clarify three principles of case selection by the ICC.

### 1.1. Gravity of the Case is an Additional Safeguard for Admissibility

With the exception of the text of Article 17(1)(d) which requires that a case be of 'sufficient gravity' the operative part of the Statute is inconclusive in establishing a clear-cut filter to cases as part of the admissibility requirements. The Regulations of the Office of the Prosecutor have established a rule of case selection, which reinforces the importance of gravity as a criteria for the selection of cases within a situation:

*'The Office shall review the information analysed during preliminary examination and evaluation and shall collect the necessary information and evidence **in order to identify the most serious crimes committed within the situation.** In selecting potential cases within the situation, the Office shall consider the factors set out in article 53, paragraph 1 (a) to (c) in order to assess issues of jurisdiction, **admissibility (including gravity),** as well as the interests of justice.'*<sup>12</sup> (emphasis added)

Turning to the preamble, the sufficiency of the gravity of a case can be put into context with memories of *'unimaginable atrocities that deeply shock the conscience of humanity'* and affirmations that *'the most serious crimes of concern to the international community'* must be punished and effectively prosecuted. The selection of cases from amongst those that bear the hallmark of being the *most serious* might sit awkwardly with the determination *'to put an end to impunity for the perpetrators of these crimes'* where the ICC is expected to be the sole adjudicator for the crimes contained therein, if it were not for two paragraphs that *recall the duty of States to exercise their criminal jurisdiction* and emphasize the complementary relationship between the ICC and States in these matters.<sup>13</sup> The preamble has simultaneously been interpreted as insulating the ICC against the selection of cases, as well as enabling it. The practice of case selection from the crimes within their jurisdiction, however unpopular in some quarters, has also been a long-term practice of the ad-hoc international criminal

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<sup>12</sup> Regulation 33, OTP Regulations (n 1)

<sup>13</sup> For matters of resource allocation, if nothing else, the selection of cases has become a reality of the ICC's practice that over-rides any ambiguity established under the preamble.



tribunals, either based on statutory criteria or through resolutions largely associated with their completion strategies. Their selection practices have primarily been categorized according to notions of responsibility and status of the perpetrators which will be reviews in Section 3.

The existence of a case selection practice by the ICC emerged in the Lubanga case, where the Pre-Trial Chambers found that a case must consist of something more than the jurisdictional requirements of the Statute:

*'[T]he gravity threshold is in addition to the drafters' careful selection of crimes included in articles 6 to 8 of the Statute [...]. Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.'*<sup>14</sup>

The Pre-Trial Judges returned to the notion of the sufficiency of the selected crimes in the situations of Kenya and the Ivory Coast, where it considered that the gravity threshold of article 17(1)(d) forms an additional safeguard against the pursuit of peripheral cases that nonetheless satisfied the subject matter of the ICC:

*'the Chamber recalls that all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases.'*<sup>15</sup>

The repetition of these formulas in the Pre-Trial Chambers decisions, and the absence of appeals, indicates that the selection of cases by the ICC has been recognized as a necessary practice of the Court, whereby the gravity of the crimes operates as a threshold to reduce the flooding of the Court with 'less grave' or 'peripheral' cases that have nonetheless reached the threshold of the ICC crimes.<sup>16</sup>

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<sup>14</sup> Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, Warrant of Arrest, (Warrant of Arrest Decision: Lubanga) [2006] ICC Pre-Trial Chamber I ICC-01/04-01/06, 10 February 2006 5 [41]; Prosecutor v Bahar Idriss Abu Garda, Decision on the Confirmation Charges (Confirmation of Charges Decision: Abu Garda) ICC Pre-Trial Chamber I ICC/02/05-02-/09-243-Red, 08 February 2010 [30].

<sup>15</sup> *Kenya Article 15 Decision* (n 2) [56], *Article 15 Decision: Côte d'Ivoire* (n 2) [201] *Situation in the Republic of Côte d'Ivoire, Request for Authorisation of an Investigation pursuant to Article 15 (Article 15 Request: Côte d'Ivoire)* [2011] ICC Office of the Prosecutor ICC-02/11-3, 23 June 2011 [58].

<sup>16</sup> Sa Couto and Cleary (n 4) 808; El Zeidy (n 4) 36.

## **1.2. The Gravity Threshold at the Preliminary Examination Phase: 'against the backdrop of potential cases'**

The second emerging principle on the selection of cases during admissibility focuses on the scope of evaluation. Initially, the pre-trial chambers outlined two different requirements for the evaluation of the gravity threshold during the pre-trial phase, described in Lubanga as:

*"(i) at the stage of the initiations of an investigation, the relevant situation must meet such a gravity threshold and (ii) once a case arises from the investigation of a situation it must also meet the gravity threshold provided for that provision."*<sup>17</sup>

This has been understood as requiring the Prosecutor to determine gravity during the preliminary examination by applying the gravity threshold to the entire situation (i) and applying the gravity threshold to the features of any specific cases that emerge from the formal investigation (ii).

However, in the Kenya Article 15 Decision, the Pre-Trial Chambers revised the situation-level requirement for gravity during preliminary examination, declaring that:

*'although an examination of the gravity threshold must be conducted, it is not feasible that at the stage of the preliminary examination it be done with regard to a concrete "case". Instead gravity should be examined against the backdrop of the likely set of cases or "potential case(s)" that would arise from investigating the situation.'*<sup>18</sup>

The requirement or parameter for the gravity threshold identified here, requires that the preliminary examination should cease to evaluate the general gravity of the situation and should instead be examined against the backdrop of 'potential cases,' which the PTC described as:

*(i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).'*<sup>19</sup>

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<sup>17</sup> Warrant of Arrest Decision: Lubanga (n 13) [41]

<sup>18</sup> Kenya Article 15 Decision (n 2) [58]

<sup>19</sup> Kenya Article 15 Decision (n 2) [50]

Even at the preliminary examination phase, the Judges have reinforced the nature of the court as a criminal court, thereby requiring or re-emphasizing the importance of linking the selection of crimes to those persons most responsible for them. The use and application of factors to determine the most responsible persons or groups will be considered throughout **Section 4** whilst the application of factors to determine the gravity of the crimes will be addressed in **Section 3**.

### **1.3. The Gravity Threshold must be evaluated as the second phase of Admissibility**

The third principle to have been affirmed by the Court is a simple affirmation of the appropriate sequencing of the determination of the gravity threshold. In almost all pre-trial cases where the gravity threshold is assessed, the Chambers have asserted that gravity threshold should be determined following assessment of jurisdiction and the first three tests of admissibility (activity, willingness or ability) as established in the sequence of Article 17(1).

In conclusion, the gravity threshold has emerged as an additional safeguard to filter out those cases that the ICC has jurisdiction over, to those that would be admissible before the Court. To define the threshold, the Court has directed the Prosecutor to consider the most responsible persons (**see section 4**) and the gravity of the crimes, where several factors have been established and applied. It is to these factors, and their application in cases before the ICC that we now turn to.

## **2. Factors of the Gravity of the Crime**

While the gravity threshold clearly serves to limit the admissibility of those cases that meet the jurisdictional tests of the ICC, the method to measure or define the gravity of the crimes or the most responsible groups or persons is more complicated. The concept of the ‘gravity of a crime’ must take the criminal conduct as its axis, but there are numerous normative approaches that can be taken to construct a framework for measuring it.<sup>20</sup>

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<sup>20</sup> Unlike the other admissibility criteria willingness, ability and *ne bis in idem*, which rotate around the qualities of the criminal justice system in the context of the specific investigation or case. In a dissenting opinion of Judge Pikkis, some effort was made to provide synonyms of gravity, which include weightiness, sufficiency and

The Statute does little to guide the Prosecutor or Judges to any particular methodology. Its preambular formula, of *the most serious crimes* of concern to the international community, which reappears in Article 5 to establish the crimes within the jurisdiction of the ICC serves only to denote that *all* of the underlying acts of the prescribed crimes are considered to be within the most serious category. Furthermore, a comparative gravity is used in Article 8(1)(g) on war crimes to allow for additional types of sexual violence unforeseen by the Statute, where the acts constitute 'any other form of sexual violence of comparable gravity.' In a dissenting opinion, some effort was made to provide synonyms of gravity, which include weightiness, sufficiency and adequacy, although this remains in such abstract terms as to be unhelpful.<sup>21</sup>

## 2.1. The Prosecutor's Factors: Scale, Nature, Manner of Commission, Impact

Prior to the adoption of the Regulations of the Office of the Prosecutor in 2009, the OTP had presented aspects of the gravity of the crimes in a variety of policy papers, including general Prosecutorial Policies<sup>22</sup> specific issue led papers<sup>23</sup> including referrals and communications.<sup>24</sup> The Regulations of the Office of the Prosecutor however, establish four factors that govern the application of the gravity of the crimes within the context of the initiation of an investigation or prosecution:<sup>25</sup>

*'In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.'*<sup>26</sup>

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adequacy, although this remains in such abstract terms as to be unhelpful. See the *Separate and Partly Dissenting Opinion of Judge Georgios M Pikkis' Situation in the Democratic Republic of the Congo "Judgment of the Prosecutor's Appeal Against the Decision of Pre Trial Chamber I entitles 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'* ICC Appeals Chamber ICC-01/04-169, 13 July 2006.

<sup>21</sup> Ibid.

<sup>22</sup> ICC Office of the Prosecutor, 'Draft Policy Paper on Preliminary Examinations' (International Criminal Court 2010) para 6.

<sup>23</sup> ICC Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor' (International Criminal Court 2003).

<sup>24</sup> ICC Office of the Prosecutor, 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications' (International Criminal Court 21 April 2004);

<sup>25</sup> While they are not strictly included in the sources of applicable law under Article 21, they nonetheless provide guidelines that instruct the operations of the Office of the Prosecutor, and have been accepted as relevant factors in decisions by the Pre-Trial Chambers.

<sup>26</sup> Regulation 29(2) OTP Regulations (n 1)

These four factors subsequently formed the basis of a more detailed *Draft Policy on Preliminary Examinations, 2010* (Draft Policy) and have been used in the delivery of annual preliminary examination reports<sup>27</sup> as well as the more sporadic country reports.<sup>28</sup>

### ***Scale of the Crimes***

Largely a quantitative factor, the Draft Policy refers to indicators such as the numbers of direct and indirect victims, and their geographical or temporal range; the intensity or frequency of crimes (for example high intensity or high frequency crimes committed over a short timescale or low intensity violence committed over an extended period). The policy also emphasizes qualitative dimensions including the extent of the damage caused by the crimes, specifically bodily or psychological harm caused to the victims and their families.<sup>29</sup>

### ***The Nature of the Crimes***

The nature of the crimes is largely used as a synonym for the specific elements or underlying acts of the offences. Additionally, it emphasises certain thematic crimes against the person, including killings, rapes and other sexual or gender violence crimes, crimes committed against children, or the imposition of conditions of life on a community calculated to bring about its destruction.<sup>30</sup>

### ***The Manner of the Commission of the Crimes***

The third factor turns to the groups or individual perpetrators, through identifying qualitative dimensions of the organization and execution of the crimes, by the individual suspect as well as the organizational structure that supported them. The non-exhaustive list draws on several common elements of the crimes relevant to the commission of the crimes, covering organizational policies as well as individual intent or *mens rea*, as well as the aggravating factors relevant to sentencing. This includes:

*‘the means used to execute the crime, the degree of participation in the intent its commission, the systematic nature of the crimes, whether they formed part of a plan*

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<sup>27</sup> ICC Office of the Prosecutor, ‘Report on Preliminary Examination Activities 2012’ (International Criminal Court 2012). ‘Report on Preliminary Examination Activities 2012’ (n 26)

<sup>28</sup> ICC Office of the Prosecutor, ‘OTP Response to Communications Received Concerning Iraq’. Government of Mali “referral of the Situation in Mali since January 2012” of 18 July 2012

<sup>29</sup> ‘Draft Policy Paper on Preliminary Examinations’ (n 21), para 70.a

<sup>30</sup> *Ibid*, para 70(b)

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*or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying communities.*<sup>31</sup>

The thematic crime of sexual violence is once again elevated to a specific indicator, perhaps in-keeping with the profiling of sexual and gender violence in the Statute.<sup>32</sup>

### ***The Impact of the Crimes***

The final indicative factor of gravity moves to the consequences of the crimes, to the local or international community, particularly concerning long-term social, economic and environmental damage, or those crimes that seek to increase civilian vulnerability or spread terror among civilians.<sup>33</sup> Many of these factors can be expected to feature within the assessments of the interests of the victims, one of the two balancing criteria in the determination of the interests of justice (see Section 4), however the concept, as well as the indicative features of it, allows for a broader analysis of the crimes.

Throughout the four factors of gravity, one indicator, 'harm against the person' is almost constant, appearing to give greater prioritisation to conduct that results in physical or psychological harm. Yet many preliminary examination reports include acts of pillage and destruction of property indicating that the emphasis on bodily or psychological harm has not limited the selection of incidents involving physical destruction such as attacks against protected property, buildings and monuments, pillage, destruction or seizure of property, or the displacement of civilian populations<sup>34</sup> particularly where it is large-scale, psychological and or violent.

In elaborating these four indicative gravity factors, the OTP has intended to provide clarity and transparency to its investigative functions and procedures, to serve to guide to States and

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<sup>31</sup> Ibid, para 70(c),

<sup>32</sup> Article 42(9) instructs the Prosecutor to appoint legal expert advisors on specific issues, including *but not limited to* sexual and gender violence and violence against children, while Article 54(10)(b) requires the Prosecutor to take appropriate measures during the investigations to respect the interests and personal circumstances of victims and witnesses, particularly where the crime involves gender violence, sexual violence of violence against children. Rome Statute (n 9)

<sup>33</sup> 'Draft Policy Paper on Preliminary Examinations' (n 21), para 70(d).

<sup>34</sup> Including serious violations such as the specific acts of war crimes listed in article 8(2)(b)(ii),(iii), (v), (ix), (xiii), (xvi), Article 8(2)(e)(ii)(iii)(iv)(v)(viii). Rome Statute (n 9)

all actors seeking to engage in the preliminary examination process, in the ordering or structure of their dialogue, but also in shaping national fact-finding and investigative strategies. But beyond this, their coherence with the preliminary stage of inquiry has been questioned, by some commentators<sup>35</sup> and by the Pre Trial Chambers, who have examined the coherence, consistency and application of the gravity factors in particular preliminary examinations and in general terms have cautioned that:

*‘the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case.’*<sup>36</sup>

Notably, the Appeals Chamber has cautioned against *‘an overly restrictive legal bar to the interpretation of gravity’* on grounds that it would impinge upon the deterrent role of the Court, as well as formulaic assessments of gravity against *any* criteria.<sup>37</sup>

## 2.2. Aggravating Circumstances

The Prosecutor’s factors or indicators of the gravity of the crime are not the only source of regulation. Further guidance can be found in Part 7 of the Statute, on Penalties, and Article 78 in particular, where the *gravity of the crime* forms a factor in the determination of sentencing.<sup>38</sup> Here gravity is understood as synonymous with aggravated circumstances, which Sa Couto has argued can serve as factors for the identification of the gravity of the crimes during pre-trial procedures.<sup>39</sup> Under Rule 145(2)(b) this would allow the gravity of the crime to be informed by factors such as abuse of power or capacity, or the commission of the crime where it involved discrimination, particular cruelty, multiple victims or vulnerability of the targeted group.<sup>40</sup> Under the sentencing rules, more than one aggravating circumstance would indicate the *‘extreme gravity’* of the crime, thereby providing the basis to impose the sentence of life imprisonment.<sup>41</sup>

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<sup>35</sup> See for example, De Guzman de Guzman (n 4); Schabas, ‘Prosecutorial Discretion and Gravity’ (n 4).

<sup>36</sup> Confirmation of Charges Decision: Abu Garda (n 13) [31]

<sup>37</sup> Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’ (Arrest Warrant Appeal Judgment: Lubanga and Ntaganda) ICC Appeals Chamber, ICC-01/04-169-US-Exp, 13 July 2006 [69–79].

<sup>38</sup> Article 78(1), Rome Statute (n 9)

<sup>39</sup> Sa Couto and Cleary (n 4) 813.

<sup>40</sup> Rule 145(2)(b), Rules of Procedure and Evidence 2002 (ICC-ASP/1/3) 94.

<sup>41</sup> Rule 145(3), *ibid.*

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The Tribunals have applied similar concepts of gravity in their sentencing practices, and insofar as the ICC Pre-Trial Chambers have encouraged adoption of the ICC's own aggravating circumstances provisions, reflection on the adhoc tribunals practices may also be helpful.<sup>42</sup> The ICTY Chambers have, for example, established that the gravity of offences is determined by, inter alia, the effect on victims or on persons associated with the crime and nearest relations,<sup>43</sup> or the depravity of the crimes,<sup>44</sup> which can be understood as a synonym for the manner of commission of the crimes, as adopted by the Office of the Prosecutor (**see Section 3.1**).

The Pre-Trial Chambers have acknowledged the relevance of the sentencing factors in determining the gravity of the crimes, but rather than using the aggravating circumstances as advocated by Sa Couto, they have instead referred to other sentencing factors listed in Rule 145(1)(c). The Abu Garda confirmation of charges decision declared that sufficient gravity could be determined with the additional factors that regulate the sentencing of perpetrators:

*'The Chamber finds that certain factors that may be of relevance to the assessment of gravity are listed in rule 145(1)(c) of the Rules, relating to the determination of sentence. The rule makes reference to "the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime", which, in the view of the Chamber, can serve as useful guidelines for the evaluation of the gravity threshold required by article 17(l)(d) of the Statute.'*<sup>45</sup>

By encouraging the use of sentencing guidelines which closely correspond to the OTP's own factors, the role of the perpetrator in the criminal acts is encouraged at the outset of inquiry, thereby inserting a perpetrator lens to the OTP factors.

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<sup>42</sup> El-Zeidy encourages the review of ICTY sentencing practices in determining the factors of gravity by the ICC. See El Zeidy (n 4).

<sup>43</sup> Prosecutor v. Duško Tadić, Sentencing Judgment, IT-94-1-T, 14 July 1997 [61]; Prosecutor v. Duško Tadić, Sentencing Judgment, IT-94-1-Tbis-R117, 11 November 1999 [25]; Prosecutor v. Mucic et al. 'Celebici' Case', Judgment, IT-96-21-T, 16 November 1998 [1226].

<sup>44</sup> Prosecutor v. Ivica Rajić, a.k.a. Viktor Andrić, Sentencing Judgment, IT-95-12-S, 8 May 2006; Prosecutor v. Dragan Nikolić, Sentencing Judgment, IT-94-2-A, 18 December 2003 [186–199] (providing factual circumstances on the criterion of the 'manner of commission of the crimes' and known as 'depravity of the crimes')

<sup>45</sup> Confirmation of Charges Decision: Abu Garda (n 13) [32].



### 2.3. Gravity During Preliminary Examinations: New Facts and Evidence

To date, the only public preliminary examination to be rejected on partial grounds of insufficient gravity, concerned the killing and inhumane treatment of Iraqi civilians and soldiers by UK armed forces. In its 2006 decision not to open an investigation into alleged war crimes committed against Iraqi prisoners by British forces, the OTP found that although the ICC had material and personal jurisdiction and there was a reasonable basis to believe that these crimes had been committed, the incidents under scrutiny did not appear to form ‘*part of a plan or policy or as part of a large-scale commission*’ as described in Article 8(1).<sup>46</sup> Furthermore, in recognizing that this may not be an absolute legal requirement, of the war crimes chapeau text, the Prosecutor considered that the estimation of between 4 and 12 victims of willful killing, and approximately 8 victims of inhuman treatment to be of a ‘different order’ to other situations under investigation by the ICC, where thousands of willful killings appear to have been committed, and therefore did not satisfy the gravity threshold required under Article 53.<sup>47</sup>

The decision has garnered considerable consternation for its incomplete approach to gravity.<sup>48</sup> firstly, for limiting its assessment to the quantitative factors of scale<sup>49</sup> and ignoring other factors, notably concerning the impact of the crimes having been committed by an occupying force operating under UN Security Council Resolution,<sup>50</sup> secondly for limiting its examination only to the incident contained in the communication and thirdly for its comparative assessment, whereby the alleged acts committed by British forces in Iraq were compared to the quantitative scales of situations in other countries under investigation by the OTP.<sup>51</sup> The absence of any reasoned analysis and the subsequent opening of a case in Sudan for the killing of a similar number of UN Peacekeepers has led to calls for the preliminary examination to be reopened<sup>52</sup> while in January 2014, an extensive joint-communication was submitted to the OTP by the European Center for Constitutional and Human Rights and

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<sup>46</sup> OTP, Response to communications received concerning Iraq (Iraq Response Letter), 9 February 2006, page 8.

<sup>47</sup> Ibid, page 9.

<sup>48</sup> The text of the Statute calls for ‘sufficient gravity’ rather than the comparative gravity that the Prosecutor made, between the number of victims in the Iraq communications and those in the situations under examination in Uganda and DRC. de Guzman (n 4) 1433.

<sup>49</sup> Melanie O’Brien, ‘The Impact of the Iraq Communication of the Prosecutor of the International Criminal Court on War Crimes Admissibility and the Interests of Victims’ University College Dublin Law Review 8.

<sup>50</sup> 10 December 2008, William Schabas, ‘Gravity: Are Lives of Civilians Not as Important as Those of Peacekeeping Troops?’.

<sup>51</sup> de Guzman (n 4) 1432

<sup>52</sup> Schabas (n 49)

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Public Interest Lawyers (ECCHR-PIL Communication) which addresses each of the gravity criteria in turn, along with a detailed review of the policy element of Article 8(1) which had caused discomfort to the previous Prosecutor.<sup>53</sup>

The ECCHR-PIL Communication assesses each of the selection criteria adopted by the Prosecutor in Regulation 29, to conclude that on the basis of public domain information and confidential materials that the communicants have access to, the facts and evidence clearly passes the necessary threshold to open a preliminary examination.<sup>54</sup> The Communication contains detailed analysis of alleged torture and ill treatment of 2,193 separate allegations by 109 victims, with a further 303 victims alleging ill treatment by UK Services Personnel between 2003- 2008. In addressing the factor of scale, the Communication clearly seeks to revoke the earlier quantitative determination of scale made by the OTP Prosecutor, by demonstrating that the number of alleged victims far exceeds the scope of the 2006 examination, but also that the geographical and temporal scale of alleged crimes was far larger than earlier considered.<sup>55</sup>

The Communication joins the nature of the alleged crimes and the manner of their commission, pointing to evidence of widespread commission of the alleged crimes, the involvement of sexual abuse and religious humiliation and a systematic practice of brutal violence as indicators, along with the collegial ways that the crimes were carried out. The Communication asserts that additional aggravating circumstances, such as the use of sexual acts and sexually orientated humiliation, or other forms of humiliation, such as forcing inmates to dance 'like Michael Jackson' or hitting detainees in succession to force them to cry in order to recreate to a signing choir establishes a reasonable basis to assert the gravity of the alleged acts.<sup>56</sup>

In turning to the impact of the alleged crimes, the Communication asserts their seriousness on the local community, including victims and their families, while claiming that internationally,

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<sup>53</sup> European Center for Constitutional and Human Rights and Public Interest Lawyers, 'Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008 (ECCHR & PIL: Iraq Communication)' (2014).

<sup>54</sup> Ibid, 209-214

<sup>55</sup> Ibid, 210

<sup>56</sup> Ibid, 210-210, citing evidence of surviving detainees and photographs from Camp Breadbasket.

the alleged crimes have had a heightened impact, due to the nationality of the perpetrators, the means available to the UK and the role of the UK in executing a UN Security Council mandate.<sup>57</sup> It includes evidence of physical impacts of victims, including scarring, disfigurement, ongoing pain, surgery and even miscarriage, as well as estimations of serious psychological damage, based on the Communicants experience in engaging with the victims and informed by the Istanbul Protocol and other medical and psychological testimony documenting the long lasting physical and psychological impact of torture.<sup>58</sup> The Communication goes on to outline the impact of the alleged crimes on the international community, linking the nature and manner of the commission of the crimes to the international mandate that the UK Services Personnel operated under, notably the obligations of the Multi National Forces to respect and adhere to international law obligations, including the Geneva Conventions.<sup>59</sup> The Communication also points to the additional (and considerable) international impact on the respect of national and international law obligations where violations occur with impunity by personnel of a country with considerable means<sup>60</sup> and international status<sup>61</sup> such as the UK. This is undoubtedly a compelling dimension of the factor of impact, and it is entirely applicable to the evaluation of gravity.

While the OTP has yet to publicly respond to the Communication, its structure, which follows the criteria established by OTP Policy and jurisprudence of the ICC, depth of sources and quality of analysis establishes a robust response to the earlier rejection of the OTP which, according to the established selection criteria, establishes a strong justification for reviewing its earlier decision.

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<sup>57</sup> Ibid, 211 - 214

<sup>58</sup> The ECCHR & PIL: Iraq Communication cites testimony given by Doctor Abigail Selzer, a Consultant Psychiatrist in Camden and Islington Trust, who has worked with Freedom from Torture since 2001 and with the Helen Bamber Foundation since 2010 to the the Al Sweady Inquiry, on 17 April 2012, along with witness statements of psychological harm, Psychological Medico-Legal Reports of victims interviewed by PIL and the "Istanbul Protocol" *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

<sup>59</sup> UN Security Council, 'Resolution 1483 (2003)' (United Nations 2003) S/RES/1483 (2003) ss 4-5; 'Resolution 1511 (2003)' (United Nations 2003) S/RES/1511 (2003); 'Resolution 1546 (2004)' (United Nations 2004) S/RES/1546 (2004).

<sup>60</sup> The Communication lists this as foresight, planning, training, discipline and resources. See ECCHR & PIL: Iraq Communication (n 52) 213.

<sup>61</sup> Which the Communication establishes as the UK's permanent member status at the UN Security Council as well its membership of the European Union.

## 2.4. The Gravity Factor of 'Scale' Should Not Be Mixed With the Legal Requirements of the Crimes

The Arrest Warrant Decision in the Ntaganda case, and its subsequent over-turning on appeal has helped to define the scope of the factors of scale, impact and the most responsible persons.<sup>62</sup> In 2006, Pre-Trial Chamber I (PTC-I) rejected the warrant of arrest request for Bosco Ntaganda on three grounds of insufficient gravity. The Chambers had attempted to develop three factors to determine the gravity threshold, each of which were subsequently over-ruled by the Appeals Chamber:<sup>63</sup> that (i) the *scale* of conduct should be systematic or large-scale; (ii) the impact should trigger social alarm amongst the international community (see section 3.5) and (iii) accused persons must fall within the category of most senior leaders suspected of being most responsible (see section 4.2). The PTC adopted a laborious and contorted reasoning to reach its conclusion, adopting literal, contextual and teleological interpretations of gravity in order to reach its conclusion. In over-turning the PTC Decision, the Appeals Chamber found the 'three-pronged test' to be flawed and incorrect.<sup>64</sup>

The Appeals Chamber robustly rejected the PTC interpretation of the scale of conduct, finding that the requirement for conduct to be either systematic or large scale to be inconsistent with the definitions of the common contextual elements of war crimes (Article 8(1)) and crimes against humanity (Article 7). The definition of war crimes requires that the crimes were committed as "part of a plan or policy or as part of a large scale commission of such crimes" whereas the PTC interpretation of scale selected only one of the three alternative legal requirements, that of its large scale. Similarly, the Statute requires that crimes against humanity must be "committed as part of a widespread or systematic attack" whereas the PTC-I focused only on the systematic dimension.<sup>65</sup> The Appeals Chamber went further, establishing that PTC-I had blurred the distinction between the jurisdictional requirements contained in the chapeau elements for war crimes and crimes against humanity and the admissibility procedure:

*"in requiring conduct that is either systematic or large-scale, the Pre-Trial Chamber introduces at the admissibility stage of proceedings criteria that effectively blur the*

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<sup>62</sup> Stegmiller (n 4).

<sup>63</sup> Arrest Warrant Appeal Judgment: Lubanga and Ntaganda (n 36) [56-58]

<sup>64</sup> Ibid [82].

<sup>65</sup> Ibid [69].

*distinction between the jurisdictional requirements for war crimes and crimes against humanity that were adopted when defining the crimes that fall within the jurisdiction of the Court. [...] Indeed, it would be inconsistent with article 8 (1) of the Statute if a war crime that was not part of a plan or policy of a large-scale commission could not, under any circumstances, be brought before the International Criminal Court because of the gravity requirement of article 17 (1) (d) of the Statute.”<sup>66</sup>*

## **2.5. The Gravity Factor of ‘Impact’ Should Not Include ‘Social Alarm Caused to the International Community’**

The second (erroneous) factor of gravity that led to PTC-I dismissing the first Ntaganda arrest-warrant was based in the Chambers interpretation of the impact of the alleged conduct, which they described as the ‘social alarm caused to the international community.’<sup>67</sup> Adopting a contextual interpretation, the PTC considered that due consideration should be given to the notion of social alarm due to the current thematic vogue within the international community against the practice of enlisting and conscripting children into armed groups.<sup>68</sup> Despite its self-confessed ‘contextual interpretation’ the decision gave no reason for the applicability of ‘social alarm’ and failed to identify legal sources that supported its conclusion that the offence caused to the international community should influence the decision to arrest a person.<sup>69</sup> The Appeals Chamber rejected the criterion of ‘social alarm’ as a subjective factor that distorts the careful selection of crimes listed in the Statute, opening the Court to influence of subjective and contingent reactions to crimes.<sup>70</sup>

While the Appeals Chamber rejected each of the tests put forward by the PTC, describing them as inconsistent with the Statute and a distortion of the requirements of jurisdiction and

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<sup>66</sup> Ibid [70-71].

<sup>67</sup> *Situation on the Democratic Republic of Congo in the case of the Prosecutor v Bosco Ntaganda, Decision on the Prosecution Application for a Warrant of Arrest (First Warrant of Arrest Decision: Ntaganda)* [2006] ICC Pre-Trial Chamber I ICC-01/04-02/06-I-US-Exp-tEN; and Redacted version, 6 March 2007, ICC-01/04-02/06-1-tENG-Red, 22 August 2006 [64].

<sup>68</sup> Ibid [46].

<sup>69</sup> The Prosecutor argued that social alarm is absent from the Statute and depends heavily on subjective and contingent reactions to crimes. See *Arrest Warrant Appeal Judgment: Lubanga and Ntaganda* (n 36) [72] quoting the Prosecutor’s Supporting Document [49]. This reasoning was also criticized as being inconsistent with the purpose of the Court to end impunity, as social alarm does not engage with the objective features such as mens rea and actus rea of the conduct. See Sa Couto and Cleary (n 4) 814.

<sup>70</sup> *Arrest Warrant Appeal Judgment: Lubanga and Ntaganda* (n 36) [72]

admissibility, it did not grant the Prosecutor's request for relief, to identify the correct legal principle in the interpretation of Article 17(1)(d). Instead it simply found that the application of the admissibility criterion was an error of law.<sup>71</sup>

## 2.6. Balancing The Gravity Factors of 'Scale' and 'Impact'

The Prosecutor's case against Bahar Idris Abu Garda (Abu Garda) focused on an intentional attack against African Union Mission Peacekeepers (AMISS Peacekeepers), where 12 peacekeepers were killed, charging the accused with three counts of war crimes of violence to life,<sup>72</sup> intentionally attacking a peacekeeping mission<sup>73</sup> and pillaging<sup>74</sup> and where Abu Garda bore individual criminal responsibility as a co-perpetrator or an indirect perpetrator through his position as the Vice President and General Secretary of the Justice and Equality Movement (JEM). Unlike the 2006 preliminary examination in Iraq where the killing of eight to twelve persons was considered of insufficient gravity, the Prosecutor considered that the intentional killing of twelve peacekeepers, and the attempted killing of eight peacekeepers to be of sufficient gravity.<sup>75</sup>

In an unfortunate choice of words, the Prosecutor sought to establish the gravity of the case through qualitative factors, such as the impact of the attack on the communities reliant on the peacekeepers for humanitarian aid and security: *'The gravity of the crimes is not in the instant case related to the number of casualties but to the quality, as peacekeepers, of the personnel attacked.'*<sup>76</sup> He then continued to establish the impact on the international community, drawing on the International Law Commission Commentary on the Draft Code of Crimes, the Prosecutor continued that intentional attacks against peacekeeping operations *'constitute exceptional serious offences which "strike at the very heart of the international legal system established for the purpose of maintaining international peace and security"'* whereby *'such attacks "constitute violent crimes of exceptionally serious gravity which have*

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<sup>71</sup> Ibid [68, 89].

<sup>72</sup> Article 8(2)(c)(i) and Article 25(3)(a) and (f), Rome Statute (n 9)

<sup>73</sup> Article 8(2)(e)(iii) and Article 25(3)(a), Ibid

<sup>74</sup> Article 8(2)(e)(v) and Article 25(3)(a), Ibid

<sup>75</sup> Notwithstanding the heavily contested status of the AMIS Peacekeeping base and whether it had in fact retained its status as a protected civilian object or had become a legitimate military target, by taking an active part in the hostilities. See *Confirmation of Charges Decision: Abu Garda (n 13)* [60-62]

<sup>76</sup> Request for Warrant of Arrest (Abu Garda) [2008]. para 174

*serious consequences not only for the victims, but also for the international community.”*<sup>77</sup>

Foreseeing the future factor the manner of commission, the Prosecutor also used the size of the attacking forces to establish gravity, whereby he asserted that more than 1,000 members of the armed groups attacked the AMIS Peacekeeping compound, as well as the frequency of attacks on peacekeepers and humanitarian organisations.<sup>78</sup> The PTC accepted the Prosecutor’s submission, finding that the case met the gravity threshold, upon consideration of the range of relevant factors, including the impact that the attack had.

In assessing the gravity threshold, the PTC reinforced its earlier interpretation of the ‘sufficient gravity’ threshold as an additional threshold test to the jurisdictional barrier created by the classification of the crimes of the Statute, concluding that “the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.”<sup>79</sup>

Turning to the relevant factors in the determination of gravity, the PTC returned to Rule 145(1)(c) which relates to the determination of sentencing, to establish what it considered to be useful guidelines for the evaluation of gravity, namely (i) the extent of damage caused, (ii) the harm caused to victims and their families, (iii) the nature of the unlawful behavior and (iv) the means employed to execute the crime.<sup>80</sup> Only one of these factors neatly corresponds to the prosecutor’s adopted factors of gravity – that of the nature of the unlawful behavior, while there is some overlap between the other factors of scale, manner of commission and impact. Notwithstanding the Chamber’s preferred factors of gravity outlined above, they agreed with the Prosecution’s submission that factors of the nature, manner and impact of the [alleged] attack are critical, and noted that factors other than the quantitative scale of victims are relevant to an assessment of gravity, to include qualitative factors.<sup>81</sup>

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<sup>77</sup> Ibid [6], quoting International Law Commission Commentary to Art. 19, Draft Code of Crimes.

<sup>78</sup> Ibid [76].

<sup>79</sup> *Confirmation of Charges Decision: Abu Garda (n 13)* [30].

<sup>80</sup> *Confirmation of Charges Decision: Abu Garda (n 13)* [32].

<sup>81</sup> Ibid [31].

## **2.7. Gravity Factors Should Demonstrate Potential Cases not the General Gravity of a Situation**

The Prosecutor's Request (Request) to open an investigation into the post-election violence in Kenya was the first *proprio motu* action in the history of the ICC: it was submitted on 26 November 2009<sup>82</sup> and accepted by Pre-Trial Chamber on 31 March 2010 (Decision).<sup>83</sup> While the PTC accepted the request, they did so after considerable review of the necessary requirements of the gravity of the crimes analysis at the transitory phase of the Article 15 Request (see section 1.2 above) to reinforce that even at the early phase of inquiry, gravity analysis should distinguish between the gravity of the potential cases that are likely to be the focus of investigation, from the general situation:

*'In this regard, there is interplay between the crimes and the context in which they were committed (the incidents). Thus, the gravity of the crimes will be assessed in the context of their modus operandi.'*<sup>84</sup>

While the PTC Decision pursued this approach, reviewing the materials submitted and subsequently identifying particular incidents according to factors of gravity, the OTP Request provided a very broad, three paragraph description of the general gravity of the post-election violence, before setting out description of four underlying acts of crimes against humanity, while the facts of the acts as well as their legal character often repeated information provided within the generic gravity assessment without identifying specific incidents. This sub-section will review the OTP submission first, followed by the PTC- analysis.

### ***Searching For Gravity: The Preliminary Examination in Kenya***

The four paragraph summary of the gravity threshold lists quantitative and geographical dimensions of the factors of scale of the entire situation, listing between 1,133 to 1,220 civilian murders, the rape or committal of sexual violence against at least 900 women, men and children, more than 350,000 displaced persons and 3,561 acts of causing serious injury,

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<sup>82</sup> Office of the Prosecutor, Request Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Kenya Article 15 Request) [2009] Pre Trial Chamber II ICC-01/09, 26 November 2009.

<sup>83</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Kenya Article 15 Decision) (n 2).

<sup>84</sup> Ibid [61].



which took place in six of Kenya's eight regions, including the country's most populated areas. In addressing the manner of commission, the Request claims that the acts were organized and planned to attack sections of the civilian population, based on 'distinctive ethnic features and/or presumed political affiliation' where perpetrators targeted members of other ethnicities that were minorities within the area<sup>85</sup> and that acts were committed with particular cruelty, instilling check points in order to select victims based on ethnicity, and then attacking them brutally, cutting off body parts, hacking or burning civilians to death, using gang rape, genital mutilation, forced circumcision and penile amputation.<sup>86</sup>

Finally, in seeking to establish *impact*, the Request includes factors ranging from the psychological, medical and physical consequences of the victims and their relatives, to matters of personal, communal and political security and national economic wellbeing, where Kenyan Gross Domestic Product growth rate fell from 7% before the election violence, to 1.7% in the year of the violence.<sup>87</sup> But whilst its analysis is broad, it is largely drawn on generalised expectations, rather than documented impacts. For example, the extreme physical and psychological trauma of the victims of sexual violence committed during the post-election violence is assessed according to standard psychological and physical impacts, rather than effects that have been catalogued or assessed in the context of the post-election violence:

“Victims of sexual violence, who often suffered grave physical injury, suffer from enormous psychological trauma, may have been infected with HIV/AIDS and/or other types of sexually transmissible diseases, are often abandoned by their husbands and/or families and suffer from social stigma.”<sup>88</sup>

Similarly, while the vulnerability of displaced persons, particularly women and children, is raised, as well as the impact of displacement on the each facet of the livelihood of the displaced individuals, families and communities, no specific examples were provided. Turning to the analysis of the Crimes, the Request largely repeats the same facts of the gravity analysis.

## **Murder**

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<sup>85</sup> Kenya Article 15 Request (n 81). [57].

<sup>86</sup> Ibid [58].

<sup>87</sup> Ibid [59] see also Draft Policy Paper on Preliminary Examinations (n 21), 14-21.

<sup>88</sup> Kenya Article 15 Request (n 81) [59]

The Request cites the estimated scale of murders across the country, breaking down the total estimated range of 1,113 to 1,220 to six of Kenya's provinces: the Rift Valley (744), Nyanza province (134), Nairobi (125), Western province (98) Coast (27) Central Province (5). While the Report notes that the most violent attacks within the Rift Valley occurred in the districts of Uasin Gishu, Nauru and Trans Nzoia<sup>89</sup>, it provides no further analysis of factors of gravity in these locations, without giving any direction on the future potential cases that the investigation may pursue. Instead it returns to a generic description of the manner of the commission of the crimes, including diverse and often brutal causes of death 'by burns, arrow shots, blunt object, severe wounds, sharp pointed object, assault, drowning, suffocation injury, stoning, shock, and hanging.'<sup>90</sup>

### **Rape and Sexual Violence**

The statement of facts and analysis of the acts of rape and sexual violence continues in the same generic narrative, describing the patterns of approximately 900 acts of rape or other forms of sexual violence, the request cites the reports of registered rapes from hospitals in Nairobi to indicate an increase in sexual assault during the violence, while noting their expectation of significant under-reporting occurred based on a report into sexual violence of the post election period.<sup>91</sup> Within the description of criminal acts, the report continues to include general practices that while indicating brutality, are not linked to specific locations or attacks. For example the report notes 'numerous incidents of rape and sexual violence' which it supports with descriptions of brutality in their commission, including sexual mutilation by the cutting of vaginas and labia, of penis amputation and circumcision, and gang-rapes or public rapes but it fails to identify locations (even redacted locations). One potential incident indicates that women who had sought refuge in temporary shelters were told to move or expect to be raped, while reports of sexual violence being used as a tool to terrorise communities into leaving their villages with the purpose of 'land-grabbing' from rival ethnic or political groups.<sup>92</sup>

### **Deportation and forcible transfer**

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<sup>89</sup> Ibid [65]

<sup>90</sup> Kenya Article 15 Request (n 81) [94].

<sup>91</sup> Ibid [66].

<sup>92</sup> Ibid [96-98].

Turning to deportation or forcible transfer the Prosecutor recounted the number of forcibly transferred persons to be approximately 350,000, asserting the existence of nearly 200 Internally Displaced Camps in the Rift Valley, Nyanza, Western, Coastal and Central provinces, with around 12,000 Kenyans having crossed the border to seek refuge in Uganda.<sup>93</sup> But apart from characterizing the displacement as part of ethnic and political targeting, organized through the mobilization of organized groups associated to main political parties,<sup>94</sup> the review omits any analysis of the geographical, ethnic or political distribution of individual acts of displacement or to indicate potential incidents against the background of the general patterns of violations.<sup>95</sup>

### **Other inhumane acts**

In summarizing the final category of crimes, ‘other inhumane acts’ the statement of facts recounts the Waki Commission findings, including the estimated number of victims (3,561 people) and the character of the violations committed against them, whereby the majority *‘suffered injuries from sharp pointed objects, blunt objects, soft tissue injury gunshots, arrow shorts, burns, and other assaults.’*<sup>96</sup> The choice of objects used to inflict injury, the brutal manner of the commission of the acts and the intention to cause injury to the physical or mental well being of the victims was also noted in a general sense.<sup>97</sup>

Notwithstanding the PTC’s review of the necessary features of the gravity threshold test, the Chambers nonetheless accepted that the Prosecutor had substantiated the gravity test, for each of the alleged criminal acts of murder<sup>98</sup> rape and sexual violence,<sup>99</sup> forcible displacement,<sup>100</sup> and other inhumane acts.<sup>101</sup> Furthermore the PTC asserted that the factor of scale was *‘justified on the basis of the alleged number of deaths, documented rapes, displaced persons, and acts of injury, as well as the geographical location of these crimes, which appears widespread.’*<sup>102</sup> Turning to consider the manner of the commission of the Crimes, it also accepted the Prosecutor’s submission of the brutality of the commission of the crimes as

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<sup>93</sup> Ibid [69].

<sup>94</sup> Kenya Article 15 Request (n 81) [100].

<sup>95</sup> The estimated figure represents approximately 1% of the population, which at 2008, stood at 37.4 million persons, International Monetary Fund - 2011 World Economic Outlook.

<sup>96</sup> Kenya Article 15 Request (n 81) [100].

<sup>97</sup> Ibid [101].

<sup>98</sup> Kenya Article 15 Decision (n 2) [143]

<sup>99</sup> Ibid. [152]

<sup>100</sup> Ibid. [158]

<sup>101</sup> Ibid. [168]

<sup>102</sup> Ibid. [190-191]

pertinent, but it did so through its preferred medium of the 'means used to execute the violence.'<sup>103</sup> Particular examples that the Chambers highlighted included the manner of the commission of acts of rape, notably forced circumcision and genital amputation, gang rapes, including by a group of over 20 men, cutting of victims and the insertion of crude weapon and other objects in the vagina.<sup>104</sup> The PTC decision also emphasized the importance of corroborating evidence submitted by victim's representatives, in addition to the materials presented by the Prosecutor.<sup>105</sup>

Finally, the *Decision* acknowledged the individual and social impact of rape and forced displacement, noting that the direct victims of rape and sexual violence had reported the contraction of HIV/AIDS, abandonment by their husbands or families due to the social stigma of rape, pregnancy and 'inevitable psychological burdens of helplessness and isolation.'<sup>106</sup> Turning to the impact of forced displacement and the further vulnerability to attack experienced in IDP camps, the Pre Trial Chambers noted the loss of property, homes, legal documents and possessions, coupled with the lack of security in ad hoc camps for IDPs, which 'scarcely provided better security against attacks' where displaced persons could be further victimized through attacks of rapes and sexual violence, but including transactional sex and sexual exploitation. In addition to poor security conditions, the PTC accepted that the act of forced displacement, coupled with the conditions of the IDP camps exacerbated the individual impact of the violence on the victims social and economic situation, notably the absence of access to education for displaced children, poor living conditions and health concerns in IDP camps, including contraction of sexually transmitted diseases following rape within the IDP camps, psychological trauma, stress and depression, abandonment, separation of families, loss of income and businesses.<sup>107</sup>

The second proprio motu investigation request<sup>108</sup> into post-election violence in Ivory Coast adopted the Kenya formula of assessing gravity against the backdrop of a potential case

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<sup>103</sup> Ibid [193]

<sup>104</sup> Ibid [193]

<sup>105</sup> Ibid [196]

<sup>106</sup> Ibid [195]

<sup>107</sup> Kenya Article 15 Decision (n 2) [196]

<sup>108</sup> *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 (Article 15 Decision: Côte d'Ivoire)* [2011] ICC Pre Trial Chamber III ICC-02/11, 03 October 2011.

within the context of a situation.<sup>109</sup> However, its analysis of the persons or groups of persons and the gravity of the crimes was assessed in two confidential annexes, limiting the possibility of identifying emerging practices of the Kenya formula.<sup>110</sup>

## 2.8. The Mali Report: Gravity Against the Backdrop of Potential Cases

Both the 2012 Preliminary Examination Report, and the country specific report on Mali (Mali: Article 53 Report), publicized once the investigation was opened, have provided a more comprehensive and analytical approach to the application of the gravity threshold during preliminary examination, where PTC requests for the potential cases to be shown in relief against the general patterns of crimes committed within the situation.

The 2012 Report identified six alleged crimes committed in a number of different or overlapping incidents that the Prosecutor considers to fall under the jurisdictional parameters of the Court, including three incidents of killings, both of captured armed forces and unarmed civilians, torture and ill-treatment, attacks against religious and historical monuments including of World Cultural Heritage in Timbuktu, pillaging, rape and child recruitment.<sup>111</sup> Three months later, the *Mali: Article 53 Report* (Mali Report) introduced one further underlying act, that of sentencing and the carrying out of executions,<sup>112</sup> relating to incidents that had previously been listed under killings, and considered that with the exception of the recruitment of child soldiers, which required additional information, the Mali Report found that there was a reasonable basis to believe that each of the acts had been committed.

In considering whether national proceedings exist in Mali for any of the alleged crimes referenced, the Report notes that a special administrative commission of inquiry was established in relation to the alleged crimes committed in Anguelhok did not result in judicial proceedings,<sup>113</sup> although other incidents, such as the allegations of torture and enforced disappearances of the Presidential Guard (Regiment of Paratrooper-Commandos or Red Berets) and the killings of Muslim preachers appear to be the subjects of national

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<sup>109</sup> Ibid [55].

<sup>110</sup> Ibid [56]

<sup>111</sup> 'Report on Preliminary Examination Activities 2012' (n 26), paras 171-178

<sup>112</sup> Pursuant to Article 8(2)(c)(iv), Rome Statute (n 9)

<sup>113</sup> ICC Office of the Prosecutor, 'Situation in Mali: Article 53(1) Report' (International Criminal Court, 16 January 2013) 144-148.

investigations.<sup>114</sup> It then moves on to consider the gravity of the incidents, grouping them by underlying acts, with the exception of killings, which it restricts to one incident, the summary executions of Malian Armed Forces (MAF) in Aguelhok on 24 January 2012.

### ***Killings in Anguelhok***

Referred to as the *Aguelhok Incident*, the report notes that reports of the scale of summary executions of MAF range between 70 and 153, with the manner of the killings being particularly alarming, with alleged mutilations, disemboweling, torture, throat slitting and shots to the head. In addressing the nature of the crime, the Mali Report points that there can be no distinction between the gravity of combatants killed hors de combat and the killing of civilians, while the impact of the killings has been recorded as one of the worse single crimes committed due to the manner of the killings.<sup>115</sup>

### ***Punishment***

The second crime, punishment imposed by armed groups in the North, refers to a policy by three armed groups, to impose sentences on civilians and members of the armed forces hors de combat, including executions, amputations, stoning and flogging, without previous judgment pronounced by a regularly constituted court. The Mali Report noted a lack of information on the factors that could help to determine the scale of the alleged crimes, although it noted that the acts appeared to operate according to a policy. Under with *nature of the crimes*, the report includes both the underlying act of passing of sentences and carrying out of executions,<sup>116</sup> as well as violence to life and person to encompass the amputations, stoning and flogging.<sup>117</sup> The manner of punishments listed are reported to have taken place in public, or at a police station, military camp or informal detention site, impacting upon victims and their families who are traumatized and stigmatized in their communities, while also instilling fear within local communities, exacerbated by having often been forced to watch the execution of the punishments.<sup>118</sup>

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<sup>114</sup> Ibid, 138-139

<sup>115</sup> Ibid, 144-148.

<sup>116</sup> Article 8(2)(c)(iv), Rome Statute (n 9)

<sup>117</sup> Article 8(2)(c)(i), Ibid

<sup>118</sup> ICC Office of the Prosecutor, 'Situation in Mali: Article 53(1) Report' (n 112) 149–153.

### ***Destruction of Religious and Historical Sites***

The destruction of religious and historical sites in Timbuktu is one of the most reported violations in the conflict. In addressing the scale of the attacks, the Mali Report notes the targeting of significant numbers of the buildings listed as UNESCO World Heritage sites, including at least nine of 16 mausoleums, two out of three great mosques and two historical monuments. The report turns to the ICRC Commentary on attacks against cultural or spiritual heritage as being intimately associated with the history and culture of the people, to illustrate the grave nature of the attacks, while the manner of the attack, through the use of axes, hatches and picks to destroy parts of the buildings and burning of wooden parts indicate intentional damage, in keeping with the ideology of the perpetrators.<sup>119</sup>

The destruction of cultural heritage in Timbuktu is described as having an impact upon the conscience of humanity, based on the declarations from the African Union and UN Security Council condemning the attacks. Notwithstanding the significance of the international condemnation of the attacks, the Ntaganda Appeals Chamber decision has spoken against the use of subjective factors such as the alarm caused to the international community as a permissible factor to evaluate impact.

### ***Pillaging in Gao and Timbuktu***

Despite apprehension that the Prosecutor's indicative gravity criteria would prioritise crimes against the person, the fourth crime considered to be of sufficient gravity to warrant investigation is pillaging. The scale and manner of pillaging in the cities of Gao and Timbuktu, indicate that systematic looting and destruction of banks, shops, food reserves, places of worship, public buildings, hospitals, schools, offices of humanitarian organisations including the ICRC, and the residences of high level civil servants, Malian security services and economic personalities indicate that the attacks imposed a 'severe' impact on the looted cities and villages. While these incident appear to have passed the OTP's gravity threshold,

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<sup>119</sup> Ibid, 154-160

caution on the linkage between the individual acts of pillage and the common elements of war crimes, namely that they were large scale or committed as part of a plan or policy.

### ***Rape and Sexual Violence in and around Gao and Timbuktu***

Finally, the Mali Report cites between 50 and 100 rapes, following the seizure of northern cities by armed groups, especially in Gao and Timbuktu,<sup>120</sup> is included, qualified in part by the need for further information, given the lack of clarity on the scale of the crimes as well as whether they formed part of a plan or policy or where large scale. In addressing the nature of the crime, the Report cites the Akayesu judgement of the ICTR, to emphasise the bodily and psychological harm that rape causes, while the manner of the commission of the crimes reveals patterns of abduction and sexual assault over a period of 24 hours, usually in abandoned homes, hotels or other buildings, with occasional gang-rapes and frequent racial insults meted out to the victims. The Mali Report *foresees* that these acts would have a '*grave impact on victims, their family members and the local population*'<sup>121</sup> although it does not refer to information verifying this.

## **2.9. Limited Review of the Factors of Gravity: Uganda and Libya**

In contrast to the situations reviewed thus far, the judicial and diplomatic submissions concerning Uganda, Sudan and Libya contain little or no review or contestation of the gravity threshold, by the Prosecutor, by the Pre-Trial Chambers or by the various parties.

The situation in Uganda has targeted six leading members of the Lords Resistance Army (LRA), retaining focus on rebel leaders and not on government forces, the Uganda People's Defence Forces (UPDF) on the bases that the LRA crimes have a higher gravity relative to the alleged criminal acts committed by the UPDF.<sup>122</sup> Yet the investigation phase submissions make little to no reference of scales of gravity between the two groups, leading to some concerns of selectivity bias by the ICC. In his letter notifying the Ugandan authorities that he had decided to open an investigation into crimes committed in northern Uganda, the

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<sup>120</sup> 'Report on Preliminary Examination Activities 2012' (n 26), para 177

<sup>121</sup> ICC Office of the Prosecutor (n 112), 166-170

<sup>122</sup> Sa Couto and Cleary (n 4) 810.



Prosecutor based his analysis on general factors of scale, frequency and brutality of offences committed against the civilian population in the ongoing conflict with involving the LRA. While briefly listing the underlying acts, including murder, torture, mutilation, rape, sexual slavery, child conscription and referring to the devastating impact that the crimes have had on the region, the Prosecutor omitted any analysis of gravity as part of the investigation and admissibility criteria (pursuant to article 53(1) and article 17(1)). Similarly, while Uganda has adopted a specialized division within its High Court, to prosecute lower level perpetrators, the Ugandan Attorney General has invoked the gravity of the alleged crimes of the LRA six as one of three reasons why the ICC remains the more appropriate forum to undertake the trial of the most responsible persons.<sup>123</sup> The factors of gravity were also largely absent from the proprio motu review of the admissibility of the situation by the Pre-Trial Chambers, following the establishment of a national criminal mechanism, the International Crimes Division of the High Court.<sup>124</sup>

Following the Security Council referral of the situation of Libya to the ICC in February 2011, the only public review of the OTP's gravity threshold factors occurred in the Prosecutor's first report to the UN, in May 2011.<sup>125</sup> Subsequently, despite the extensive litigation on the admissibility of the two cases, issues of gravity have not been debated. The Prosecutor's UN Report provided similar generic description of the gravity factors to the Kenya Article 15 Request: beginning with the manner and nature of the crimes, the report highlights the systematic shooting of protestors in multiple locations, which followed the same modus operandi by the Security Forces. In acknowledging acts of persecution and (unspecified) war crimes the Prosecutor appeared satisfied by the appearance or apparent commission of attacks in a number of cities. Turning to scale, the report recounts general efforts to cover up crimes, including the deployment of Security Forces to hospitals had obstructed the ability to determine the precise number of victims, by preventing Doctors from gathering documentation of the dead and injured who had been admitted to hospital. Despite these

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<sup>123</sup> The other two factors being national reconciliation and social rehabilitation and the inability of Uganda to arrest the persons bearing the greatest responsibility. *Letter of the Solicitor General of Uganda to the ICC Government of Uganda ICC-02/04-01/05-329-Conf-AnxD*, 28 May 2004.

<sup>124</sup> The mandate of the ICD restricts the High Court to hearing cases of mid to high-level leaders, due to an amnesty package that excludes lower level perpetrators from criminal prosecution. The first case before the ICD, of Thomas Kwoyelo, was repealed by the Constitutional Court on grounds that the accused was protected by the Amnesty Law. See *Thomas Kwoyelo alias Latoni vs. Uganda, Judgment*, HCT-00-11CD-Case No.02/10, Constitutional Court of Uganda, 22 September 2011

<sup>125</sup> ICC-OTP, '(First) Statement to the United Nations Security Council on the Situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011)'. Paragraphs 15-20.

difficulties, the Report refers to credible reports that between 500 and 700 people died as a result of Security Forces shootings against protesters in February 2011, before quoting estimations of the Libyan Interim National Council (INC) that up to 10,000 people were killed during February and March, with more than 50,000 wounded. Turning to impact, the Prosecutor lists figures compiled by the UN, of the displacement of approximately 535,000 migrant workers, refugees and asylum seekers, and 327,342 Libyans. On this basis, the Prosecutor concluded that a sufficient gravity threshold had been reached to justify the opening of an investigation and no subsequent report to the UN Security Council has referred to gravity.<sup>126</sup>

Within the judicial fora, the factors of gravity have not formed a substantial dimension of any of the pre-trial proceedings before the ICC, including the admissibility challenge, where all parties agreed that the cases at hand were sufficiently grave.<sup>127</sup>

### 3. Factors of the Most Responsible Persons or Groups

The second part of the gravity threshold invokes the degree of criminal responsibility of suspects or perpetrators, by directing investigative and prosecutorial resources towards *those who bear the greatest responsibility* for the crimes that the Court is scrutinizing. This functions as a form of selection criteria, ensuring that cases are not submitted for crimes that

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<sup>126</sup> Prosecutor, (Second) Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), New York, 02 November 2011; Prosecutor, (Third) Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), New York, 16 May 2012; Prosecutor, (Fourth) Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), New York, 07 November 2012; Prosecutor, (Fifth) Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), New York, 08 May 2013; Prosecutor, (Sixth) Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), New York,

<sup>127</sup> The Prosecutor's arrest warrant request made a brief assertion that the case was of sufficient gravity, pursuant to its factors of gravity, to warrant the intervention of the Court, based on a general assessment of the general facts and circumstances of the situation as well as the particular incidents included in redacted Section E(5) of the Request. *Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* [2011] [51–55]. The Government of Libya robustly asserted that they were actively investigating additional incidents and violations to those selected by the prosecutor, including the notorious Abu Selim prison massacre where Al Senussi is suspected of being a direct perpetrator in the killings of more than 1,270 prisoners. While this incident would remain outside the temporal jurisdiction of the ICC, the Government continued to assert that investigative duties were underway for other incidents connected to the UN Security Council referral, including killings or rebels *hors de combat*. *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute relating to Saif Al-Islam Gaddafi (Article 19 Application: Gaddafi)* Government of Libya ICC-01/11-01/11-130-Red, 01 May 2012.

may well have passed the gravity threshold, but where liability is nonetheless attributed to persons that the Court does not consider to be the most responsible. But the identification of ‘the most responsible persons’ contains subjective factors that will often be contested: the debate can often oscillate around the combining of concepts of seniority and notoriety, where the position of the person within any formal or semi-formal hierarchy and any particularly brutal, reprehensible or callous behaviour can be combined to identify different types of most responsible persons.<sup>128</sup> This has resulted in formulas where ‘notorious low-level perpetrators’ can be prosecuted alongside ‘high level organizers, planners and funders’ and both bear the status of ‘most responsible.’<sup>129</sup>

Despite the status of the ICC as a *criminal* court, this criterion is not an explicit or statutory requirement but one that has emerged from practice. An indirect reference to the degree of responsibility of the perpetrator can be inferred from the text of Article 53(2) on the interests of justice consideration during investigation, where the Prosecutor is directed to ‘*consider the role of the alleged perpetrator in the alleged crime*’ as one of the balancing factors of the interests of justice equation. The preamble and Article 1 remains relatively silent on the types or level of perpetrators that the ICC should prioritize: the preamble simply reinforces the determination of the States Parties to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community. Similarly, Article 1 reinforces the power of the Court to ‘*exercise its jurisdiction over persons for the most serious crimes of international concern.*’ Neither the preamble nor Article 1 indicate that the Court should or must prioritise the perpetrators that it exercises jurisdiction over and nor do they indicate the types of perpetrator that should form the focus of the judicial powers of the ICC.

The modes of liability and the permissible defenses contained in Part 3 on General Principles of Law ensure that both direct and indirect perpetrators can be held criminally responsible, as individuals, regardless of their status or hierarchy. The responsibility of commanders and

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<sup>128</sup> See for example, the analysis by Nancy Armoury Combs and Mark Drumbl, concerning the categorization of perpetrators by the ICTR through its completion strategy and the Rwandan Gacaca Courts, according to the ranking or status of the individual as well as their role in the crimes perpetrated. Nancy Armoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford University Press 2007); Mark A Drumbl, ‘Lessons for International Criminal Justice from Rwanda’ [2002] SSRN eLibrary <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=355300](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=355300)> accessed 21 April 2010.

<sup>129</sup> For example the Foča cases before the ICTY, where notorious low level perpetrators such as Kunarac were prosecuted for the rape of Muslim women. Xabier Agirre Aranburu, ‘Prosecuting the Most Responsible for International Crimes: Dilemmas of Definition and Prosecutorial Discretion’ in J Gonzalez (ed), *Protección Internacional de Derechos Humanos y Estado de Derecho* (Grupo Editorial Ibañez 2009).

other superiors over the actions of subordinates under their effective command is clearly codified<sup>130</sup> as are the conditions that establish the irrelevance of superior orders and prescription of law<sup>131</sup> demonstrating that the Court should have no preference for the status of the perpetrator or their position within an organization that falls under the jurisdiction of the ICC. This is further reinforced by the irrelevance of official capacity, where Article 27 clearly establishes that:

*'The Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility.'*

As a categorical removal of official immunities, Article 27 does not give additional weight or emphasis to persons who hold an official capacity, it merely rejects any immunity that they may try to claim.<sup>132</sup>

The Statute is also quite categorical in its inclusion of multiple forms of liability, covering principal perpetrators through committing or attempting, as well as indirect modes of liability, including ordering, soliciting or inducing, aiding or abetting, providing the means for the commission of the crime as well as the more contentious modes of common purpose, or the specific incitement to others to commit genocide. The codification of multiple varieties of indirect liabilities helps to reinforce the plurality of perpetrators that the Court is empowered to prosecute and does not provide any weighting or preference to any level of liability or position of the perpetrator.

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<sup>130</sup> Article 28, Rome Statute (n 9). For example, Alberta Arnold and Otto Triffterer, 'Article 28: Responsibility of Commanders and Other Superiors' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed, Beck 2008); Kai Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the "most Responsible"' in Andre Nollkaemper and Harmen van der Wilt (eds), *System criminality in international law* (Cambridge University Press 2009).

<sup>131</sup> Article 33, Rome Statute (n 9)

<sup>132</sup> See Kenya challenges over immunity and the routes adopted to circumvent the irrelevance of the official capacity of the President and Prime Minister. While the amendment to Rule 134 of the Rules of Procedure and Evidence at the 12<sup>th</sup> Assembly of States Parties, to allow both video testimony from outside the seat of the Court and the excusal from presence at trial for extraordinary public duties of accused persons does weaken the authority of the Court, it does not alter the force of Article 27. See Amendments to the Rules of Procedure and Evidence, Resolution ICC-ASP/12/Res.7, Adopted at the 12th plenary meeting, on 27 November 2013, by consensus.

Some indicators of the role of the perpetrator may be discernable from Article 78 on the determination of sentence, where the Court is directed to take into consideration factors such as the gravity of the crime and the individual circumstances of the convicted person. These factors are supplemented by Rule 145, which includes factors of aggravation that may be relevant to the determination of the level or degree of culpability of the person, for the purpose of selection. While introduced in Section 2.3 above, the aggravating circumstances provide factors governing the status and behaviour of the perpetrator, including the abuse of power or official capacity, particular defencelessness of the victim, particular cruelty, discrimination or multiple victims can be evidenced during the commission of the crime.<sup>133</sup>

The Statutes, amendments and practices of the recent ad-hoc tribunals offer mixed guidance in defining the type of perpetrator that should be the subject of international criminal prosecution, but in general they lean towards the prioritization of those persons who occupy positions of authority and power. The model more comparable to the ICC is that of the Special Court of Sierra Leone (SCSL) whose Statute was enacted after the Rome Statute was concluded. The SCSL Statute gave it power to:

*‘prosecute persons who bear the greatest responsibility [...] including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.’*<sup>134</sup>

Notwithstanding the adjudicatory record of the SCSL or its selection practices, its Statute clearly expressed direction towards those perpetrators who are central to the criminal acts (‘greatest responsibility’) with a preference towards persons in positions of authority (‘those leaders’) on the basis that their actions provided the greatest threats to the establishment of peace. As will be seen in Section 3.3 below, the ICC has refrained from any connections to positions of seniority or leadership, as well as to any peace processes or settlements to conflicts.

The Statute of the Extraordinary Chambers of the Court of Cambodia (ECCC) establishes similar competences over categories of persons who were senior leaders *and* categories of persons that are most responsible:

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<sup>133</sup> Rule 145(2)(b), Rules of Procedure and Evidence 2002 (ICC-ASP/1/3) 94.

<sup>134</sup> Article 1(1), Statute of the Special Court for Sierra Leone 2000 (UN Security Council Resolution 1315).

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*'The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia'*<sup>135</sup>

The phrasing of the provision appears to affirm that the ECCC has jurisdiction over two categories of persons, rather than *'those senior leaders who are most responsible'* although the Chambers has chosen to prioritise the most senior who were also the most responsible, thus adopting a conjunctive application of their competences.<sup>136</sup>

The Statutes of the two adhoc Tribunals for the Former Yugoslavia and Rwanda did not specify the level or category of suspects to be subject to their jurisdiction. The various practices that emerged - the big fish v. little fish strategies of the Prosecutor (also known as 'pyramidal structure'),<sup>137</sup> the ICTY Rules of the Road criteria to regulate the selection of cases between the international and national fora, as well as their completion strategies have served all informed a distinct methodology or criteria for the selection of cases which has been heavily influenced by the status of the perpetrator.<sup>138</sup>

The Completion Strategies of the ICTY and ICTR demanded the transfer of cases and indictments from the international tribunals to the territories of the conflicts, based on categorizations of the level of the crimes and the level of the perpetrators. Resolution 1534 which established the Completion strategy required both Tribunals to review and confirm new indictments, ensuring that they:

*'concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal'*<sup>139</sup>

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<sup>135</sup> Article 1, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea 2004.

<sup>136</sup> See also Aranburu (n 130) 386.

<sup>137</sup> Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. Int. Criminal Justice, 2004, 586-88; Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy*, 2 J. Int. Criminal Justice, 2004, 447-48; José E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 Michigan Law Review, 1998, 2093.

<sup>138</sup> See for example Olympia Bekou, *'Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence'* (2009) 33 Fordham International Law Journal 723; Mohamed M El Zeidy, *'From Primacy to Complementarity and Backwards: (re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals'* (2008) 57 International and Comparative Law Quarterly 403; OSCE Mission to Bosnia and Herzegovina, *'Domestic War Crimes Prosecution: Monitoring and Reporting on Rule 11bis Cases'*.

<sup>139</sup> UN Security Council, *'Resolution 1534'* para 5.

In implementing the resolution, the amended Rule 11 bis of the ICTY specified its referral criteria, which have largely been reflected in the ICC practice, whereby:

*'In determining whether to refer the case [...] the Referral Bench shall [...] consider the gravity of the crimes charged and the level of responsibility of the accused.'*<sup>140</sup>

The level of responsibility of the accused did not follow the same criteria when assessed by the Referral Bench. The Referral Bench requested briefings on whether the responsibility of the accused should be determined conjunctively, by the role that the defendant played in the commission of the offenses *and* their position in the civil or military hierarchy, or as alternates.

In several cases, the stricter, conjunctive approach was adopted<sup>141</sup> leading to praise for allowing *'a clearer determination of the role and position of the accused, providing a more accurate picture on gravity.'*<sup>142</sup> As a consequence of these decisions, low-ranking but more notorious perpetrators such as Radovan Stanković was referred back to jurisdictional States, whereas two second in command leaders, Rašević and Todović were referred back, despite the case of their first in command being retained by the ICTY. In her analysis of the ICTY Referral Bench decisions, Bekou considered that the Bench differentiated *'between planners and actors that execute the will of the planners'* on the basis that the planners are expected to hold a political role that elevates them above the other perpetrators: the combination of an assumed political role and *'increased planning capacity constitutes greater gravity'* than the other actors.<sup>143</sup>

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<sup>140</sup> ICTY, Rule 11 bis (c), Revised 30 Sept 2002, amended 28 July 2004, amended 11 Feb 2005

<sup>141</sup> *The Prosecutor v Janković, Decision on Referral Under Rule 11 bis* ICTY Referral Bench IT-96-23/2 'Foča', 22 July 2005; *Prosecutor v Ljubičić, Decision for Further Information in the Context of the Prosecutor's Motion Under Rule 11 bis* ICTY Referral Bench IT-00-41-PT, 'Lašva Valley', 05 September 2005; *Prosecutor v Todović & Rašević, Decision on Referral of Case Under Rule 11 bis with Confidential Annexes I and II* ICTY Referral Bench IT-97-25/1 'Foča', 08 July 2005; *Prosecutor v Stanković, Decision on Referral of Case Under Rule 11 bis* ICTY Referral Bench IT-96-23/2-PT, 'Foča', 17 May 2005; *Prosecutor v Lukić & Lukić, Decision on Referral of Case Under Rule 11 bis with Confidential Annex and Annex B*, ICTY Referral Bench IT-98-32/1-ARIIbis.1, 'Višegrad', 05 April 2007; *Prosecutor v Lukić, Decision of Milan Lukić's Appeal Regarding Referral* [2007] ICTY Referral Bench IT-96-23/2 'Foča', 22 July 2005; *Prosecutor v Ademi & Norac, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis*, ICTY Referral Bench IT-04-78-PT, 'Medak Pocket', 14 September 2005.

<sup>142</sup> Bekou (n 137) 746.

<sup>143</sup> *Ibid*, 747

The ICTR referral criteria is less helpful for the purposes of identifying factors of the most responsible persons. Unlike the ICTY, the ICTR omits the referral criteria of gravity and the level of responsibility, instead requiring only that referral be determined by fair trial and sentencing features of Rwandan national law rather than by the features of the indictment:

*'In determining whether to refer the case [...] the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.'*<sup>144</sup>

Despite the absence of gravity criteria in the referral process, the national system in Rwanda, established a procedure for forum allocation of core international crimes cases, based on the seniority of the perpetrator as well as the gravity of the alleged crimes. The High Court retained jurisdiction over the most senior perpetrators of genocide and crimes against humanity, which includes planners, organisers, instigators and supervisors of the genocide, leaders of political parties, armies, religious denominations or militias, well known or zealous perpetrators, and persons accused of committing rape or sexual torture.<sup>145</sup> The Gacaca Courts would adjudicate over all remaining alleged perpetrators of genocide and crimes against humanity,<sup>146</sup> where its Sector Courts prosecute cases of murder, torture and dehumanising behaviour through direct perpetration, attempt, aiding and acting as an accomplice and its Cell Courts prosecute those responsible for property related offences.<sup>147</sup>

The most obvious difference between the ICTY/R Completion Strategies is that the Rule 11bis referral process was designed to disperse cases from the international tribunals to their national counterparts, where selection according to the seniority or role of the perpetrator (or indeed the gravity of the crimes) is used simply to identify and then allocate jurisdiction, rather than to distinguish between those that will be criminally prosecuted and those that will not. It has been alleged that the Rule 11 bis formula and practice has found its equivalent in the principle of complementarity before the ICC, notably in the sharing of jurisdiction<sup>148</sup> and

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<sup>144</sup> Rule 11 bis, (c) ICTR Rules of Evidence and Procedure

<sup>145</sup> Rwanda, Law on the Organisation and Pursuits of Crimes against Humanity, 1996.

<sup>146</sup> Where the defendant confesses to the conduct of criminal acts with the intent to commit genocide or crimes against humanity .Article 1 and 2, Gacaca Law, revised 2008.

<sup>147</sup> Category 2, Article 51 Gacaca Law.

<sup>148</sup> Bekou (n 137) 731.



yet the criteria for selection that has emerged from the ICTY Referral bench practice, as well as the rules that established it have been rejected by the ICC Chambers.<sup>149</sup>

### 3.1. OTP Policy: Shifting Sands

Before turning to the ICC jurisprudence governing the selection of cases according to the most responsible persons, it is instructive to consider the approaches taken by the Office of the Prosecutor, not least as the ICTY Rule 11bis practice appears to have heavily informed its early policy. During the first decade of its operation, the targeting of *'those who bear the greatest responsibility'*<sup>150</sup> was primarily defined as *'leaders who bear most responsibility for the crimes.'*<sup>151</sup> The hierarchical status of the alleged perpetrators<sup>152</sup> was a paramount factor in determining who bore the greatest responsibility, whereby the Prosecutor would focus investigations on the *'highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.'*<sup>153</sup> The early OTP policy did not exclude those lower down the chain of command from consideration, but included them primarily where they had a strategic value for the whole case.<sup>154</sup> In 2010, the relevance of lower level perpetrators as amongst those most responsible, was acknowledged, where they bore liability for particularly serious or notorious acts.<sup>155</sup> Justified in terms of the limited resources of the Court, the OTP sought to balance this selection criterion with the development of positive complementarity, where it would continue to encourage national prosecutions for 'lower ranking' perpetrators, in order to reduce the impunity gap of any given conflict or atrocity.<sup>156</sup>

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<sup>149</sup> See 4.2 below, First Warrant of Arrest Decision: Ntaganda (n 66) [80]

<sup>150</sup> Regulation 49(2)(c) requires the Prosecutor to describe the persons or groups of persons involved when issuing a request to open a proprio motu investigation, where those persons identified should not be peripheral perpetrators, but *those who bear the greatest responsibility*. ICC Office of the Prosecutor, 'Policy Paper: Issues, 2003' (n 22) 7; ICC Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (International Criminal Court 2003) Informal Expert Paper; ICC Office of the Prosecutor, 'Report on Prosecutorial Strategy' (International Criminal Court 2006) para 2b; ICC Office of the Prosecutor, 'Prosecutorial Strategy 2009-2012' (International Criminal Court 2010) para 19.

<sup>151</sup> ICC Office of the Prosecutor, 'Policy Paper: Issues, 2003' (n 22) 3.

<sup>152</sup> ICC Office of the Prosecutor, 'Policy Paper on the Interests of Justice' (International Criminal Court 2007).

<sup>153</sup> ICC Office of the Prosecutor, 'Prosecutorial Strategy 2009-2012' (n 153) 19.

<sup>154</sup> Ibid.

<sup>155</sup> ICC Office of the Prosecutor, 'Policy Paper on the Interests of Justice' (n 151).

<sup>156</sup> 'Paper on Some Policy Issues before the Office of the Prosecutor' (n 22), 3, 7; Fourth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005) (14 December 2006); ICC Office of the Prosecutor, 'Prosecutorial Strategy 2009-2012' (n 153) 19.

Following review of the effectiveness of this 'leader focused' approach and coupled with significant evidentiary failures in several cases pursued by the Prosecutor,<sup>157</sup> the subsequent Strategic Plan of the OTP revised the emphasis on top-level leaders.<sup>158</sup> Instead of targeting only those in positions of leadership, the OTP has expanded its attention to '*encompass mid or high-level perpetrators, or even particularly notorious lower level perpetrators*' as part of a strategy to '*gradually build upwards*' in order to reach those most responsible for the most serious crimes.<sup>159</sup> In doing so, the OTP has recognised that the increasing evidentiary standards that occur in the transition from investigation to a case, requires a diversification of evidence categories, in order to demonstrate the often complex structures that are necessary to prove direct or indirect liability of those in leadership positions.<sup>160</sup> Implicitly, it has also broadened the conceptual or normative understanding of those who bear the greatest responsibility, by expanding its investigative attention to include notorious low-level perpetrators as well as mid to high level perpetrators.

### **3.2. Rejection of the Ad-Hoc Tribunal's Conjunctive Formula Of Seniority And Responsibility**

In one of the early rulings of the Court, the Appeals Chamber ruled strongly against the conjunctive formula of the level or position of the perpetrator and their role in the commission of the crimes that gained popularity in the ICTY Rule 11bis cases and within the OTP.<sup>161</sup> Their judgment emerged following the Pre-Trial decision not to issue the warrant of arrest of Ntaganda on the basis that he could not be considered amongst the most senior leaders of the UPC/FPLC as he did not bear a sufficient role on the decision making policies and practices, nor did he have autonomy to change or prevent such policies or practices.<sup>162</sup>

The Pre-Trial Chamber had rejected the arrest warrant request for Ntaganda on three erroneous grounds of scale (see section 3.4 above), impact (see section 3.5 above) that the accused persons must '*fall within the category of most senior leaders suspected of being most*

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<sup>157</sup> Kenya cases- footnotes to confirmation of charges rejections and withdrawal of charges.

<sup>158</sup> Although it had earlier argued that the 'institutional design' of the ICC generated the '*prospect of accountability for those suspected of bearing the greatest responsibility for the most serious crimes*' through recourse to the Preamble. See 'Draft Policy Paper on Preliminary Examinations' (n 21), para 22.

<sup>159</sup> ICC Office of the Prosecutor, 'Prosecutorial Strategy 2009-2012' (n 149) 4, 9, 22.

<sup>160</sup> *Ibid*, 19

<sup>161</sup> Arrest Warrant Appeal Judgment: Lubanga and Ntaganda (n 36) [72-81].

<sup>162</sup> First Warrant of Arrest Decision: Ntaganda (n 66) [87]

responsible' whereby two factors must be affirmatively answered, in a manner reminiscent of the ICTY Referral Bench:

*“(1) the role played by the relevant persons through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large scale crimes [...] and*

*(2) the role played by such State entities, organisations or armed groups in the overall commission of crimes.*<sup>163</sup>

Within this framework, three additional factors would need to be met: the suspect must be one of the most senior leaders, the role that the suspect played when the organization to which they belonged committed the crimes and the role of the suspect's organization in the commission of the crimes.<sup>164</sup>

In doing so, the PTC sought to maximize the Court's deterrent effect by focusing only on the most senior leaders, arguing that it is only the most senior leaders *'who can most effectively prevent or stop the commission of those crimes.'*<sup>165</sup> Relying heavily on the rules of the adhoc Tribunals which govern the selection of the most senior persons bearing the greatest responsibility, the PTC adoption of a teleological interpretation was squarely rejected<sup>166</sup> and the reliance on the adhoc tribunals was declared to be flawed due to the particular circumstances whereby the Ad hoc tribunal adopted narrow selection criteria for suspects.<sup>167</sup> The Appeals Chamber correctly established that the teleological conclusion conflicted with a contextual interpretation of the Statute, by contradicting provisions of the Statute that establish the irrelevance of superior orders and the irrelevance of official capacity<sup>168</sup> (**see section 4 above**). The Appeals Chamber continued by referencing the Rome Statute Preamble, which uses the prefix of seriousness only in the context of crimes ('the most serious crimes') and not perpetrators ('perpetrators' and 'those responsible') to assert that a

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<sup>163</sup> Ibid [64].

<sup>164</sup> Ibid [52-53].

<sup>165</sup> Ibid [54].

<sup>166</sup> Ibid [78].

<sup>167</sup> Due to the context in which the ICTY and ICTR Rules on the most senior leaders bearing the greatest responsibility' was adopted (i.e. the Completion Strategy). Ibid [80].

<sup>168</sup> Articles 33 and 27(1), Rome Statute (n 9).

cumulative construction of responsibility of the perpetrator would generate an intolerable impunity gap.<sup>169</sup>

More significantly, the Judgment questioned the deterrent effect that would be generated by focusing exclusively on high-ranking leaders by actively excluding all those below this threshold. Rallying against what the Appeals Judges considered to be an excessively formalistic criteria, they argued that a more logical assumption that the deterrent effect will be at its highest where no category of perpetrator is excluded from being brought before the Court. When transcribed to the national sphere, this will require considerably more nuance than the model adopted by the Ad hoc Tribunals and that sought by the PTC.<sup>170</sup>

### **3.3. All Modes of Liability Can Satisfy the Gravity Factor of the Most Responsible Person**

The choice of liability has also been disputed before the Court in the context of the gravity threshold and determinations of the most responsible person. This unfolded in the second case of the Kenya situation, following the decision of PTC-II to accept the alternative mode of liability for the Ali, of having '*contributed to a crime committed by a group of persons*'<sup>171</sup> in its *Decision to Request Surrender* of Muthuara, Kenyatta and Ali.

The defence team of Ali challenged the gravity threshold of the charges during the confirmation of charges hearing, arguing that '*there is substantial doubt as to whether inaction can, as a matter of law, result in liability and rise to the sufficient level of gravity.*'<sup>172</sup> To substantiate their argument, the Defence relied on the discredited framework for gravity articulated in Ntaganda (see 3.2 above), in order to establish that Ali was not one of the most senior leaders and that the deliberate failure to act by the Kenyan Police (of

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<sup>169</sup> Arrest Warrant Appeal Judgment: Lubanga and Ntaganda (n 36) [78-80].

<sup>170</sup> Ibid, [73-79]

<sup>171</sup> In the Request to Surrender, the Prosecutor alleged that Ali, along with Muthuara and Kenyatta had acted either as indirect co-perpetrators or as contributors in the alternative, for each of the five charges. In the *Decision*, the PTC judges considered that the Prosecutor had included insufficient material to hold Ali responsible for acting as an indirect co-perpetrator. See *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Pre Trial Chamber II ICC-01/09-02/11-01, 08 March 2011 [46-48].

<sup>172</sup> *Situation in the Republic of Kenya in the case of the Prosecutor v Francis Kirimi Muthuara, Uhuru Muigai Kenyatta and Mohammed Hussein Ali 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'* [2012] ICC Pre-Trial Chamber II ICC-01/09-02/11, 23 January 2012 [63].

whom Ali was in charge) was not *'systematic or large-scale'*.<sup>173</sup> Furthermore, they sought to declare that the charges against Ali were of insufficient gravity because he had not been accused of being a principal or direct perpetrator, clearly ignoring the liabilities that allow for indirect perpetration. While the PTC rejected the Defence's choice of gravity test, they nonetheless considered the substance of the arguments, which it identified as (i) that an alleged omission should fail to reach the gravity threshold and (ii) that only principal or direct perpetration fulfills the gravity test.

The PTC rejected the argument of alleged omission as untenable on two bases, first that the Statute provides for the liability of omission and to restrict the Statute for the purpose of gravity would contradict the object and purpose of the Court, and second, that the Prosecutor had clearly alleged that Ali had contributed towards the five acts by taking positive steps to ensure that the Kenyan Police remained inactive, during and for the purpose of the commission of the crimes, rather than having omitted to act.<sup>174</sup> The PTC also found the argument that only principal or direct perpetrators are of sufficient gravity to be legally unfounded, as it would *'deprive article 25(3)(d) of the Statute of any meaning'*.<sup>175</sup>

Having rejected the Defence arguments on the parameters of the most responsible persons, as untenable and legally unfounded, the PTC considered the gravity of the five charges that Ali was charged with, considering that the *'numerous deaths and brutal injuries, massive displacement and sexual violence'* that was *'allegedly committed in two locations over the course of a number of days'* were committed in a manner that *'featured particular brutality, such as beheading victims and also burning victims alive'* and thereby clearly satisfied the gravity threshold of Article 17(1)(d).<sup>176</sup> The PTC ultimately declined to confirm the charges against Ali, on the basis of insufficient evidence, but its evaluation of the factor of the most responsible persons in the context of the gravity threshold has helped to confirm the applicability of indirect forms of perpetration and provide distance from the faulted PTC decision in Lubanga.

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<sup>173</sup> Ibid [65]

<sup>174</sup> Ibid [46]

<sup>175</sup> Ibid [47]

<sup>176</sup> Ibid [49-50]

### **3.4. Identification of the Groups of Persons Likely to be the Object of Investigations During Preliminary Examination**

The Prosecutor has not always explicitly analysed the potential perpetrators or perpetrator groups in the context of gravity during preliminary examination. This has led to various reprimands by the Pre-Trial Chambers, who, notably in the Kenya cases, sought to insist that the form of preliminary examinations must also be shaped by the likely perpetrators or perpetrator groups, rather than the Prosecutor's earlier prioritization of the crimes alone.

In the Prosecutor's request to open an investigation into the post-election violence in Kenya, the submission considered that the likely persons or groups to form the basis of an investigation could be '*gangs of young men armed with traditional weapons*' as the main groups of direct perpetrators, while referring to the list of suspects compiled by the Waki Commission to infer that '*persons in positions of power appear to have been involved in the organization, enticement and/or financing of violence targeting specific groups.*'<sup>177</sup> In authorizing the investigation, Pre Trial Chamber II referred to reports by the UNHCHR and Human Rights Watch,<sup>178</sup> to characterize those most responsible for the organization or funding of the attacks as leaders, businessmen and politicians.<sup>179</sup> The PTC went on to express its opinion that admissibility assessments of actual or potential cases cannot be conducted in the abstract, but require the parameters of potential crimes and suspects:

*In this respect, the Chamber fails to comprehend how the Prosecutor can determine whether a case "would be admissible", without preliminarily knowing the type of groups of persons or incidents (involving the commission of crimes falling within the jurisdiction of the Court), or both, likely to shape his future case(s).*<sup>180</sup>

While the Chambers went on to confirm the Request, it expressed its view that Article 15 Requests must include:

*'(i) the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s);'*<sup>181</sup>

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<sup>177</sup> Request Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Kenya Article 15 Request) (n 81) [74-75]

<sup>178</sup> Human Rights Watch (HRW), "From Ballots to Bullets", March 2008

<sup>179</sup> Kenya Article 15 Decision (n 2) [123]

<sup>180</sup> Ibid [49]

<sup>181</sup> Ibid [59]

but that the identification of groups or persons likely to form the object of the investigation should consist of a generic assessment, that is '*general in nature and compatible with the pre-investigative stage into a situation.*'<sup>182</sup> In assessing the alleged crimes, an 'interplay' between the crimes and the context of their commission exists which the Chambers have decided to assess in the context of their *modus operandi*.<sup>183</sup>

The views of the PTC were largely incorporated into the subsequent Article 15 Request, into the post election violence in the Ivory Coast. In contrast to the Kenya Request, the Ivory Coast Request identified various entities and command structures within the state and military as potential perpetrators, including defence and security forces, battalions of the elite Service Personnel of the then national army, marines in the navy and the overall command by the Minister of Defence.<sup>184</sup> The OTP also identified the Minister of Interior (as a superior with respect to the police) and the Presidential Security Group. The Request refers to Confidential Annex 1B, which the Request and Decision describe as containing a list of potential suspects, including assignations of those bearing greatest responsibility. In its analysis of the confidential materials, the PTC referred to the Prosecutor's submission that the individuals likely to be the focus of future investigations would be '*high-ranking political and military figures.*'<sup>185</sup> These details, combined with the crimes including murder, rape and enforced disappearance that were alleged to have been committed, satisfied the PTC that the '*criterion of gravity in relation to these potential cases is thus met.*'<sup>186</sup>

Finally, the recent communication to the prosecutor concerning allegations of war crimes committed by British forces in Iraq (**see Section 3.3 above**) demonstrates the influence and absorption of the PTC requirements by those seeking to trigger the Prosecutor into action. The ECCHR-PIL communication identifies two groups of responsible persons,<sup>187</sup> namely groups, bodies and commanders of the British military and representatives of the civil service as well as government ministers.<sup>188</sup> From its analysis of the forms of liability under the Rome Statute, the Communication draws on public information sources to establish the command

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<sup>182</sup> Kenya Article 15 Decision (n 2) [60]

<sup>183</sup> Ibid. [61]

<sup>184</sup> Kenya Article 15 Request (n 81) [70].

<sup>185</sup> Article 15 Decision: Côte d'Ivoire (n 2) [205]

<sup>186</sup> Ibid.

<sup>187</sup> Referring to Regulation 49(2)(c) which comes into effect during the investigative phase.

<sup>188</sup> PIL Communication, page 158

structures of the British military and civilian supervisors, from which it attempts to demonstrate that individual criminal responsibility as established under the Statute, can reasonably be traced to named civilian superiors<sup>189</sup> and heads of various military units that they consider as persons bearing the greatest responsibility. Furthermore, the Communication asserts that the status of the most responsible persons places them under *'positions of moral leadership and authority, which carry with them the responsibility of ensuring respect for domestic and international laws.'*<sup>190</sup>

#### **4. The Effects of ICC Case Selection on Admissibility Procedures and Positive Complementarity**

While the selection of cases by the ICC is intended to limit the Court from the pursuit of *'peripheral cases'* its effect on complementarity models, including its positive component is significant. As the two core criteria of ICC case selection, the concepts of gravity and the most responsible persons will dominate the scope of the cases that appear before the Court to undergo admissibility determinations and will influence the national prosecutorial policies of any States that seek to retain jurisdiction over ICC crimes. This has been overlooked in all of the complementarity models, and yet the practice of case selection by the ICC will dominate admissibility, creating a threshold of the specific incidents and alleged perpetrators that are most likely to trigger the ICC's jurisdiction. Those above the threshold will need to be prosecuted by the State, or alternatively by the ICC, while many incidents and suspects will fall below the threshold and are therefore unlikely to form the object of ICC investigation or prosecution.

Despite the mixed record of case selection by the ICC, during preliminary examination and in the transition to investigation and case, it is clear that the ICC system of justice will be heavily shaped by case selection and the resource constraints of the ICC. This is an operational reality of the ICC that requires a choice to be made over which of the crimes within the ICC's jurisdiction should form the object of any ICC procedure. The Chambers have made it clear that peripheral cases, crimes or perpetrators should not take up the

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<sup>189</sup> including the serving Secretaries of State for Defence during the period (Geoffrey Hoon, John Reid, Des Browne and John Hutton) and Ministers of State for Service Personnel (Adam Ingram and Bob Ainsworth). See ECCHR & PIL: Iraq Communication, 186

<sup>190</sup> ECCHR & PIL: Iraq Communication, 209



resources of the ICC and furthermore, that the exclusion of minor cases, or cases that are not central or emblematic should begin within the preliminary examination, where gravity should be assessed against the backdrop of potential cases. One plausible outcome of case selection by the ICC is to incubate a threshold for criminal prosecution, where cases above the threshold are fast-tracked towards criminal sanction, while those below the threshold can be subjected to the panoply of alternative or transitional justice mechanisms.

The early decisions of the ICC have gone some way in helping to establish this threshold: first the Court has been able to dispel some of the widely repeated criticisms of case selection, the most common of which is that every violation of the Rome Statute should undergo *criminal* investigation, prosecution and adjudication, and that the de-selection of cases or incidents from the punitive process amounts to a denial of justice to victims and the gift of impunity to their perpetrators. In these narratives, case selection has been portrayed as an antagonism to justice and a companion of impunity, driven by a tacit assumption that criminal justice is the superlative, or only option to provide accountability for all violations. By focusing on the ‘de-selected’ crimes and perpetrators, the purpose of case selection is obscured, which is the punishment of *selected* perpetrators of gross violations by a particular mechanism. This clarification opens up a breadth of possibilities familiar to transitional justice mechanisms, many of which are supported by international human rights bodies and which form the corpus of the rapid internationalisation of transitional justice. Instead of being seen as the only remedy available to victims, criminal justice, either at the national or international realm can be seen as one component of an inclusive, rather than exclusive justice and accountability process. Case selection, by the ICC and correspondingly, by States, can be better understood as a necessary method for the allocation of accountability mechanisms, particularly so in situations where very high incidences of crime have occurred.

Of course, the criteria upon which case selection occurs – the gravity of the crime (or conduct) and the most responsible persons – are grounded in concepts that reinforce the values of the international community and may contrast to emerging norms or concepts of seriousness or gravity and responsibility. This is often the case when considering victim-led definitions of seriousness and responsibility, where the definitions of both concepts may be underpinned on an entirely opposite rationale, and will continue to raise challenges that must be responded to sensitively and diligently.

Finally, turning to the impact of case selection upon positive complementarity, it is clear that the prevailing conceptualisation of the gravity threshold – of the gravity of the crimes and the responsibility of the perpetrators – will shape the support that States require, in determining an appropriate policy, identifying the quantitative elements of such a policy, allocating resources, identifying the necessary skills required to fulfil such a policy. Several situation States or States under preliminary examination have adopted selection or prioritization strategies, which demonstrate varying models of engagement with the country-focused selection practices of the ICC and other criminal, alternative or transitional mechanisms, while those bodies submitting communications to the ICC have also responded to the emerging practice of the Court. Ensuring that this process is conducted with methodological rigor, with fairness and transparency will continue to challenge and trouble even the most genuine criminal justice institutions and broader criminal justice actors, while it is of utmost relevance to national capacity to operate within the Rome system of justice.

## Chapter 5

### *Willingness of the National Judicial System: Models of Complementarity and Emerging Indicators*

The extent to which States Parties are required to uphold international due process protections over their domestic criminal investigations or prosecutions of ICC crimes, by the International Criminal Court, was widely disputed following the entry into force of the Rome Statute.<sup>1</sup> More recently, expectations or aspirations of an internationally harmonized global system of gold-plated criminal justice have been combusted through methodical doctrinal analysis and legal realism.<sup>2</sup> Instead, the emerging ICC System of Justice limits the jurisdictional authority that the ICC will hold over the fair trial practices of States under its scrutiny, placing it at odds somewhat with regional and international human rights mechanisms and retreating from the expectations of some that the ICC could become a further arbiter of international fair trial obligations. This chapter reviews the due process debate through the sources of applicable law as defined by Article 21, drawing on the recent jurisprudence from the ICC in the admissibility decisions in the cases of *Gaddafi* and *Al Senussi* and ICC policies, in order to identify whether any reliable rules concerning national due process requirements of ICC-scrutinised investigations or cases have emerged. In particular, it finds the overwhelming attention to the scope of the due process standard of Article 17(2) to have been misplaced, overlooking the importance of more foreseeable due process requirements of the admissibility regime, such as the requirement of witness protection schemes to ensure that necessary testimony can be obtained.

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<sup>1</sup> See Introduction, Section 3.1

<sup>2</sup> Enrique Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice"?' (2005) 18 *Leiden Journal of International Law* 829; Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 255; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd ed, Cambridge University Press 2010); Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67.

## **1. The Principles of Due Process Recognised by International Law and Consistency with Internationally Recognised Human Rights**

The textual basis for ICC scrutiny over the protections of participants under national accountability mechanisms find their origins in the issues of admissibility of article 17(2) which instructs the judges to have regard to due process, and in the sources of applicable law and in the human rights consistency principle of article 21(3). In addition, discreet due process rights can be read into the specific criteria of inapplicability, established in Article 17(3) as will be analysed in Chapter 6. In full the two provisions read as follows:

Article 17(2): '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, as applicable' (emphasis added)

Article 21(3): 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, [...]'<sup>3</sup>

These two provisions have encouraged the development of a seductive 'due process thesis' whereby the Court will have the power to wrest jurisdiction from countries where the rights of the defendant have not been guaranteed or protected. Early writings on the fair trial requirements of States Parties tended to assume that these provisions would require that their national practices adhere to international human rights standards. Mark S. Ellis argued that this mean that '*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 right of defendants*'<sup>4</sup> while others asserted that full adherence to due process rights are essential for legality and legitimacy,<sup>5</sup> that they would be applicable to alternative forms of justice,<sup>6</sup> that the ICC would defer to national criminal justice procedures where they are found to be '*effective and respect basic human rights standards*'<sup>7</sup> or that States may be considered unwilling if their

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<sup>3</sup> Rome Statute of the International Criminal Court (Rome Statute) 1998 (A/CONF183/9).

<sup>4</sup> Mark S Ellis, 'International Criminal Court and Its Implication for Domestic Law and National Capacity Building, The' (2002) 15 Florida Journal of International Law 215, 241.

<sup>5</sup> Jan Kleffner, 'The Impact of Complementarity on National Implementation of Substantive Criminal Law' (2003) 1 Journal of International Criminal Justice 86, 112.

<sup>6</sup> Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 J Int Criminal Justice 695, 713.

<sup>7</sup> Darryl Robinson, 'The Rome Statute and its Impact on National Law' in Antonio Cassese et. al (Eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002). 1866

proceedings *'failed to accord with international due process norms.'*<sup>8</sup> These interpretations are largely based on some sort of direct effect or *ultra-compliance*, whereby the operative parts of the Statute become binding upon States, or through conceptual expansion through their broadly recognized status as codified customary international law.

The hypnotic attraction of the ICC as a criminal court with a strong human rights core was clinically exposed by Kevin Jon Heller, in the game-changing article, *The Shadow Side of Complementarity*. Writing in 2006, Kevin Jon Heller challenged what he described as the *'prevailing scholarly consensus that [...] a State's failure to guarantee a defendant due process makes a case admissible under article 17.'*<sup>9</sup> Instead, Heller argued that the ICC could intervene only when *'its legal proceedings are designed to make a defendant more difficult to convict,'*<sup>10</sup> basing his argument on a largely persuasive textual analysis of Article 17. Further critiques of the Due Process Theory have been loudly publicized by Frederic Mégret, who has successfully attached arguments of legal pluralism to discussions on the effect of the ICC on national due process,<sup>11</sup> while Rob Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurt have asserted the preservation of institutional mandates whereby *'general human rights considerations about the conduct of national proceedings are more properly addressed by human rights bodies.'*<sup>12</sup>

Notwithstanding the seductive qualities of the due process thesis, it is clear that even where Article 17 is filtered by the human rights consistency principle of Article 21(3), the Court does not have unrestricted powers to assert jurisdiction whenever the human rights of suspects, accused persons or victims and witnesses are violated by the State in question, and instead, due process protections must be 'read-in' to the specific requirements of the admissibility test. This section shall review the general due process requirement, while the subsequent sections will consider the effect of the human rights consistency principle on due process considerations (section 1.2 below) before turning to the interpretation by the ICC

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<sup>8</sup> Dawn Yamane Hewett, 'Sudan's Courts and Complementarity in the Face of Darfur' (2006) 31 Yale J. Int'l Law 276, 278.

<sup>9</sup> Heller (n 2) 277.

<sup>10</sup> Ibid. 278.

<sup>11</sup> Frédéric Mégret, 'Too Much of a Good Thing? Implementation and the Uses of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Frédéric Mégret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya The Case for Tolerating Flawed Domestic Trials' (2013) 11 Journal of International Criminal Justice 571.

<sup>12</sup> Cryer and others (n 2) 151.

Pre-Trial Chambers (1.3 below) and the specific factors of the willingness (**section 2-4 below**).

### **1.1. The Due Process Requirement is Part of the Willingness Criteria**

The most convincing dimension of Heller's *Shadow Side* argument is made in his analysis of the limited authority that the principles of international due process can command over admissibility. Through textual and grammatical interpretation, Heller persuasively delineates the influence of due process as a separate criterion or as a dominant factor in the determination of admissibility. Located in the chapeau part of the text, the due process requirement is intended as a subordinate part of the framework through which the exhaustive factors of the willingness criteria should be determined. Heller describes it thus:

*'According to traditional rules of grammar, subordinate clauses depend on independent clauses for their meaning – which means that the chapeau is not separate from the three subparagraphs, but simply explains how the Court should determine whether one or more of the paragraphs are satisfied (namely, with regard to the principles of international due process).'*<sup>13</sup>

As such, the due process requirement forms part of the instructive framework to determine willingness: it is not a disjunctive, or free-standing rule, that exists in addition to the factors of unwillingness or inability, to enable admissibility to be determined through independent assessment of the States adherence to due process principles recognized by international law, but a subordinate clause.<sup>14</sup> Instead, each of the three factors of unwillingness must be assessed in regard of principles of due process recognized by international law: shielding should be determined with regard to international due process, as should unreasonable delays as well as the loss of independence and impartiality.

Although the plain text reading of the value of the due process requirement is unambiguous, the restriction of due process analysis to just three factors of State criminal justice practices – of shielding, undue delay and loss of independence and impartiality – is not in accordance to the due process protections expected of the ICC or of other international criminal tribunals.

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<sup>13</sup> Heller (n 2) 260.

<sup>14</sup> On the conjunctive requirement of 'due process' in determining unwillingness see *Prosecution Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'* [2013] Pre-Trial Chamber I ICC-01/11-01/11-321/Red, 24 April 2013 [32].

But a contextual reading of the Statute is unconvincing in the quest to find a legal basis for the ICC to enforce due process rights on its States Parties.

The ICC Statute explicitly guarantees its suspects, accused persons and convicted persons the procedural protections that are comparable with international and regional human rights treaties and courts. This includes eight pre-trial rights afforded to suspects, covering: (i) the rights of non incrimination, (ii) the prohibition of coercion, duress or threat or torture or any other form of cruel, inhuman or degrading treatment or punishment, as well as arbitrary arrest or detention (iii), (iv) access to an interpreter and to translation into a language that they fully understand, without cost, (v) to be informed about the alleged criminal conduct before questioning, (vi) access to legal assistance of their choice, including the right to be questioned with counsel (vii), and of course the right to remain silent must have been fulfilled (viii).<sup>15</sup> At the trial phase, the ICC protects the rights of the accused, including the rights to be present at trial (i), to conduct the defence in person or through legal assistance of the accused's choosing (ii), to be informed of this right (iii) to have legal assistance assigned by the Court without payment (iv),<sup>16</sup> to be informed about the charge (v), be given sufficient time to prepare the defence (vi), to be tried without undue delay (one of the admissibility factors of unwillingness) (vii), to examine witnesses (viii) and raise defences (ix), to have a competent interpreter (x), to be protected against self-incrimination (xi) and the imposition of a reverse onus (xii) and to make an unsworn statement (xiii).<sup>17</sup> Furthermore, Article 68 establishes the protections of victims and witnesses and their participation in proceedings, establishing the responsibility of the Court to take appropriate measures to protect their safety, physical and psychological well-being, dignity and privacy.

It is clear that the full panoply of due process rights enumerated in the Rome Statute are not intended to be enforced by the ICC when determining the genuine willingness and ability of States, given their location in parts five and six of the Statute, which govern the work of the Court, and the absence of any reference to the applicability of the provisions to national proceedings. They may however, serve to contribute towards the interpretation of the specific factors of unwillingness and ability, through the status of the rights under external sources of

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<sup>15</sup> Article 55(1), *Rome Statute* (n 3).

<sup>16</sup> Article 67(1)(d), *Ibid.*

<sup>17</sup> Article 67(1), *Ibid.*

The International Criminal Court and Positive Complementarity: the Impact of the ICC's Admissibility Law and Practice on Domestic Jurisdictions.

international law,<sup>18</sup> through Article 21, as rules and principles of international law and the human rights consistency principle, although as shall be seen **below**, this has also been heavily qualified.

### **1.1. Applicable International Treaties, Rules and Principles of Due Process**

The parity between the due process protections provided to participants in ICC proceedings are comparable to those established by international and regional human rights treaties and through the rules and principles that have emerged from their case law. This has been championed by human rights NGO's and advocates such as Mark Ellis<sup>19</sup> or Jonathan O'Donahue,<sup>20</sup> to imply or infer that States are therefore required to fulfill the same procedural obligations of the ICC, while early complementarity scholars such as Jan Kleffner<sup>21</sup> and Jo Stigen<sup>22</sup> have used the jurisprudence of international and regional courts to establish applicable rules of due process for the admissibility criteria. There is little to fault with the second approach, where their meticulous review of case law has helped to identify rules and principles of each of the indicators of unwillingness and inability as defined in the Statute.

The interpretive challenges of the first approach are somewhat more problematic.<sup>23</sup> Those advocating for fair trial parity in the ICC's assessment of national proceedings obscure the object and purpose of the due process protections under Parts 5 and 6 of the Statute, which govern the ICC's actions, and the equivalent rules established under international and regional treaties, which govern and provide remedy for States Parties behavior by distinct

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<sup>18</sup> Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005); UN OHCHR, 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers'; 'Article 67: Rights of the Accused', , *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed, Beck 2008); Ximena Medellín Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, vol II (María Galvis Patiño ed, Due Process of Law Foundation 2013); Dovydas Vitkauskas and Grigoriy Dikov, 'Protecting the Right to a Fair Trial under the European Convention on Human Rights' (2012) Council of Europe Human Rights Handbook.

<sup>19</sup> Ellis, 'International Criminal Court and Its Implication for Domestic Law and National Capacity Building, The' (n 4); Mark S Ellis, 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions' 1 Hague Journal on the Rule of Law ( 79).

<sup>20</sup> Jonathan O'Donohue and Sophie Rigney, 'The ICC Must Consider Fair Trial Concerns in Determining Libya's Application to Prosecute Saif Al-Islam Gaddafi Nationally'. EJIL: Talk! Blog of the European Journal of International Law, 11 June 2013

<sup>21</sup> Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (First, Oxford University Press 2008).

<sup>22</sup> Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers 2008).

<sup>23</sup> Mégret (n 11).



legal regimes. In effect, the ICC is assumed to become an external enforcer of States treaty obligations to external bodies, such as the UN Human Rights Committee, the European Court of Human Rights or the Inter-American Court of Human Rights, imposing or ‘encouraging’ state adherence to rules that while shared, are clearly not intended to be imposed by the ICC.

However attractive the dream of a harmonized or homogenous criminal procedure for international crimes may be, the ICC is not a legitimate forum to impose or apply the fair trial rules or jurisprudence of external bodies *ad infinitum*, except where it is directly mandated to do so. As *Cryer et al* have said, human rights bodies rather than the ICC are the legitimate forums to address and redress fair trial violations, while the ICC ‘s interventions based on fair-trial violations (of undue delay etc) are not to redress the harm done, but to attempt to remove the violated accused person for trial before the ICC. Instead, the institutional responsibility of the ICC over persons it has accused of crimes may be a more appropriate avenue for human rights advocates to pursue, which may in turn effect the legal reasoning of the ICC.<sup>24</sup>

Turning to the Adhoc Tribunals, it has oft been considered that the rules and jurisprudence from their trials, as well as their transfer panels could instruct the practice of the ICC. As late as 2009, the former ICTY Prosecutor and Director of the International Centre for Transitional Justice, David Tolbert asserted that the transfer proceedings of the ICTY could provide valuable lessons to the ICC.<sup>25</sup> Yet it is also clear that the formal scrutiny that the ICC is given over the national enforcement of human rights in criminal proceedings of international criminal conduct is markedly weaker. The referral rules under Rule 11 bis of the ICTY and ICTR, as well as the ICTY’s Rules of the Road practice had led many Hague-orientated commentators to advocate for similar standards before the ICC.<sup>26</sup> Instigated through the

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<sup>24</sup> The defence team of *Al Senussi* unsuccessfully raised the principle of non-refoulement as grounds for declaring the case admissible before the ICC, *Defence Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’* Pre-Trial Chamber I, International Criminal Court ICC01/011-01/011-356, 14 June 2013.

<sup>25</sup> David Tolbert and Aleksandar Kontic, ‘The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts and Lessons for the ICC’, *The Emerging Practice of the International Criminal Court*, vol 48 (Martinus Nijhoff 2009).

<sup>26</sup> Article 9(2) ICTY Statute governing the primacy of the ICTY required national jurisdictions to defer cases to the tribunal where it decided this was necessary. The introduction of the ‘Rules of the Road’ in BiH required that national prosecutors submitted their case files to the ICTY Prosecutor to review the charges and evidence before domestic prosecution could proceed, in order to ensure that international standards were met. On the Rules of the Road procedure, see Lilian A. Barria & Steven D. Roper, *Judicial Capacity Building in Bosnia and*

Completion Strategies, Rule 11 bis provided the Transfer Panels of the ICTY and the ICTR with the framework to transfer indicted persons from the jurisdiction of the ICTY to applicable national jurisdictions. Subparagraph (B) established the requirement to reject the transfer of cases to national jurisdictions where fair trial practices could not be guaranteed and where the death penalty could be imposed:<sup>27</sup>

*'The Referral Bench may order such referral [...] after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.'*<sup>28</sup>

The transfer process, as well as the content of the rule is markedly distinct from the admissibility procedure before the ICC. As part of the strategy to close the two ad hoc tribunals, the transfer process establishes conditions under which indicted persons would move from the jurisdiction and due process protections of the ad hoc tribunals to national jurisdictions. As such, Rule 11 bis (B) functions in a similar way to the non-refoulement principle, as a process to ensure that the tribunals did not act in a way that would violate the fundamental rights of *its* indictees. The ICC's admissibility procedure originates from a distinct principle to the transfer process and functions in a markedly different way:

is intended to regulate the movement of cases into the orbit of the ICC, it does not require an indictment in order to be triggered and nor does it require that the indicted person be under the control of the ICC.

## **1.2. The Scope of Internationally Recognised Human Rights and the Interpretation of Due Process**

The human rights consistency principle of Article 21(3), which acts as a final filter to the argumentation of the Court, has commonly been considered by those in favour of ultra-compliance, as a fallback rule that would allow broader due process requirements to inform and influence the admissibility and complementarity practices of the ICC. Given the broad range of sources that the sub-paragraph allows (**see Chapter 2, section 1.4 and 4.4**) as well as the richly populated jurisprudence of international and regional human rights mechanisms concerning due process rules and principles, resort to Article 21(3) offers a great temptation. As with many immediate attractions, the *prima facie* appeal of article 21(3) should be

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*Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY*, Human Rights Review 2007.

<sup>27</sup> Rule 11 bis (B), ICTY Rules of Procedure, IT/32/Rev.44 2009 (IT/32/Rev 44).

<sup>28</sup> Rule 11 bis, *ibid.*

somewhat tempered: it is unconvincing to interpret Article 21(3) as a never-ending supply of **jus cogens rules or emerging human rights standards** that can simply over-ride the cautious wording of the Statute. As the PTC-I has reiterated, Article 21(3) does not overwrite the Statute, but rather that *'prior to undertaking the analysis required by article 21(3) of the Statute, the Chamber **must** a provision, rule or principle that, under article 21(1)(a) to (c) of the Statute, could be applicable to the issue at hand'*<sup>29</sup>

Within the confines of Admissibility, and the particular strictures of the due process requirement, the issue at hand needs to be clearly identified. While Article 21(3) may introduce well-established international rules and principles governing due process as sources that regulate the consistency of the Court's practices with internationally recognised human rights, it does not place them in a higher position of authority over the Statute. In short, international human rights do not trump the somewhat conservative structure of the Statute provisions on admissibility, but it requires that they be applied consistently with international human rights. Jonathan O'Donohue and Sophie Rigney have tried to assert this, arguing that Article 21(3) over-rides the wording of Article 17(2) to require that the ICC assert jurisdiction over States that are, or can be expected to violate or fail to fulfill due process rights, without any connection to the explicit grounds for declaring admissibility.<sup>30</sup> Megret has also considered this use of article 21(3) as an unconvincing leap of logic:

*'[...] the injunction not to violate human rights (nor to read the applicable law as permitting any such violation) is entirely appropriate as it applies to the operation of the Court itself, to apply this provision as a basis for the Court to insist upon admissibility is a considerable stretch. It suggests that the Court's failure to find a case admissible despite the existence of fair trial violations would be, in itself, a violation of human rights, a leap of logic.'*<sup>31</sup>

The expectation that the Court would apply its own rules or standards of practice over States within its jurisdiction is not unrealistic: in terms of the explicit conditions of admissibility, in particular of undue delay, the ICC has accepted arguments that **'the ICC should not impose**

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<sup>29</sup> *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the Practices of Witness Familiarisation and Witness Proofing (Witness-Proofing Decision: Lubanga)* [2006] ICC Pre-Trial Chamber I ICC-01/04-01/06-679, 08 November 2006.

<sup>30</sup> O'Donohue and Rigney (n 20).

<sup>31</sup> Mégrét and Samson (n 11).

*standards beyond its own practices'* even where, in the context of undue delay, it sails perilously close to time periods that its compatriot human rights courts have considered as lengthy or excessive.<sup>32</sup> However, to reinterpret Megret, the issue at hand is not whether the applicable sources of law (including article 21(3)) **permit** the ICC to impose its own due process standards on States, but whether the applicable law permits the ICC to defer jurisdiction in cases where the human rights of suspects of interest to the ICC can reasonably be expected to be violated. The defence team in *Gaddafi* tried unsuccessfully to establish that this was not the case, through the principle of non-refoulement, arguing that the ICC may violate principles of international law including non-refoulement where the declaration of admissibility would expose the accused to a violation of fundamental fair trial rights. They argued that, as Gaddafi was the subject of an ICC arrest warrant, the ICC would '*violate the right of Mr Gaddafi to benefit from the protections enshrined in article 67(1) of the Statute in full equality with other defendants tried before the Court*' if they were to transfer jurisdiction to Libya and furthermore that the act of transferring jurisdiction triggered extradition protections, including the principle of non-refoulement.<sup>33</sup> The Pre-Trial Chambers did not assess this argument in their decision to declare the case admissible, but it can be inferred from the decision to defer the case of *Al Senussi* to national proceedings, that the Chambers were not convinced of its rigor or applicability.

Another, potentially persuasive method to 'read-in' broader fair trial requirements of States under admissibility consideration could be through interpretation of the 'genuineness' standard of national criminal justice activity,<sup>34</sup> although this too has been interpreted as invoking a separate and distinct standard that is independent to that of fairness. In the rough eloquence that typified the statements of the first prosecutor, this distinction was made clear in the context of the Libyan situation, where on a visit to Tripoli, he declared that:

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<sup>32</sup> See the arguments of the Prosecutor in the Gaddafi case and the ensuing analysis in the Pre-Trial Chamber decision *Prosecution response to Libya's Further Submissions on Issues Related to the admissibility of the case against Saif Al-Islam Gaddafi* (Prosecutor's Additional Response to Libya's Further Submissions on Admissibility: Gaddafi) Pre-Trial Chamber I ICC-01/11-01/11-276/Red2, 11 February 2013; *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* [2013] ICC Pre-Trial Chamber I ICC-01/11-01/11, 31 May 2013.

<sup>33</sup> *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 32) [157]; *Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute'* (Defence Observations: Gaddafi Admissibility) Office of Public Defence Counsel ICC-01/11-01/11-190-Corr-Red, 31 July 2012 [51–52].

<sup>34</sup> Heller (n 2).

*'We are not a human rights court. We are not checking the fairness of the proceedings. We are checking the genuineness of the proceedings'*<sup>35</sup>

In their pursuit of fair-trial compliance, Donohue and Rigney, sought to incorporate fair trial rights into the meaning of the adverb 'genuine' thereby elevating the qualities of genuineness above the legal standard of fairness, in opposition to the preferred interpretation of the ICC:

*'Respect and protection of fair trial rights are key objective factors that must be considered in determining whether proceedings are of such a quality that they may be considered "genuine".'*<sup>36</sup>

Rooting the Rome system of justice as one of process, rather than outcome is an eminently attractive proposal for those who believe in the importance of rule of law: Heller himself has explained the 'shadow side' of Article 17 as one which aims to reduce impunity for core international crimes, but which must overlook or remain unmoved by 'impunity of another kind' namely of the violation of defendants rights by States Parties in order to make them easier to convict. It becomes emblematic of the clash of objectives and expectations of the ICC as contained within its preamble and in the minds of those who strive to make it effective, as well as between different international legal bodies, and the absence of coherent and articulate theories that juxtapose the various assumptions of the purpose of the ICC enables the various proponents to continue talking past one another.

### **1.3. National Fair Trial Irregularities Must Constitute an Indicator of Unwillingness or Inability**

The limited case law before the ICC has led to fruitful clarification of the scope of the due process principle. In the *Al Senussi* Admissibility Challenge, the Government of Libya argued that the list of criteria in article 17(2) was exhaustive, with the due process clause being inserted as a further objectivity requirement of the ICC judges scrutiny of the exhaustive criteria, and *'not to ensure that the domestic proceedings accord with a particular*

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<sup>35</sup> Press statement made by the then ICC Prosecutor, Luis Moreno Ocampo in Libya following the UN Security Council Referral, 16 May 2011.

<sup>36</sup> O'Donohue and Rigney (n 20).

*ideal as determined by the ICC.*<sup>37</sup> The Prosecutor argued for a broader interpretation, invoking the object and purpose of the Statute and the human rights consistency principle of Article 21(3) to argue that:

*[o]nly where the national investigation or proceedings lack fundamental procedural rights and guarantees to such a degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3) should the Court consider matters of fairness as a corollary to its admissibility determination.*<sup>38</sup>

The defense argued that the national proceedings involved violations of the fundamental rights of Al Senussi, including undue delays, loss of independence and impartiality of the judiciary, bias which can form part of the Article 17(2) factors but also of due process violations that may not form part of the explicit criteria for unwillingness determinations, such as that the State had failed to provide defence counsel to the accused, that the custody and safety of the accused could not be guaranteed and that the investigations continued to be plagued with procedural irregularities, due to the general incapacity of the national criminal justice system. The defence concluded that the application of article 21(3) must include due process rights in determinations of unwillingness.<sup>39</sup>

In its review of the various submissions, the PTC reiterated that the assessment of admissibility must be conducted with reference to Libyan national laws, but emphasized that such reference will not be made for any or all alleged departures or violations from the national legal framework, but that it will:

*'take into account only those irregularities that may constitute relevant indicators of one or more of the scenarios described in article 17(2) or (3) of the Statute, and that are sufficiently substantiated by the evidence and information placed before the Chamber.*<sup>40</sup>

Although the PTC decision is consistent with the textual analysis that underpins Heller's *Shadow Side thesis*, the Chambers have made clear that it will consider all due process or fair trial issues that directly contribute towards the analysis of the indicators of unwillingness or

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<sup>37</sup> *Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute (Article 19 Application: Al-Senussi)* [2013] Pre Trial Chamber I ICC-01/11-01/11-307(Red2), 02 April 2013 [111].

<sup>38</sup> *Prosecution Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'* (n 14) [180].

<sup>39</sup> *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* [2013] Pre-Trial Chamber I ICC-01/11-01/11-466-Red, 11 October 2013 [180].

<sup>40</sup> *Ibid*, 221.

inability. In acknowledgment of this clarification, which offers something of a middle ground between the restrictive interpretation conducted by Heller or Megret, and the expansive, ultra-compliant methodology adopted by Ellis, O-Donohue and others, this Chapter will now consider each of the indicators of article 17(2) to (3) for actual and predictable irregularities that can support determinations of admissibility. It should of course be recalled that, according to the established ‘same person same conduct’ test that has emerged from Article 17(1), the genuine willingness and ability of States is addressed only once the Court has determined that the State is actively engaged in an investigation or case that overlaps with its own international investigation or case (see Chapter 3).

## 2. Shielding a Person From Criminal Responsibility

As the first of three factors upon which a State can be considered as unwilling, Jo Stigen has described shielding as its core, whereby the remaining criteria of undue delay and loss of independence or impartiality simply offer different mechanisms of measurement, a sentiment that is widely shared.<sup>41</sup> Operationally, the national proceedings or decision must purposefully shield suspects or perpetrators,<sup>42</sup> through an action or series of actions that intend to make it more difficult to try certain persons or to prevent those persons from being held criminally responsible.<sup>43</sup> The dimension of intent requires a qualitative assessment of the criminal justice measures taken by a State, whereby the judicial activities of a State may appear to be *‘fulfilling the letter of the Statute by engaging in an investigation or prosecution, but not the spirit, by in fact having a sham proceeding to shield the person from criminal responsibility.’*<sup>44</sup> In full, it requires that:

*(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;*<sup>45</sup>

The shielding of a person from criminal responsibility within the judicial process clearly violates established **principles of fairness**, although, largely due to its inclusion as part of the

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<sup>41</sup> STIGEN (N 22) 8.

<sup>42</sup> Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 21) 135.

<sup>43</sup> Stahn, ‘Complementarity, Amnesties and Alternative Forms of Justice’ (n 6) 701.

<sup>44</sup> ‘Article 17: Issues of Admissibility’, , *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd ed, Beck 2008).

<sup>45</sup> Article 17(2)(a), *Rome Statute* (n 3).

criteria of unwillingness, it has not been the subject of much debate by those advocating for the due process or mirror thesis. However, the internal rules of the ICC remain silent in the elaboration of possible factors that may constitute shielding and the Court has yet to determine admissibility of a case on the basis of shielding.<sup>46</sup> In this absence, some policy initiatives and doctrinal efforts have been made.<sup>47</sup> Within the Office of the Prosecutor, its *Draft Policy on Preliminary Examinations (2010)* offers the most up-to-date assertion of **eight** indicative factors that inform the OTP's assessment of *shielding* and thereby can be of interest to national criminal justice actors.<sup>48</sup>

### *Indicators of Shielding from the Office of the Prosecutor*

The indicative criterion of the OTP Draft Policy largely overlaps with the list of potential indicators of shielding proposed by Jo Stigen in 2008,<sup>49</sup> where he includes over 25 markers of shielding, derived from review of international case law and standards of the Inter-American Court of Human Rights, the European Court of Human Rights, the UN Human Rights Committee, the Committee on the Elimination of all Forms of Racial Discrimination as well as the UN Declarations of Basic Principles of Justice for Victims of Crimes and Abuse of Power. It is not my intention to repeat or update the scholarly review conducted of these external sources, rules and principles, or to conduct an extensive review of the possible interpretive boundaries of the criteria of shielding. Rather, it is to establish whether the policy indicators of the Office in the Prosecutor and the various pre-trial judicial submissions and decisions of the Court have generated a consistent framework of the minimum required practice of States, which can serve as a guide to national criminal justice actors. In the context of shielding this is a somewhat limited due to the absence of judicial decisions and relative lack of submissions asserting or rebutting the shielding of perpetrators.

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<sup>46</sup> Rule 51 of the Rules of Procedure and Evidence allows the Court to consider information referred to it by the State undergoing admissibility review, detailing its adherence to international recognised norms and procedures for the independent and impartial prosecution of similar conduct, which can ensure that the ICC is furnished with the States legal framework and practices, although Kleffner considers this to offer no more than a rebuttable presumption. See Rules of Procedure and Evidence 2002 (ICC-ASP/1/3) 94; Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 21) 136.

<sup>47</sup> Julio Bacio Terracino, 'National Implementation of ICC Crimes Impact on National Jurisdictions and the ICC' (2007) 5 *Journal of International Criminal Justice* 421; Stigen (n 22) 8.

<sup>48</sup> ICC Office of the Prosecutor, 'Draft Policy Paper on Preliminary Examinations' (International Criminal Court 2010) para 60.

<sup>49</sup> Stigen (n 22) Chapter 8



***Degrees of Responsibility and Seriousness: From the Most Responsible, the Most Serious Crimes to Marginal Perpetrators or Minor Offences***

The first indicator establishes the selection of perpetrators and offences by the State to require comparative assessment of the choice of cases that are active within the national courts. It is a counterpart to the selection of suspects and conduct that underpin the gravity threshold of Article 17(1)(d) whereby the genuineness of the States judicial activity can begin to be determined through its choice of suspects and offences. It also mirrors or forecasts the emerging jurisprudence of the Court, where the PTC have directed the OTP to focus its own investigations on cases that are central and not peripheral to the situation that is under scrutiny.<sup>50</sup>

Its formulation indicates that a positive response would be afforded to States that investigating or prosecuting the most responsible perpetrators for their conduct in the perpetration of the most serious crimes, according to the command theory that underpins the ICC's framework of the most responsible persons. This is in part undermined by the latest Prosecutorial Strategy of the Office of the Prosecutor, whereby a strategic 'pyramid' model of prosecutions could be followed, whereby the ICC Prosecutor may target mid-level or notorious lower level perpetrators in order to build up evidence and established facts that would then enable stronger cases against those that are considered to be *most* responsible.<sup>51</sup>

The formulation of the indicator also appears to include 'partial shielding' where specific perpetrators, including those most responsible, are investigated or prosecuted for clearly minor offences.<sup>52</sup> The gravity threshold test established in article 17(1)(d) is likely to be of importance here following the adoption of the 'same person same conduct' test by the Court. The gravity threshold largely functions to focus the ICC Prosecutor's selection of situations and cases to the most emblematic or grave violations (**see Chapter 5**), which the Pre-Trial Chambers have interpreted as a direction to exclude 'peripheral cases.' The Court thus is

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<sup>50</sup> *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Kenya Article 15 Decision)* [2010] ICC Pre Trial Chamber II ICC-01/09, 31 March 2010 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 (Article 15 Decision: Côte d'Ivoire)* [2011] ICC Pre Trial Chamber III ICC-02/11, 03 October 2011 150.

<sup>51</sup> ICC Office of the Prosecutor, 'OTP Strategic Plan: June 2012-2015' (International Criminal Court 2013).

<sup>52</sup> Stigen (n 22), although this has also been criticized for being a non-essential use of ICC resources which should be directed towards those cases of total impunity.

expected to target the more major or serious offences, rather than minor offences. This becomes relevant at the earlier 'activity' phase of admissibility assessment, whereby the adoption of the 'same person same conduct' test requires that the States selection of offences or conduct largely overlaps with the conduct under scrutiny by the ICC (**see Chapter 3**). A States' pursuit of 'minor offences' in its national proceedings is therefore likely to fail at this first stage of admissibility and be declared 'inactive' thereby precluding the more sensitive analysis of its shielding of perpetrators.

The inclusion of *marginal* perpetrators, whereby neither the hierarchical position of the perpetrator nor their notoriety is identified, enables a more dynamic or fluctuating interpretation of they types of perpetrators that can be considered as *most* responsible. The OTP has commonly referred to the most responsible perpetrators through status and hierarchy, to indicate those who command power and influence on high level – the most senior persons – as well as those in mid to high level positions and those who have acted with particular brutality albeit not occupying a hierarchical position of power – the notorious lower-level perpetrators. Trusting that the choice of noun was purposeful, those who may be considered as 'marginal' perpetrators could be understood as having played a peripheral or minor role in the criminal conduct, despite the possibility that they incur one or more of the liabilities in the Statute. Where States target marginal perpetrators, or even lower-level perpetrators, the other factors of shielding will need to be scrutinized, notably to identify and evaluate the measures that have been taken to investigate those bearing 'greater' responsibility.

### ***Manifestly Insufficient Steps in the Investigation or Prosecution***

Evidence of manifestly insufficient steps in the investigation or prosecution by a State can be both indicators of shielding, as recognized by the OTP Draft Policy, and inability, notably to obtain the accused, as well as evidence and testimony. In the context of inability, the PTC recently assessed the sufficiency of investigatory measures by the Libyan authorities in the admissibility challenge in the Al-Senussi case (**see Section 7 below**). The core distinction between inability and unwillingness in this context is that for unwillingness to be proven, the lack of activity or its low quality will need to be attributed to an intent to shield the person from justice.

Evidence of shielding through insufficient steps could reasonably include failure to obtain the accused by not issuing arrest warrants or request extradition, particularly where few or no measures were taken to prevent the absconding or movement of the suspect. This could also include the failure to obtain evidence, including forensic or ballistic tests, as well as testimony of witnesses, or a failure to do so in accordance with rules of evidence, leading to the contamination of evidence, breakages in the chain of custody etc. Such failures may also be compared to other relevant cases, to the qualities and timeliness of other investigations (see 2.1.3 below).

While incompetence on the behalf of the investigating or prosecuting authorities may contribute towards inability it is unlikely to be persuasive in the context of shielding. Notwithstanding the legal and evidentiary complexities of gross human rights violations (which amount to international crimes), particularly within a post-conflict setting, jurisprudence from the Inter-American Court of Human Rights (IACHR) has consistently insisted that efforts to investigate violations ‘*must be undertaken in a serious manner and not as a mere formality*’<sup>53</sup> that is ‘*preordained to be ineffective*’.<sup>54</sup> The IACHR has also ruled against ‘*mechanical implementation of certain procedural formalities*’ where there is an absence of genuinely seeking the truth to require the State to show ‘*that it carried out an immediate, exhaustive, serious and impartial investigation*’.<sup>55</sup> The European Court of Human Rights imposes a ‘reasonable steps’ threshold on national efforts to secure sufficient evidence of the incidents under investigation, where ‘*any deficiency which undermines its ability to establish [the crime or the responsible person or persons] will risk falling foul of this*

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<sup>53</sup> *Case of the Pueblo Bello Massacre v Colombia, Judgement (Merits)* Inter-American Court of Human Rights 31 January 2006 143; *Case of Ximenes Lopes v Brazil, Judgement (Merits)* Inter-American Court of Human Rights 04 July 2006 148; *Case of the ‘Mapiripán Massacre’ v Colombia, Judgement (Merits)* Inter-American Court of Human Rights 15 September 2005 219, 223; *Case of Manoel Leal de Oliveira v Brazil, Merits (Publication)* Inter-American Commission of Human Rights Report No. 37/10, Case 12.308, 17 March 2010 114.

<sup>54</sup> *Case of Velasquez Rodriguez v Honduras, Judgement (Merits)* Inter-American Court of Human Rights 29 July 1988 177.

<sup>55</sup> *Case of Juan Carlos Abella v Argentina, Merits (Publication)* Inter-American Commission of Human Rights Report No. 55/97, Case 11.137, 18 November 1997; *Case of Arges Sequeira Mangas v Nicaragua, Merits (Publication)* Inter-American Commission of Human Rights Report No. 52/97, Case 11.218, 18 February 1998; *Case of Manoel Leal de Oliveira v. Brazil, Merits (Publication)* (n 53).

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*standard.*<sup>56</sup> Decisions of insufficient evidence should also be scrutinized in order to determine if the investigation itself was insufficient.<sup>57</sup>

### ***Deviations from Established Practices and Procedures***

The deviation from established laws and procedures in order to shield a person from criminal responsibility may be identified or measured in many ways. It is an inherently comparative exercise, requiring identification of the procedural laws and rules and their adherence in other similar cases. It may be that the acts of deviation constitute a breach of the principle of equality or fairness through decisions to hold the case in an inappropriate or partisan location that favours the suspect, and likely intimidate or threaten victims and witnesses, or providing partisan investigators with unrestricted access to unsecured evidence, forensics and ballistics, or even the allocation of partisan judges and prosecutors to the case. Or deviation from established practices may be to reduce the level or standard of investigative or prosecutorial activity, such as making mistakes in the collection and storage of evidence,<sup>58</sup> issuing decisions or orders concerning the case from authorities that are outside the jurisdiction of the prosecution,<sup>59</sup> systematically transferring the jurisdiction of the case,<sup>60</sup> establishing special tribunals where the integrity or impartiality of the personnel can reasonably be questioned or considered as institutionalizing impunity,<sup>61</sup> failing to respond or to provide resources to respond to complaints or irregularities.<sup>62</sup>

### ***Ignoring Evidence or Giving it Insufficient Weight***

Unlike the factor of insufficient steps to gather evidence, this factor allows for circumstances where evidence has been gathered or presented, either by diligent investigators or possibly

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<sup>56</sup> *ECtHR, Jordan v. UK, para 107*

<sup>57</sup> *Case of Manoel Leal de Oliveira v. Brazil, Merits (Publication)* (n 53) 124–127.

<sup>58</sup> *Ibid*, 127-130.

<sup>59</sup> *Ibid*, 130.

<sup>60</sup> *Case of James Zapata Valencia and José Heriberto Ramírez Llanos v Merits (Publication)* Inter-American Commission of Human Rights Report No. 100/99, Case 10.916, 27 September 1999 179–183.

<sup>61</sup> *Concluding Observations of the Human Rights Committee: Colombia* UN Human Rights Committee CCPR/CO/80/COL, 26 May 2004 8, 11.

<sup>62</sup> *Case of Dextor Lendore v Trinidad and Tobago, Merits (Publication)* Inter-American Commission of Human Rights Report No. 28/09, Case 12.269, 20 March 2009 41; *Case of Alfonso Martín del Campo Dodd v Mexico, Merits (Publication)* Inter-American Commission of Human Rights Report No. 117/09, Case 12.228, 19 November 2009.

even by victims groups or other private actors, and is ignored or overlooked by investigators prosecutors, judges or jury members. Together with the preceding factors, it allows or predicts that shielding may occur by small, or discreet segments of criminal justice institutions, where of course, it forms part of an intentional exercise to shield the perpetrator from criminal responsibility.

### ***Irreconcilability of Findings with Evidence Rendered***

As an extension of the previous factor, findings that are irreconcilable with the evidence tendered can be an indicator of shielding and will be identified through the oral and written deliberations of the judicial panel or jury responsible for the investigation or prosecution. This requires that the facts and evidence submitted are not adequately analysed, or that the findings are at odds or contradictory to the evidence delivered.

### ***Intimidation of Victims, Witnesses or Judicial Personnel***

The intimidation of victims, witnesses and judicial personnel (extending to include investigative and prosecutorial personnel) is one of the most fundamental challenges to the pursuit of justice and accountability for the crimes prescribed by the Rome Statute. It was raised as a matter of concern by the UN Committee of Racial Discrimination in its review of Rwanda, as '*intimidation of judicial authorities seeking to investigate and address human rights violations committed since 1994 against ethnic Hutus*'<sup>63</sup> reaffirmed in the UN Declarations of Basic Principles of Justice for Victims of Crimes and Abuse of Power,<sup>64</sup> establishes that the intimidation of actors can amount to shielding perpetrators from justice, and incorporated into the decision making of the Inter-American Commission of Human Rights.<sup>65</sup>

The use of anonymous judges has also been suggested as a potential form of shielding by Stigen, where he used the example of anonymous 'hooded judges' in early Colombian drug-

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<sup>63</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Rwanda* UN Committee on the Elimination of Racial Discrimination CERD/C/304/Add.97, 24 March 2000 18.

<sup>64</sup> UN General Assembly, 'UN Declarations of Basic Principles of Justice for Victims of Crimes and Abuse of Power' A/RES/40/34, 29 November 1985.

<sup>65</sup> *Report on the Situation of Human Rights in Ecuador* Inter-American Commission of Human Rights OEA/Ser.L/V/II.96, Doc. 10 rev.1, 24 April 1997 Chapter 3.

trafficking cases. The purpose of providing the judges with anonymity was itself to protect the judges from intimidation and threats, and yet it a clear consequence of this form of 'protection' can be to allow a partisan judge to shield the person, as they cannot be identified. Intimidation of judicial personnel may include circumstances where the intimidation does not amount to loss of independence, such as the attempts to intimidate the judges in the recent trial of former Guatemalan President Efraim Rios Mont for crimes of genocide and crimes against humanity.

However, while both the States concerned and the ICC have an objective duty to protect all participants in the proceedings from harassment and intimidation, in the context of shielding, it can be expected that the intimidation must be to favour the accused and be attributable to a state policy, due to the intent requirement of Article 17(2)(a). Similar failures to protect or prevent intimidation may lead to determinations of inability, where there is an absence of state involvement (**see Section 7**).

The current factors however exclude bribery or other form of impermissible interventions with victims, witnesses and judicial intervention, as an indicator of shielding. As the ICC is itself experiencing in two separate cases, the bribery or attempted bribery of persons participating in criminal cases is a frequently utilized mechanism,<sup>66</sup> used to derail trials and undermine the quest for individual criminal responsibility. While it is proscribed in cases before the ICC as an offence against the administration of justice, through corruptly influencing a witness<sup>67</sup> or a Court official,<sup>68</sup> where there is evidence of it occurring in national investigations and cases, it may also provide credible evidence of efforts to shield a person. As such, evidence of corruptly influencing witnesses, judicial personnel or other participants in the criminal justice process should be accepted as an indicator of shielding, to be subjected to the same tests as the other factors, of connection to State practice or intent to protect the suspect or accused person from individual criminal responsibility.

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<sup>66</sup> The Prosecutor v. Walter Osapiri Barasa, ICC-01/09-01/13; The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13 (the so-called Bemba 2 case). See also, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Kenya Article 15 Decision)* [2010] ICC Pre Trial Chamber II ICC-01/09, 31 March 2010 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 (Article 15 Decision: Côte d'Ivoire)* [2011] ICC Pre Trial Chamber III ICC-02/11, 03 October 2011 201.

<sup>67</sup> Article 70(1)(c), *Rome Statute* (n 3).

<sup>68</sup> Article 70(1)(d), *Ibid.*

### ***The Lack of Resources Allocated to the Proceedings at Hand as Compared with Overall Capacities***

The resources available for national criminal justice proceedings continues to be of central importance in the complementarity landscape, providing many of the contours that make up the panorama of willingness and ability. But as a factor that may indicate shielding, it should be measured comparatively, through assessment of the allocation of resources to the specific investigations or prosecutions (including trials) in contrast to its overall capacity. Within the international human rights framework, the lack of resources or under-funding of the criminal justice system can be considered as an impediment to the expeditiousness of a trial and consequently lead to findings of an undue delay,<sup>69</sup> as well as contributing towards corrupt practices and the loss of independence or impartiality of judges,<sup>70</sup> particularly where the magnitude and social repercussions of the case are high.<sup>71</sup>

In practice, the allocation of resources would need to encompass both economical resources, but also personnel with sufficient skills and knowledge to pursue the case at hand, as well as the facilities necessary to conduct the criminal proceedings.<sup>72</sup> The training of criminal justice practitioners, as well as the receipt of technical assistance and international funding has also been encouraged and used as evidence of a commitment to be sufficiently resourced.<sup>73</sup> But again, within the context of *shielding* the allocation of resources to the specific case in question will be assessed in comparison to its general resources: Stigen describes this as the

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<sup>69</sup> *Case of Jorge, José and Dante Peirano Basso v Eastern Republic of Uruguay, Merits (Publication)* Inter-American Commission of Human Rights Report No. 86/09, Case 12.553, 06 August 2009 133, 167.

<sup>70</sup> UN Human Rights Committee, General Comment 32, paragraph 27. UN Human Rights Committee, 'General Comment No. 32. Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (United Nations 2007) CCPR/C/GC/32 27; *Concluding Observations of the Human Rights Committee: Democratic Republic of Congo* UN Human Rights Committee CCPR//C/CAF/CO/2, 2006.16.

<sup>71</sup> *Case of Jorge, José and Dante Peirano Basso v. Eastern Republic of Uruguay, Merits (Publication)* (n 69) 167.

<sup>72</sup> Issues of resources in each of these categories formed a significant component of proceedings in the admissibility procedure in the two Libya cases before the ICC. See Chapter 5, section 5.4

<sup>73</sup> See references to the importance of education and training of criminal justice actors in various UN Guiding Principles and soft instruments, such as UN General Assembly (n 64); *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* Government of Libya ICC-01/11-01/11-285-Red2, 23 January 2013; *The Government of Libya's Appeal against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi' (Admissibility Appeal: Gaddafi)* [2013] Government of Libya ICC-01/11-01/11-350, 07 June 2013.

requirement of 'sufficient coherence between the national system's general *capabilities* and its actual *performance*.'<sup>74</sup> Where a sufficient level of resources for the general practice could be determined, a gap, or incoherence between capability and performance could indicate shielding, whereas a lack of capability would need to be assessed as part of the inability criteria, even where there was coherence between capability and performance.

### ***Refusal to Provide Information or to Cooperate***

The refusal or reluctance of States to cooperate with the ICC has become an operational reality of the Court, notably in the UN Security Council-referred Darfur situation<sup>75</sup> and the Kenya cases. State cooperation or willingness to provide information has also become the "800lb gorilla" of admissibility proceedings, as the ICC learns exactly how vulnerable it is to State cooperation in all phases of its work, but particularly in UN Security Council Referrals of non-State parties.<sup>76</sup> Jurisdictional states are informed of the Prosecutor's interest in crimes and possible perpetrators within their jurisdiction at an early stage of the Prosecutor's

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<sup>74</sup> Stigen (n 22), Chapter 8

<sup>75</sup> ICC Pre-Trial Chamber I, *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, ICC-02/05-01/09-195, issued 09 April 2014; *Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir*, 26 March 2013; *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139, 12 December 2011; *Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-140, 13 December 2011. Statement of the ICC Assembly of States Parties President on the Visit of the Sudanese President to Chad, 20 February 2013, The EU High Representative Catherine Ashton, Statement On The Visit Of Sudanese President Al-Bashir To Chad, 16 May 2013.

<sup>76</sup> As of October 2013, the arrest warrants or surrender requests of 14 persons remained outstanding. See also Franco Palmisiano, 'Cooperation By Non-States Parties' in Flavia Lattanzi (ed), *The International Criminal Court: Comments on the Draft Statute* (Editoriale Scientifica 1998); *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Transnational Publishers 2005); Jackson N Maogoto, 'A Giant without Limbs: The International Criminal Court's State-Centric Cooperation Regime' [2006] Bepress Legal Series 53; Göran Sluiter, 'Obtaining Cooperation from Sudan — Where Is the Law?' (2008) 6 *Journal of International Criminal Justice* 871; Han-Ru Zhou, 'The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC' (2006) 4 *Journal of International Criminal Justice* 202; René Blattmann and Kirsten Bowman, 'Achievements and Problems of the International Criminal Court: A View From Within' (2008) 6 *Journal of International Criminal Justice* 711; Göran Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (2010) 8 *Journal of International Criminal Justice* 365; Dapo Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 299; Carsten Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for "Shared Responsibility"' (2012) 10 *Journal of International Criminal Justice* 325; Dire Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98' (2013) 11 *Journal of International Criminal Justice* 199.



examinations (see Chapter 3) ensuring that they have adequate notice of the Court's interest in their domestic proceedings and through the so-called 'reverse cooperation' provision in Article 93(10) they may also request assistance and cooperation from the Court.<sup>77</sup> Equally, a cooperation framework exists to regulate cooperation and judicial assistance matters: State Parties have a general obligation to cooperate with the ICC,<sup>78</sup> they must ensure that there are national proceedings to enable all forms of cooperation specified under Part 9 of the Statute<sup>79</sup> while the Rules of Procedure establish channels and languages of communication for these purposes<sup>80</sup> and several administrative units exist within the ICC organs and Assembly of States Parties (ASP) to facilitate cooperation practices.<sup>81</sup>

In light of the legal framework and infrastructure supporting cooperation with the ICC, the absence of cooperation from a State is likely to indicate either unwillingness or inability: in the context of unwillingness through shielding, the absence of communication must reasonably be intentional, although the noun adopted by the OTP – *refusal* – indicates that the non-cooperation must be active rather than passive. A failure to cooperate through lack of resources is more likely to indicate inability, unless for example, the lack of resources, including the designation of inappropriate or incompetent communication channels is also indicative of intentional practice by the State to make it harder to pursue criminal responsibility for the individuals concerned.<sup>82</sup> The scope of non-cooperation in the context of shielding should extend to all of the cooperation obligations, where the non-cooperation

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<sup>77</sup> *Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194* [2011] ICC Pre-Trial Chamber II ICC-01/09-58 21-04-2011, 21 April 2011; *Application on behalf of the Government of Kenya for leave to reply to the Prosecutor's Response of 10 May 2011 and Corrigendum of 11 May 2011 to 'Request for Assistance on behalf of the Government of Republic of Kenya pursuant to Article 93(10) and Rule 194'* ICC Pre-Trial Chamber II ICC-01/09-61, 18 May 2011; Government of the Republic of Kenya, 'Request on Behalf of the Government of Kenya in Respect of Its Application for Leave to Reply to the Prosecutor's Response of 10 May 2011 and Corrigendum of 11 May 2011 to "Request for Assistance on Behalf of the Government of Republic of Kenya pursuant to Article 93(10) and Rule 194"' (2011) ICC-01/9-62; *Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence* [2011].

<sup>78</sup> Article 86, *Rome Statute* (n 3).

<sup>79</sup> Article 88, *Ibid.*

<sup>80</sup> Rule 177, 178, 180

<sup>81</sup> Within the Office of the Prosecutor this function is executed by the Jurisdiction, Complementarity and Cooperation Division (JCCD) the ASP President pursues bilateral engagements with States on matters of cooperation pursuant to paragraph 14(b) of the Assembly Procedures, while the ASP working group on cooperation also ensures a State-level discussion of the issues and challenges of cooperation and the ASP Bureau compiles an annual report of the actions undertaken both by the President and the Bureau. See 'Report of the Bureau on Non-Cooperation (11th ASP)' (Assembly of States Parties 2012) ICC-ASP/11/29.

<sup>82</sup> Although of course, this can be mitigated through Article 93(10) by requesting the court to assist (in good faith) in the execution of the cooperation request. *Rome Statute* (n 3).

emerges from a refusal rather than say, competing requests<sup>83</sup> for the arrest and surrender of persons.<sup>84</sup> This would include the refusal to arrest or surrender persons, which should be distinguished from the inability to do so, as well as where genuine efforts are ongoing to identify and locate of suspects and execute their arrest/surrender and subsequent transferal to the ICC. It should also include the other forms of cooperation, including the taking of evidence and testimony, the production of evidence, questioning of persons, service of documents, facilitation of voluntary appearances of witnesses or experts as well as temporary transfer of persons in custody of the State, the examination of places and sites, execution of searches and seizure, provision of records, protection of victims and witnesses and the preservation of evidence, the identification, tracing and freezing of assets and other types of assistance.<sup>85</sup>

Several of the other indicative factors of shielding may also be symptomatic of the refusal to cooperate, or they may surface through the cooperation process. The intimidation of witnesses and victims may clearly contravene the obligation to protect them, following a request from the ICC, while insufficient steps in the investigation or prosecution evidence and testimony may become more apparent following requests to provide evidence or records to the Court. The overlap between cooperation and the preceding seven factors of shielding adopted by the OTP demonstrates the inter-related nature of the willingness of States to ensure criminal responsibility for the most responsible persons. Herein lies the obvious paradox facing the ICC's system of justice: States who choose to shield a person from criminal accountability will be considered unwilling and therefore jurisdiction will pass from them to the ICC, and yet the ICC will often require their subsequent cooperation for the case to proceed, notably through the arrest and surrender of those that the State has chosen to protect.

In the context of shielding, the qualities of specific national investigations and prosecutions can be scrutinized comparatively and in some detail, but largely according to the established domestic procedures and standards rather than to international ones, while the scope of

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<sup>83</sup> Article 90 establishes the procedure to reconcile competing requests for the surrender of persons. *Ibid.*

<sup>84</sup> Article 89, 92, *Ibid.* Currently 14 suspects subject to a warrant of request or request to surrender remain at large: several due to States clear refusal to cooperate, whilst others such as those indicted in Uganda continue to evade efforts to secure their location and consequently their arrest and detention.

<sup>85</sup> Article 93(1), *Rome Statute* (n 3).

shielding extends only to include those persons whom the State wishes to protect, by making it harder to convict.

### 3. Unjustified Delays

The second criterion of unwillingness, unjustified delay, is recognized as an integral part of the right to a fair trial, protected as part of the rights of the accused during trials before the ICC<sup>86</sup> but is also incumbent upon States through numerous international and regional treaties. However, in the context of admissibility, an unjustified delay does not incur a determination of the violation of the accused persons right to a fair trial, but could render the unduly delayed case admissible before the Court. In full, the unjustified delay formula reads as follows:

*(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;*

This can be broken down into three tests: first whether a delay can objectively be observed, second whether it can be considered as justified. Whereas the first two tests are sufficient under international human rights law to determine that an undue or unjustified delay has occurred, the third composite test requires the prohibited delay to be inconsistent with an intent to bring the person to justice, a test which should be conducted in light of unspecified ‘circumstances.’<sup>87</sup>

A review of the subsidiary internal sources of law of the ICC reveals no further criteria or indicators for the determination of each of the tests of unjustified delay, while the various policy papers and strategies of the Office of the Prosecutor do little more than rephrase Article 17(2)(b). For example, the *informal expert paper on complementarity*, from 2003 provides an annex of indicia for unwillingness and inability, listing three sequential stages of inquiry, to determine in which stage of the proceedings the delay occurs, including the investigative and prosecutorial phases, and comparing it with normal delays for cases of

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<sup>86</sup> Article 67(1), *Ibid.*

<sup>87</sup> The repetition of the formula of intent, led Kleffner to consider that unjustified delay is a synonym or marginal elaboration on the criteria of shielding. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 21) 139.

similar complexity within the national system (assumes that there are other cases);<sup>88</sup> where delay is identified is it justified (again without any indicators for measuring justified delay); and is the unjustified delay inconsistent with an intent to bring the person concerned to justice.<sup>89</sup> More recently, in its 2010 Draft Policy on Preliminary Examinations, the OTP further reduced the 2003 indicia to an indicative assessment of whether the delay can be objectively justified in the circumstances and whether there is '*evidence in the circumstances of a lack of intent to bring the person(s) concerned to justice.*'<sup>90</sup> This approach places a great deal of importance onto the circumstances of the proceedings, which may well indicate that margin of appreciation will be afforded to States in the midst of conflict or emerging from it: the effects of such an approach is likely to be contrary to or on the upper threshold of human rights practice concerning undue delay and it can be expected to be unpopular with human rights advocates.

### 3.1. International Rules and Principles on Unjustified Delay

Protected in the International Convention on Civil and Political Rights (ICCPR)<sup>91</sup> the European Convention on Human Rights (ECHR)<sup>92</sup> the African Charter on Human and People's Rights (ACHP)<sup>93</sup> and the American Convention on Human Rights (ACHR)<sup>94</sup> as well as the Third and Fourth Geneva Conventions<sup>95</sup> and the Statutes of the ICTY, ICTR, ECCC and STL, as a part of the right to a fair trial without undue delay or within a reasonable timeframe. While the thresholds of undue versus unjustified delay were debated during the drafting of the Statute, with some States considering undue delay to be too strict, they can reasonably be considered to be the same,<sup>96</sup> providing a significant repository of jurisprudence

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<sup>88</sup> Stigen (n 22), Chapter 8; John T Holmes, 'The Principle of Complementarity' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International) 676.

<sup>89</sup> ICC Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (International Criminal Court 2003) Informal Expert Paper 28; Markus Benzing, 'International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 Max Planck Yearbook of United Nations Law 591, 611.

<sup>90</sup> ICC Office of the Prosecutor, 'Draft Policy Paper on Preliminary Examinations' (n 48) 64.

<sup>91</sup> Article 14(1) International Covenant on Civil and Political Rights 1966.

<sup>92</sup> Article 6(1) Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

<sup>93</sup> Article 26, African Charter of Human and Peoples' Rights, 1981

<sup>94</sup> Article 8 (1), American Convention on Human Rights, 1969

<sup>95</sup> Article 103(1) Third Geneva Convention and Article 71 Fourth Geneva Convention

<sup>96</sup> See Stigen (n 22), 8.3.5.2

and authoritative interpretation to which the Court can look to for guidance.<sup>97</sup> In his review of fair trial standards in criminal proceedings, Stefan Trechsel has reiterated the importance of the four key criteria established by the European Court of Human Rights (ECtHR) to assess the period of alleged undue delay: the conduct of the accused and their appointed counsel; the subjective importance of the proceedings for the accused; the complexity of the case, with greater tolerance being given to cases with an international dimension; and the conduct of the domestic authorities.<sup>98</sup> But as the Statute also requires that any such unjustified delay to be put first into a context of the circumstances of the proceedings and then to be found as inconsistent with the intent to bring the person to justice, two additional criterion should be added: the circumstances of the proceedings and the intent to bring the person to justice.

### ***Conduct of the Accused***

The conduct of the high-level leaders accused of international crimes has consistently reached the headlines, where elaborate performances and utilization of due process rights of the accused have sought to discredit and disrupt proceedings, often with the inevitable consequence of delays. Before the ICTY, the trial of the former President of Yugoslavia Slobodan Milosevic, was dogged by delays, adjournments on the grounds of ill-health, and use of the right to self-representation to stage political maneuvers and aggressive cross-examination of prosecution witnesses.<sup>99</sup> While at the national level, the recent trial of the former Guatemalan President Rios Montt for genocide committed against the Ixil people was also emblematic of conduct to delay and disrupt proceedings, through an arguably abusive use of legal procedures, as well as interruptions to the proceedings, staged walkouts and boycotts.<sup>100</sup>

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<sup>97</sup> UN Human Rights Committee, 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), 13 April 1984, General Comment No. 29: States of Emergency (article 4) CCPR/C/21/Rev.1/Add.11, 31 August 2001, which reinforces that the fair trial protections of the Geneva Conventions apply during conflict as well as other emergency situations.

<sup>98</sup> Trechsel (n 18). Chapter 5. The European Court of Human Rights has adopted similar factors in determining a reasonable timeframe, in *Zimmerman and Steiner v. Switzerland* (1984) 6 ECHR 17, 24

<sup>99</sup> Timothy William Waters, *The Milosevic Trial: An Autopsy* (Oxford University Press 2013).

<sup>100</sup> See inter alia, International Crisis Group, 'Justice on Trial in Guatemala: The Rios Montt Case' (2013) Latin America Report 50; Open Society Justice Initiative, 'Judging a Dictator: The Trial of Guatemala's Ríos Montt' (2013).

The use of legal procedures by the accused to delay, disrupt or stop investigations and trials from proceeding is a well litigated phenomena before human rights bodies, and while the abusive action is directly attributable to the accused person, it is also frequently understood as part of a broader effort to prevent the pursuit of justice often attributable to state institutions. For example, in the Rios Montt case, the lawyers of the former president used legal procedures, notably *amparo*, an action that enables an accused person to challenge an alleged infringement of constitutional or legal rights, more than 120 times in the duration of the investigation and trial.<sup>101</sup> The use of legal protections such as *amparo* in Guatemala has frequently formed the subject matter of complaints to the Inter American Court of Human Rights. In “Las Dos Erres” Massacre, the IACHR found that *‘the appeal for legal protection has been transformed into a means to delay and hinder the judicial process, and into a factor for impunity’*<sup>102</sup> which the Court found to have been *‘used maliciously, but with the justice system as an accomplice.’*<sup>103</sup> A number of other human rights decisions reinforce the connection between delays caused by the conduct of the accused, through the repeated or excessive use of legal protections and an intent to shield or protect the accused persons that can be attributable to judicial institutions as well as institutions of government.

Other indicators of abusive or tactical conduct by the accused such as staged walkouts or boycotts are also consistent indicators of the intent of the accused to delay or terminate proceedings. Where adequate measures exist to compel or sanction behavior that breaches rules of procedure as well as the code of conduct for lawyers, and such actions are not followed, the delays that follow may be considered to be unjustified, again with the possibility of collusion between the accused and judicial organs. During the Rios Montt case however, the staged protests, walkouts and boycotts of the trial were met with resistance from the Judges, but who nonetheless remained unable to compel the defense team to return to Court and participate in the proceedings, largely due to the absence of effective punishments and enforcement mechanisms. Where situations such as this unfold in the course of admissibility, the consequence may rather be that the State will be considered otherwise unable to carry out proceedings rather than unwilling through an unjustified delay.

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<sup>101</sup> Open Society Justice Initiative (n 100) 9.

<sup>102</sup> *Case of the ‘Las Dos Erres’ Massacre v Guatemala, Judgement (Merits)* Inter-American Court of Human Rights 24 November 2009 120.

<sup>103</sup> *Ibid*, 106

### ***Complexity of the Case***

Determining a suitable yardstick of what constitutes an unjustified delay in national proceedings of core international crime conduct is made more problematic by the complexity of these cases.<sup>104</sup> The complexity of international crime cases should be realistically assessed, although the rhetoric commonly used to describe their level of difficulty has swung off the barometer, without careful reflection of what is necessary and permissible under the ICC system and what is required under different international mechanisms. In addition to the specific features of any case, its legal complexity can be partially assigned to the choice of legal framework that is adopted and consequentially, the necessary gathering of facts and evidence and their analysis and organization into a clear and compelling case file that can articulately meet the evidentiary burden for each element of the crime and liability under the adopted framework. There are of course many challenges that influence this process at each step of the journey, many of which also influence the ICC admissibility analysis: including the quantity of data, the maintenance of evidentiary and custodial standards, access to important sites (which is often contested, raising security and political obstacles), resources, utilization of international requests for assistance, secure and adequate facilities for trial and detention, as well as witness and victim protection.

In the context of delays, the choice of legal framework can significantly alter the complexity and therefore quite legitimately, the length of time taken to pursue investigative and adjudicative activities. Notwithstanding issues of retroactivity, States with applicable Criminal Codes that include ICC crimes can reasonably be expected to apply the nomenclature established within them, requiring that evidence demonstrate each of the common elements of the crime (genocide, crimes against humanity, war crimes) as well as the specific elements that establish the underlying act or violation.<sup>105</sup> While on the contrary, those without these crimes under national laws, may often struggle to adapt ordinary crimes and liabilities to the factual reality of the violations under scrutiny. While there is no ideal solution or ‘one golden size fits all’ approach, caution should be adopted when exhorting States to adopt or apply international crime nomenclature, particularly where they are

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<sup>104</sup> Diane Orentlicher, ‘Owning Justice and Reckoning with Its Complexity’ (2013) 11 *Journal of International Criminal Justice* 517.

<sup>105</sup> See for example Uganda, which will apply its ICC Act to those perpetrators it pursues for crimes committed after 2010, when it entered into force, and a combination of its Geneva Convention laws and ordinary laws for all those preceding it.

chronically under-resourced and or emerging from conflict:<sup>106</sup> not only may it lead to delay but under the terms of the Statute it is unlikely to constitute unjustified delay, thereby exacerbating the reality of impunity.

### ***Conduct of Domestic Authorities***

In evaluating the conduct of domestic authorities, international and regional human rights bodies have considered justified delays to include delays due to lawyers strikes, awaiting letters rogatory and public unrest, while inaction in the face of delays by domestic authorities has been considered as unjustified, thereby compelling state representatives to actively follow their caseload.<sup>107</sup> In the context of admissibility decisions, the conduct of domestic authorities is also implicit in the intent to bring the person to justice and requires good faith behavior by each of the domestic authorities engaged in the investigation and prosecution: the good faith efforts of one institution to pursue its mandate to bring the person to justice may be undermined through the conduct of another, which could lead to admissibility due to the unjustified delay of the other authority

Of greater interest to the ICC system of justice as well as to admissibility, the lack of adequate funding for trials has also been rejected as a legitimate cause for delay in criminal cases, with the UN Human Rights Committee finding that *'the lack of adequate budgetary appropriation for the administration of criminal justice does not justify unreasonable delay in the adjudication of criminal cases'*<sup>108</sup> Where a State has not been able to pursue a specific prosecution due to inadequate budgetary means for example, but it has made efforts to reallocate funds or request international aid, it is entirely plausible that the Court consider deferring its case back to the impoverished State, having subsequently considered whether its fiscal restraints rendered it unable under the conditions established in article 17(3).

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<sup>106</sup> Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism' (2009) 31 Human Rights Quarterly 624, 630–634.

<sup>107</sup> Trechsel (n 18). Chapter 5.

<sup>108</sup> *André Fillastre and Pierre Bizouarn v Bolivia* UN Human Rights Committee Communication No. 336/1988, CCPR/C/D/336/1988, 06 November 1996 65.



### ***Circumstances that are Inconsistent with the Intent to Bring the Person to Justice***

The circumstance of proceedings shares several features with the complexity of the case as well as the conduct of the accused and the judicial authorities, but is also sufficiently distinct, as countervailing factor to unjustified delay. International humanitarian law establishes certain limitations or qualifications to the right to be tried without undue delay, reflecting the particular circumstances of armed conflict: Article 103(1) of the Third Geneva Convention provides that investigations of prisoners of war *'shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible'* while Article 71 of the Fourth Geneva Convention requires that accused persons who are under the authority of an Occupying Power should be brought to trial as rapidly as possible.

Through General Comment 29 on States Of Emergency, the UN Human Rights Committee has affirmed that during periods of international or non-international armed conflict, rules of international humanitarian law are applicable<sup>109</sup> and therefore that derogations from the ICCPR are allowed *'only to the extent that the situation constitutes a threat to the life of the nation.'*<sup>110</sup> Where IHL rules on the timeliness of trials apply, a permissible derogation must be justified and required by the exigencies of the situation, and ultimately that *'the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate.'*<sup>111</sup>

To date, the ICC has not claimed any cases on grounds of unjustified delay, although delays have been assessed in preliminary examinations including Guinea, and in the admissibility challenges of the two Libyan cases, *Gaddafi* and *Al Senussi* the criteria was extensively litigated.<sup>112</sup>

### **3.2. Determining Unjustified Delays in National Proceedings during Preliminary Examinations**

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<sup>109</sup> General Comment No. 29 (n 97) 3

<sup>110</sup> Ibid, 3, based on Article 4, *UN ICCPR* (n 91).

<sup>111</sup> General Comment No. 29 (n 97), 16

<sup>112</sup> See Section 3.4 onwards

Article 17(2)(b) refers to an unjustified delay in *proceedings* that are inconsistent with an intent to bring a *person* to justice. This seems to indicate that unjustified delay requires that at its minimum threshold there must be proceedings directed against a named person, similar to the fair trial dimension of unjustified delay, which commences at the date of arrest.<sup>113</sup> Yet Article 17 is also applied at the transition from a preliminary examination to an investigation, before suspects may have been clearly established, and certainly before the issuing of warrants of arrest.

The preliminary examination into the opposition rally violence in Guinea provides a useful example of the types of delays or timescales that will be tolerated by the OTP for national investigations into a contained episode of violence. The OTP announced its preliminary examination into the situation in Guinea two weeks after a government-led crackdown on an opposition rally at the Conakry Stadium on 28 September 2009, which led to reported killings, disappearances, arbitrary detention and torture, sexual violence and persecution.<sup>114</sup> Shortly after the incident, an Independent Commission of Inquiry (ICOI) was established by the UN Secretary General, reporting to the UN Security Council on 18 December that:

*'it is reasonable to conclude that the crimes perpetrated on 28 September 2009 and in the immediate aftermath can be described as crimes against humanity. These crimes are part of a widespread and systematic attack launched by the Presidential Guard, the police responsible for combating drug trafficking and organized crime and the militia, among others, against the civilian population.'*<sup>115</sup>

In accordance with its terms of reference, the ICOI Report identified the different parties to the incident as well as a list of 56 individuals that it considered to bear individual

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<sup>113</sup> Under the Rome Statute, protection against undue delay also begins following the arrest of the person, where according to Article 59(2)(c) the arrested person should be brought promptly before the competent judicial authorities, which should determine that the person's rights have been respected. Following their transfer to the ICC custody, the Pre Trial Chambers are required to ensure that the person is not detained for an 'unreasonable period' prior to trial due to 'inexcusable delay' by the Prosecutor. Following the commencement of the trial, which begins after the Confirmation of Charges decision is issued. The right to be tried without undue delay begins, under Article 67. *Rome Statute* (n 3).

<sup>114</sup> ICC Office of the Prosecutor, 'ICC Prosecutor Confirms Situation in Guinea under Examination' *ICC Website* (The Hague, 14 October 2009) <[http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/icc%20prosecutor%20confirms%20situation%20in%20guinea%20under%20examination.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/icc%20prosecutor%20confirms%20situation%20in%20guinea%20under%20examination.aspx)>.

<sup>115</sup> International Commission of Inquiry, 'Report of the International Commission of Inquiry: Events of 28 September 2009 in Guinea' (2009) S/2009/693 3.

responsibility for the acts.<sup>116</sup>

A national criminal investigation was opened on 08 February 2010, following the publication of the ICOI Report, as well as a national equivalent, the Guinean Commission of Inquiry, where the General Prosecutor appointed three investigative judges to pursue the findings of the two Inquiries. The ICC Deputy Prosecutor acknowledged the national investigation in November 2010, informing national press that the OTP was taking stock of the investigation being undertaken with the Guinean investigative judges, into the events of 28 September 2009.<sup>117</sup> But it wasn't until November 2011, some 20 months after than opening of the national investigation, that the OTP issued a review of its preliminary examination into Guinea. The OTP's analysis drew heavily on the ICOI Report, to conclude that although there was reasonable basis to establish that these acts amounted to crimes against humanity, the Guinean State was slowly conducting investigations and would therefore remain under preliminary examination.<sup>118</sup> The OTP evaluated the investigation as 'fairly slow but steady' impinged by lack of suitable security and logistical conditions.<sup>119</sup> In its 2012 Report, around 32 months after the initiation of the national investigation, the OTP noted that the investigation was on-going, and that despite identified challenges facing the judges, including limited financial and logistical resources, security concerns and occasionally tense political climate, it concluded that notable progress was achieved over the 12-month period of review<sup>120</sup> without any reasons presented to doubt the integrity of the judges.<sup>121</sup>

Notably, in the face of such constraints, the OTP accepted Guinean submissions that it had indicted six individuals, including two listed by the UN International Commission of Inquiry as among the alleged most responsible perpetrator,<sup>122</sup> it had interviewed more than 200

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<sup>116</sup> '[T]he Commission shall (a) establish the facts; (b) qualify the crimes; (c) determine responsibilities and, where possible, identify those responsible; and (d) make recommendations, including, in particular, on accountability measures.' *Ibid*, annex, 2.

<sup>117</sup> Two previous statements by the OTP were silent on the national investigations. See ICC Deputy Prosecutor, 'Statement to the Press by Ms Fatou Bensouda, Deputy Prosecutor. Conakry' (International Criminal Court 2010).

<sup>118</sup> ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities 2011' (International Criminal Court 2011) 113.

<sup>119</sup> *Ibid*, 120.

<sup>120</sup> *Ibid*, 155.

<sup>121</sup> *Ibid*, 156.

<sup>122</sup> Lt. Col. Moussa Tiegeboro Camara, head of the national agency for the fight against drug-trafficking, organized crime and terrorism (with the rank of minister) was charged on 1 February 2012 for murders, injuries and participation in a crime; Col. Abdoulaye Cherif Diaby, former Health Minister at the time of the events was

victims,<sup>123</sup> collected evidence which has led to the indictment of the suspects, of which five have appeared before the judges, while the sixth is a fugitive.<sup>124</sup> On this basis the Prosecutor determined that *'the national authorities appear to be investigating the same persons and the same conduct that would form the basis of the potential case that the Office would seek to bring before the ICC'*<sup>125</sup> but that Guinea would remain under preliminary examination as the investigation is yet to be completed, in order to continue to *'support the efforts of the Guinean authorities to ensure that justice is rendered.'*

One year later, in the 2013 Report on Preliminary Examinations, the OTP provided an update on the conduct of the national investigations, noting that the panel of investigating judges had taken further investigative steps: interviewing approximately 150 victims<sup>126</sup> as well as political leaders and military officers, including the Chief of Staff of the gendarmerie, General Balde and the Head of Presidential Security, Claude Pivi who was also indicted during the period, while efforts were made to locate alleged mass graves.<sup>127</sup>

Nonetheless, the OTP considered that the circumstances in which they were operating was problematic, with their work hampered by weekly demonstrations, a tense political climate connected to parliamentary elections, security concerns relating to the profile of potential suspects and administrative hurdles causing delays in the transmission of national and international requests for judicial assistance.<sup>128</sup> The Report also noted that two of the indicted persons continued to hold their government posts following the indictment, but concluded that there was no basis to consider that the proceedings were inconsistent with the intent to

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indicted on 13 September 2012. ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities 2012' (International Criminal Court 2012) 154.

<sup>123</sup> Many of whom Human Rights Watch contend are represented by private lawyers who are funded through national and international NGO's in order to represent the victims and pursue national justice. See Human Rights Watch, 'Waiting for Justice: Accountability before Guinea's Courts for the September 28, 2009 Stadium Massacre, Rapes, and Other Abuses' (2012) ISBN: 1-56432-954-2 2 <[http://www.hrw.org/sites/default/files/reports/guinea1012forUpload\\_0\\_0.pdf](http://www.hrw.org/sites/default/files/reports/guinea1012forUpload_0_0.pdf)>.

<sup>124</sup> Report on Preliminary Examination Activities 2012 (n 122) 157.

<sup>125</sup> Ibid, 151

<sup>126</sup> The 2013 Report lists the *total* activities of the national investigation since it began its investigation, rather than assessing the progress in previous 12 months, which can be a misleading representation of the investigative measures undertaken. The figures included here are disaggregated. See ICC Office of the Prosecutor, 'Report on Preliminary Examination Activities 2013' (International Criminal Court 2013) paras 191–195.

<sup>127</sup> Ibid, 192.

<sup>128</sup> At least one of the international requests for assistance concerns a request to interview the former President, Dadis Camara, who lives in Exile in Burkina Faso. According to Human Rights Watch, neither the Foreign Ministries or Justice Ministries of either country could explain why it was outstanding or if they were aware of the requests. See 'Waiting for Justice: Accountability before Guinea's Courts for the September 28, 2009 Stadium Massacre, Rapes, and Other Abuses' (n 123) 5.

bring persons to justice and therefore that it expects that a trial will take place without delay.<sup>129</sup>

Despite its collation of facts and data concerning the activity of the national investigation and the circumstances in which it operates, the OTP's reports do not analyze the justifiability of the delays against any standards and give little in the way of guidance or authoritative interpretation of the steps necessary to undertake in order to remain outside of the ICC.

### 3.3. Unjustified Delays as interpreted in Admissibility Challenges

Admissibility proceedings before the ICC Chambers have tended to limit their analysis of unjustified delay.

#### *Use of Admissibility Challenge to Raise Violations of the Rights of the Accused Connected to Delays is Inappropriate*

During the admissibility appeal in *Katanga* the defense submitted that the absence of any inquiry into the reasons why the DRC was unwilling to prosecute him would '*have the effect of encouraging the current practice of the DRC to simply keep detainees in detention indefinitely until the ICC decides whether or not it wants to prosecute them.*'<sup>130</sup> The permissibility of the length of detention by Congolese forces, as well as the process of the transfer of Katanga to the authority of the ICC was central to the admissibility challenge yet the line of argument here focused on the effect of ICC actions on national due process protections, notably indefinite detention without the pursuit of domestic or international trials.

The Appeals Chamber was unconvinced, both of the potential effect on national due process rights alleged above, but also on the choice of mechanism that the appellant had chosen to

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<sup>129</sup> 'Report on Preliminary Examination Activities 2013' (n 126) paras 194-195

<sup>130</sup> *Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute (The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Situation in Democratic Republic of the Congo)* [2009] 65, 100.

raise concerns over the possible violation of any of his pre-trial rights in the course of his transfer to the ICC, remarking that:

*'A challenge to admissibility [...] is not the mechanism under which to raise alleged violations of the rights of the accused in the course of the prosecutorial process. It is a limited procedure that triggers the relevant Chamber's powers to determine the admissibility of the case under article 17 of the Statute. Unless alleged prejudices and violations are relevant to the criteria of article 17 of the Statute, they cannot render a case inadmissible.'*<sup>131</sup>

### ***Use of Admissibility Challenges to Delay National Proceedings***

In the Kenya admissibility challenge, the Government of Kenya submitted that its investigation of the crimes of the 2007-2008 post election violence was continuing, having described a breadth of 'far-reaching constitutional and judicial reforms'<sup>132</sup> that aimed to strengthen its criminal justice system and its respect for international standards and efficiencies. It continued by requesting to provide a series of progress reports on the status of investigations, which it expected would advance once a Director of Public Prosecutions was appointed.<sup>133</sup> In response, the Prosecutor alluded to the potential delay tactics adopted by the Government of Kenya, through its submission request to submit further reports, arguing that *'allowing "a lengthy timetable for submissions" for the sake of assessing the development of the local judicial institutions has no basis in the Statute, and would lead to unnecessary delay of proceedings.'*<sup>134</sup>

The Pre-Trial Chambers decision did not directly tackle the thorny issue of whether the Government of Kenya was seeking to delay the admissibility proceedings through its actions, but rather expressed its surprise at the statements of the Government of Kenya, whereby it

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<sup>131</sup> Ibid, 112-113.

<sup>132</sup> *Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute* ICC Pre-Trial Chamber II ICC-01/09-02/11-96, 30 May 2011 14–15.

<sup>133</sup> Ibid, 13, 69, 72, 79; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (Admissibility Decision: Muthuara, Kenyatta, Ali 'PNU Case')* [2011] ICC Pre Trial Chamber II ICC-01/09-01/11-96, 30 May 2011 14–15; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (Admissibility Decision: Ruto, Kosgey, Sang 'ODM Case')* [2011] ICC Pre Trial Chamber II ICC-01/09-01/11-101, 30 May 2011.

<sup>134</sup> *Admissibility Decision: Muthuara, Kenyatta, Ali 'PNU Case'* ibid, 18.

appeared to contradict its assertion that its ongoing investigations reached to the highest level, whereas in fact, they had not proceeded beyond lower-level perpetrators.<sup>135</sup> It also considered that none of the reports promised by the Government of Kenya proposed to address the national proceedings underway against the three suspects, which would be in-keeping with the same-person test and would therefore be directly applicable to the proceedings.<sup>136</sup> It further found that of the 29 additional annexes that were submitted, albeit without leave to do so, only 3 appeared of direct relevance to the investigative process.<sup>137</sup> While the decision of the Chamber did not directly discuss issues of delays, it nonetheless responded to the practices that are symptomatic of delay tactics.

### ***Finding of Inability Removes the Need to Address Unwillingness***

The submissions of the parties to the admissibility proceedings of Saif al Islam al Gaddafi addressed both directly and circuitously, the distinct requirement of unjustified delay as prescribed in the Statute. However, in finding that Libya was instead genuinely unable to carry out its investigation or prosecution against Gaddafi, the Chamber decided that it would not address the alternative requirement of ‘willingness’<sup>138</sup> and in particular, that it would not address the issues raised by the defence about the impossibility of a fair trial for Gaddafi.<sup>139</sup> While this is judicially prudent, it leaves an interpretive blank in the Court’s approach to fair trial rights, both in the context of unwillingness and to a certain extent inability, and indicates a certain reluctance to engage with such matters that confront the boundaries of its powers.

Notwithstanding the judge’s caution, it can be pertinent to briefly outline the questions raised by the Defence Counsel, which focused on the conduct of the authorities as well as broader due process issues,<sup>140</sup> and the robust responses provided by the Government of Libya, as well

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<sup>135</sup> Ibid, 60-61

<sup>136</sup> Ibid, 62-63

<sup>137</sup> Ibid, 63. Paragraphs 65-69 describes the aspects of the 3 annexes that contained directly relevant material which provides an informative guide to subsequent State submissions.

<sup>138</sup> *Gaddafi Admissibility Decision* (n 32) 138, 216, 218

<sup>139</sup> *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 32), 216, 218

<sup>140</sup> None of the parties raised challenges concerning the conduct of the accused, who remained under the control of the Zintan Brigade, a militia group with allegiance to the Government but not under its direct or total control, and much of the Defence’s challenges focused on demonstrating the absence of due process rights of the accused. OPCD, *Defence Request and Response to the ‘Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge’* Office of Public Counsel for Defence ICC-01/11-01/11, 21 May 2012; *Public Redacted Version of the ‘Response to the Libyan Government’s further submissions on issues*

as its analysis of the application of the scope of unjustified delay.<sup>141</sup>

The Defence Counsel claimed that the timeliness of national proceedings and the measures adopted inferred the possibility of unreasonable delay, arguing that *'after 15 months, the ICC can no longer wait in the wings'*<sup>142</sup> To substantiate its claim it highlighted four factors of unjustified delay concerning the failure or inadequacy of measures, in its Response to the Admissibility Application, namely to: actively investigate the subject matter of the ICC case; to notify Gaddafi of the legal basis for his detention and the nature of the charges against him; to bring him before a judge; and to facilitate the pre-trial rights provided to detained persons in accordance to national law.<sup>143</sup>

In its subsequent Response to Libya's Further Submissions it focused on two issues that the Defence considered to affect the timeliness of the proceedings in such a way that *'the Pre Trial Chambers can not but draw inferences concerning the possibility of unreasonable delay.'*<sup>144</sup> The first issue concerned the possibility of a delay in the pursuit of the ICC-related case due to the scheduling of a separate case concerning security offences and its status before a Trial Chamber, whereas the case over which admissibility was being contested, remained at an investigation phase, with considerable uncertainty over the likely charges, defendants and location of the possible trial.<sup>145</sup> The Defence alleged that the security case would take priority over the investigation concerning the case of the admissibility challenge, and furthermore that several of the charges of the separate security offences had some overlap with the subject matter of the admissibility proceedings, creating *'inevitably delay'* that could *'potentially frustrate'* the commencement of the ICC-related case and would

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*related to the admissibility of the case against Saif Al-Islam Gaddafi'* (Defence Response to Libya's Further Submissions: Gaddafi Admissibility) Office of Public Counsel for Defence ICC-01/11-01/11-281-Red2, 18 February 2012.

<sup>141</sup> *Libyan Government Response to Defence Request* [2012] Government of Libya ICC 01/11-01/11, 20 May 2012; *Libyan Government's consolidated reply to the response of the Prosecution, OPCD and OPCV to its further submission on the admissibility of the case against Saif Al-Islam Gaddafi (Libya's Reply: Gaddafi Admissibility)* [2013] Pre Trial Chamber I ICC-01/11-01/11-293-Red2, 04 March 2013.

<sup>142</sup> OPCD, 18 Feb 2013, para 15. *Public Redacted Version of the 'Response to the Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'* (Defence Response to Libya's Further Submissions: Gaddafi Admissibility) (n 140), para 15.

<sup>143</sup> *Defence Request and Response to the 'Libyan Government Application for leave to reply to any Response/s to article 19 admissibility challenge'* (n 140) [164–188].

<sup>144</sup> *Public Redacted Version of the 'Response to the Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'* (Defence Response to Libya's Further Submissions: Gaddafi Admissibility) (n 140) [146].

<sup>145</sup> *Ibid*, 141.



therefore generate ‘unreasonable’ delay for the purpose of Article 17.<sup>146</sup>

The second cause of delay that the Defence Counsel sought to ascribe to the conduct of authorities concerned the possibility of a joinder of Gaddafi’s case with nine or more other co-defendants, whose investigations and trials were at different stages of proceedings and dispersed in different jurisdiction, an action which the Counsel described as ‘extremely dilatory and prejudicial’ to the defendant.<sup>147</sup> The defence cited the adjournment of one of the co-accused in the joinder on the grounds that the authorities could not obtain the transfer of his co-defendants to the courtroom as an example of the likely adjournments and delays to the proceedings that such a case could expect, which would in their view constitute an unjustified delay.<sup>148</sup>

Through its application to submit an admissibility challenge, its Response and its Consolidated Reply, the Government of Libya (GoL) made a robust effort to establish its good faith pursuit of national proceedings and cooperation with the ICC in circumstances that it described as ‘*extremely difficult*.’<sup>149</sup> In addressing the timeliness of the investigation, the GoL sought to compare the duration of the national investigation with those of the international criminal tribunals, including the ICC,<sup>150</sup> persuasively arguing that ‘*Libya should not be held to a higher standard that that encountered by international criminal tribunals dealing with post-conflict investigations in other parts of the world*.’<sup>151</sup> In further rebuffing allegations of unjustified delay in the timeframe of the investigation, the GoL asserted that the complexity of the factual and legal issues of the case to be both justifiable and intended to achieve justice, thereby satisfying both prongs of unjustified delay test, and furthermore that it had made ‘*considerable and adequate progress within this time frame in transforming this environment into a functioning democratic state and conducting effective investigations*.’<sup>152</sup>

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<sup>146</sup> Ibid, 142.

<sup>147</sup> Ibid, 143.

<sup>148</sup> Ibid, 144.

<sup>149</sup> *Libyan Government’s consolidated reply to the response of the Prosecution, OPCD and OPCV to its further submission on the admissibility of the case against Saif Al-Islam Gaddafi (Libya’s Reply: Gaddafi Admissibility)* (n 141) [3].

<sup>150</sup> Ibid, 70-71.

<sup>151</sup> *Libyan Government’s consolidated reply to the response of the Prosecution, OPCD and OPCV to its further submission on the admissibility of the case against Saif Al-Islam Gaddafi (Libya’s Reply: Gaddafi Admissibility)* (n 141) [3].

<sup>152</sup> Ibid, 77-78.

Turning to the possible joinder and its likely effect on the delivery of timely justice, the GoL Response contested its relevance to an unjustified delay under Article 17(2)(b), first, as the Defence claim failed to consider the complexity of the case in light of other similar cases, which typically span several years,<sup>153</sup> and second as the Defence had failed to consider the second 'good faith' prong of the unjustified delay test, namely that the unjustified delay must be inconsistent with the intent to bring the person to justice.<sup>154</sup> The GoL Response correctly challenged the Defence Counsel attempt to portray Article 17(2)(b) to be satisfied upon the determination of an unjustified delay. Rather, where an unjustified delay is determined, it must then be examined against the subjective intention of the State to determine if the delay is intentional, either to shield the person (in which case the correct determination would be shielding) or is contrary to bring the person to justice.<sup>155</sup>

Although the Pre-Trial Chambers did not address the submissions on unwillingness, the arguments submitted by the Defence and the GoL broadly represent the dilemma of the due process thesis in the context of unjustified delay. Exemplified through the dimensions of an actual admissibility challenge it is clear that any delay that can be considered as unjustified must then be found to be contrary to a good faith intention to bring the person to justice, as the same Chamber found shortly afterwards in the admissibility challenge concerning the case of Abdullah Al Senussi. What remains untested is the extent to which the intention to bring a person to justice is intrinsically built upon adherence to due process protections, where justice is a process as well as an outcome.

### ***'Concrete' Circumstances: the Inadmissibility of the Al-Senussi Case***

In its Admissibility Decision that the ICC case against Abdullah Al-Senussi was inadmissible, the same Pre-Trial Chamber bench briefly concluded that Libya was willing under the terms of Article 17(2) to investigate and prosecute Al Senussi<sup>156</sup> reserving the greater part of its conclusion to the determination of Libya's ability to do so (**see section 5**

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<sup>153</sup> Ibid, 72. The *Response* omitted to consider the impact that a possible joinder may have on the timeliness of the Gaddafi case.

<sup>154</sup> Ibid 73. It also seeks to establish that unjustified delay establishes a higher threshold than unjustified delay, although the argumentation is unpersuasive

<sup>155</sup> Ibid, 75.

<sup>156</sup> *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* (n 39) 290–293.

below).<sup>157</sup> In the context of unjustified delay, the Chambers decided that *'the national proceedings against Mr Al-Senussi cannot be considered as tainted by an unjustified delay that in the concrete circumstances is inconsistent with an intent to bring Mr Al-Senussi to justice.'*<sup>158</sup>

In its submissions for the *Al-Senussi* admissibility challenge, the Government of Libya developed its arguments from its admissibility challenge in *Gaddafi* that unjustified delay under article 17(2)(b) consists of two prongs, where the second prong requires proof of the *'subjective intention of the State and determine that there is [...] an absence of intent to bring the person concerned to justice.'*<sup>159</sup> It went on to argue that the evidence available (both to the national prosecutors and the excerpts that were submitted to the PTC) clearly demonstrated that Libya was genuinely investigating Al-Senussi as well as its intent to bring him to justice, claiming that there could be no motive could be deduced from the submissions that Libya wished to ensure impunity for the accused.<sup>160</sup> Addressing the complexity of the case, the GoL referred to the broader temporal jurisdiction of the national case as evidence of its increased complexity.<sup>161</sup> In addition to its investigation into the conduct that formed the subject matter of the ICC's investigation, the national authorities had expanded the investigation into the criminal actions of Al-Senussi to include violations since the 1980's,<sup>162</sup> while it updated the expected charges that were expected to be made against the accused in its final submission, presumably to demonstrate the evolving nature of the investigations.<sup>163</sup>

In seeking to assert the genuine conduct of the authorities in the national investigation of Al-Senussi, the submissions noted that more than 100 witnesses had been interviewed since his

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<sup>157</sup> *Ibid*, 294-310

<sup>158</sup> *Ibid*, 291.

<sup>159</sup> *Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute (Article 19 Application: Al-Senussi)* (n 37) [102].

<sup>160</sup> *Ibid* 105.

<sup>161</sup> *Ibid* 157

<sup>162</sup> *Ibid*, 157.

<sup>163</sup> In its Admissibility Challenge, the envisaged charges included: 'devastation, rapine and carnage; civil war; conspiracy; attacks upon the political rights of a Libyan subject; concealment of a corpse; indiscriminate or 'random' killings; arson; stirring up hatred between the classes; aiding members of a criminal association; intentional murder; use of force to compel another; misuse of authority against individuals; search of persons; unlawful arrest; unjustified deprivation of personal liberty; torture; and, possibly, incitement to rape, drug trafficking and serious damage to public funds.' *Libya's Article 19 Request* [154] to 'unlawful killing, the distribution of narcotics, incitement to commit rape, kidnapping, and other crimes associated with fomenting sedition and civil war.' *Government's Submissions and Response to Defence 'Filing on behalf of Mr Abdullah Al-Senussi pursuant to 'Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi* [2013] Pre Trial Chamber I ICC-01/11-01/11-455 [8].

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transfer of custody to Libya,<sup>164</sup> and that in connection to the 37 other co-defendants, more than 200 witnesses had been interviewed and tens of thousands of documents had been gathered as evidence:<sup>165</sup> such evidence, it suggested was concrete, tangible and pertinent to the crimes that form the subject matter of the investigation into Al-Senussi.<sup>166</sup>

Turning to the circumstances in which the investigation was conducted, the Submissions provide a breadth of information on the complex post-conflict, transitional reality in which the Libyan investigators and prosecutors operate.<sup>167</sup> This narrative, coupled with analysis on the role of complementarity in such circumstances is likely to be significant in shaping the contours of admissibility challenges in the future, and despite their relevance to the circumstances in which delays may occur, they will be considered in detail in **Section 5** on ability, as it is largely under this scenario of admissibility that they have been assessed by the Court.

The Prosecutor's submissions largely supported the Government of Libya's request, and indeed reiterated many aspects of the Government's narrative, most notably that States should not be held to a higher standard than the ICC, rephrasing it thus:

*'it is essential that States not be held to a higher standard with regard to the speed and progress of their proceedings than has been met by the ICC itself or other international tribunals, particularly given the history of Libya, its very recent emergence from four decades of autocratic rule, and the serious security challenges facing the country.'*<sup>168</sup>

While the Prosecutor noted that some delays in the investigation of Al Senussi had occurred, she asserted that they were attributable to the '*obstacles arising from the challenges of establishing a fully functional government in a transitional post-conflict stage*' but that at no

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<sup>164</sup> *Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute (Article 19 Application: Al-Senussi)* (n 37) [156].

<sup>165</sup> *Government's Submissions and Response to Defence 'Filing on behalf of Mr. Abdullah Al-Senussi pursuant to 'Decision on additional submissions in the proceedings related to Libya's challenge to the admissibility of the case against Abdullah Al-Senussi* (n 163) [5].

<sup>166</sup> *Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute (Article 19 Application: Al-Senussi)* (n 37) [124].

<sup>167</sup> *Ibid*, 176–182.

<sup>168</sup> *Prosecution Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'* (n 14) [71].

point did the investigation appear to be inconsistent with an intent to bring the person to justice.<sup>169</sup>

The submissions of the Defence sought to establish that the duration of the investigation – a period of approximately 24 months – to be a ‘*significant lapse of time*’ where ‘*preliminary logistical and legal steps remain outstanding*’<sup>170</sup> that warranted a finding of unjustified delay and admission of the case to the ICC.

In reviewing the submissions against the legal requirement of unwillingness, the chamber considered that the development of the national investigation, from the opening of the first investigation by the Military Prosecutor on 09 April 2012, to its reclassification under civilian jurisdiction, the transfer of Al-Senussi from Mauritania to Tripoli and the pursuit of interviews with the accused, to the eventual transfer of the case to the Accusation Chamber demonstrated that ‘*Libya has continued progressively to conduct its investigation, as demonstrated by the dates of witness interviews, which appear in the evidence submitted as part of the Admissibility Challenge.*’<sup>171</sup> Turning to the complexity of the case and the conduct of the authorities, the Chambers observed that the factual allegations of the proceedings against Al Senussi covered broad temporal, geographic and material parameters beyond the subject matter of the ICC’s own investigation, which it considered ‘*on its own to be sufficiently broad in scope to be understandably challenging.*’<sup>172</sup> It concluded that in the ‘specific circumstances’ the duration of the investigation and transfer of the file to the Accusation Chamber did not constitute unjustified delay according Article 17(2)(b).<sup>173</sup>

#### 4. Loss of Independence and Impartiality of the Proceedings

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<sup>169</sup> Ibid, 79.

<sup>170</sup> Defence Response to ‘Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute’ (n 24) [172].

<sup>171</sup> Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi) (n 39) [227].

<sup>172</sup> Ibid, 228.

<sup>173</sup> Ibid, 229

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The third and final criteria of unwillingness, that of independence and impartiality are recognised as 'a necessary and sufficient condition to the process of justice.'<sup>174</sup>

*(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.'*

Long accepted as an *jus cogens* right, bearing customary international law status<sup>175</sup> the principle of independence and impartiality of a tribunal is protected in the ICCPR, ECHR, ACHR, ACHPR, the four Geneva Conventions and each of the international criminal tribunals, including the ICC Statute.<sup>176</sup> The principle applies equally to acts that are detrimental to the accused and to acts which aim to protect, shield persons from justice or accountability.<sup>177</sup> It is this second dimension of the loss of independence or impartiality that Article 17(2)(c) aims to address, through the second part of its text, which requires that any established loss of independence or impartiality be inconsistent with an intent to bring the person(s) to justice. Finally, as with the shielding and unjustified delays, the violation needs to be found only in the specific case or investigations that forms the subject matter of the ICC investigation or case, through the use of 'the proceedings:' the Court's intrusion into the national criminal justice practices of the State is limited to the specific case at hand.

In supporting the Courts inquiry into a State's willingness, States are given the opportunity to provide information to the Court that shows that '*its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct*' which the Court may consider in the context of the circumstances of the case.<sup>178</sup> The Office of the Prosecutor has issued two papers that indicate its own practices concerning its

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<sup>174</sup> Stigen (n 22), Unwillingness

<sup>175</sup> General Comment No. 29 (n 97), See also the ICRC compilation of customary international law rules, ICRC, Rule 100: Fair Trial Guarantees, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule100](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule100) (accessed 06 August 2012), Judge Patrick Robertson, *The Right to a Fair Trial in International Law, with specific reference to the work of the ICTY*, Berkeley Journal of International Law, Publicist, January 2010, Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime*, Boalt Journal of International Law, 25:2, 2007; Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, Coalition for the International Criminal Court.

<sup>176</sup> Article 14(1)International Convention on Civil and Political Rights 1966; Article 6(1)European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; Article 8(1)American Convention of Human Rights 1969; Article 26African Charter on Human and People's Rights 1981. Article 3 (1)(d) common to the Four Geneva Conventions 1949; ICTY; ICTR; ECCC; Article 40, 42 *Rome Statute* (n 3);

<sup>177</sup> See Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 21) 145; Ximena Medellín Urquiaga (n 18) Chapter 2 and 5.

<sup>178</sup> Rule 51, *Rules of Procedure and Evidence* (n 46).

assessment of independence and impartiality, during preliminary examination,<sup>179</sup> and more broadly in the context of complementarity.<sup>180</sup> Its *Draft Policy on Preliminary Examinations* identifies five indicative indicators of institutional and behavioral attributes<sup>181</sup> that attempted the due process element of independence of article 17(2)(c) with its element of intent:

*[i] the alleged involvement of the apparatus of the State, including those responsible for law and order, in the commission of the alleged crimes; [ii] the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; [iii] the application of a regime of immunity and jurisdictional privileges for alleged perpetrators; [iv] political interference in the investigation, prosecution and trial; and [v] corruption of investigators, prosecutors and judges.*<sup>182</sup>

Similarly, its approach to impartiality includes two indicative criteria to identify impartiality of the proceedings, which largely reflect those of the 2003 Expert Paper:

*[i] linkages between the suspected perpetrators and competent authorities responsible for investigation, prosecution and/or adjudication of the crimes; [ii] public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.*<sup>183</sup>

The OTP's choice of indicative criteria of independence and impartiality differ somewhat from the internationally recognised standards and norms that States are invited to consider through Rule 51, when submitting information to the Court. For States undergoing the admissibility procedure before the Court, it is more feasible to follow the structure that has been developed by international and regional human rights bodies in organizing its submissions, while for analysis of admissibility, the Court is directed to consider the fair trial component of independence and impartiality within the restraints established by the rule of intent. In light of this, a brief review of international can serve as a refreshment of the scope of the right.

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<sup>179</sup> ICC Office of the Prosecutor, 'Draft Policy Paper on Preliminary Examinations' (n 48) 64–65.

<sup>180</sup> ICC Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (n 89) 27–31. The report provides 3 core indicia of independence, 4 for impartiality and 20 ancillary indicia that may be relevant when considered in context along with other indicators, that were drawn from international and regional human rights jurisprudence, that support determinations of independence and impartiality.

<sup>181</sup> Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 21) 145.

<sup>182</sup> ICC Office of the Prosecutor, 'Draft Policy Paper on Preliminary Examinations' (n 48) 64.

<sup>183</sup> *Ibid*, 65.

In its General Comment on the Right to a Fair Trial, the UN Human Rights Committee has emphasized the importance or pre-eminence of the formal and procedural mechanisms that establish an independent judiciary, which refers to *'the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.'*<sup>184</sup> In addition to conditions that protect judges against conflicts of interest and intimidation being adequately secured by law, which established: *'the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.'*<sup>185</sup>

It also addresses the limitations for dismissal of judges, on grounds of serious misconduct or incompetence, as well as the dismissal process which must ensure fair, objective and impartial procedures, as defined by law. Dismissals by the executive should be provided with specific reasons, and there should be effective judicial protection to ensure that recourse to contest the dismissal can occur.<sup>186</sup> The dismissal of judges – as well as their appointment – is likely to be of importance to the Court in establishing the general context of the independence and impartiality of the judiciary, while the appointment procedure and its impact on the case, as specified by the OTP Draft Policy will undoubtedly assist in determining the loss of independence in the case under scrutiny by the Court.

Similarly, the independence of the judiciary has also been found to require that the authority of the judiciary is respected and carried out by other organs of State:<sup>187</sup> for example, the prison authorities must respect acquittals<sup>188</sup> and enforce sentences, while the State must ensure that adequate resources are provided in order that court decisions can be complied with.<sup>189</sup> The use of threats, including death threats and intimidation of the judiciary or prosecution, and the limited protections afforded to criminal justice professions (judges, prosecutors and investigators) has also been criticized as a method of compromising the

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<sup>184</sup> UN Human Rights Committee (n 70) 19.

<sup>185</sup> Ibid, 19

<sup>186</sup> GC 32, para 20, with reference to Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.

<sup>187</sup> ECHR, *Bentham v. The Netherlands*, Application No. 8848/80, Judgement of 23 October 1985

<sup>188</sup> ECHR, *Assanidze V Georgia*, Application no. 71503/01, decided 08 April 2004

<sup>189</sup> ACHR Report on Ecuador, Chapter 3, COE Recommendation (94) 12 of 13 Oct 1994



independence of criminal justice institutions, often directly related to atrocity prosecutions.<sup>190</sup> However, incidences where intimidation has led to the loss of independence or impartiality are infrequently found before international bodies.<sup>191</sup>

The UN Human Rights Committee has clarified that, under the ICCPR, the requirement of impartiality consists of two aspects, one objective, the second subjective:<sup>192</sup>

*'First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.'*<sup>193</sup>

National submissions through Rule 51 will want to address both of these aspects, and in the course of admissibility they are likely to be examined as contextual information unless it directly addresses the specific case, where the Court will likely consider that the investigators, prosecutors and judges *'act objectively basing their decision on relevant facts and applicable law, without personal bias, preconceived ideas or personal involvement.'*<sup>194</sup> Whereas objective impartiality indicators, such as the prior involvement in the same case,<sup>195</sup> or statements against the accused or affiliated groups, may be definitively established, subjective indicators are more complex to prove. Human rights bodies have typically inferred the loss of impartiality, as there is rarely direct evidence of partial behavior:<sup>196</sup> the ethnicity of judges, their religious or political orientation, where it differs to the accused person is not

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<sup>190</sup> Human Rights Committee: Argentina (1995) UN Doc CCPR/C/79/Add.46; UN Doc A/50/40, at 144-165, also IACHR Annual Report on Colombia 2002, [47-50], available at <<http://www.cidh.org/annualrep/2002eng/chap.4.htm#COLOMBIA>

<sup>191</sup> See also ECtHR, *Al-Sadoon and Mufdhi v. the UK*, 61498/08, Judgment (Merits and Just Satisfaction), 02 March 2010

<sup>192</sup> UN Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

<sup>193</sup> UN Human Rights Committee (n 70) 21.

<sup>194</sup> Human Rights Committee, *Karttunen v Finland*, Communication No. 387/1989 (1992) UN Doc CCPR/C/46/D/387/1989, 7.2.

<sup>195</sup> *Findlay v UK*, Judgment European Court of Human Rights Application no. 22107/93, 22 February 1997; *Piersack v Belgium*, Judgment European Court of Human Rights Application no. 8692/79, 01 October 1982; *Wilkinson and Allen v UK*, Judgment European Court of Human Rights Application no. 31145/96 and 35580/97, 08 February 2001.

<sup>196</sup> Stigen (n 22), chapter 8

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of itself sufficient to indicate impartial behavior, unless it is accompanied by other circumstantial evidence.

### *Scrutiny of Independence and Impartiality within Admissibility Challenges*

Evaluation of the independence and impartiality of the judiciary in the context of Article 17(2)(c) has not occurred during preliminary examination. Before the Pre-Trial Chambers, it was analysed in the *Al-Senussi* case and although it was asserted by the Office of Public Counsel for Victims (OPCV) and the Office of Public Counsel for Defence (OPCD) in *Gaddafi*, the PTC did not respond, having found instead that Libya was unable genuinely, to prosecute him (see 3.3.3. above).<sup>197</sup>

#### *Al-Senussi*

In the admissibility challenge for the case of *Al-Senussi*, the OPCV and Al Senussi's Defence Counsel submitted **five** separate indicators that they alleged to render a negative finding of independence and impartiality in the case of Al-Senussi, while the Government submissions sought to demonstrate its adherence to internationally recognised norms and standards concerning the independence and impartiality of the case in question, supplemented by details of the capacity development and technical assistance that the judiciary had received in this area.<sup>198</sup>

Notwithstanding the Rule 51 information provided by the Government of Libya to the Court on its adherence to international norms and standards governing due process, its Admissibility Challenge in *Al-Senussi* briefly described the legal framework that established the independence and impartiality of the judiciary, including its Constitutional guarantee

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<sup>197</sup> The OPCV sought to assert that Libya had failed to show that its courts met internationally recognised norms and standards concerning independent and impartial prosecution of similar conduct, and that this contributed to its unwillingness. *Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute* Office of Public Counsel for Victims ICC-01/11-01/11, 04 June 2012 [49]. Whereas the OPCD sought to ascribe almost all the fair trial violations it alleged the State to be committing against Gaddafi to be demonstrative of its absence of independence and impartiality under Article 17(2)(c). See PTC summary of its submission, *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 32) [163].

<sup>198</sup> *Libyan Government's consolidated reply to the response of the Prosecution, OPCD and OPCV to its further submission on the admissibility of the case against Saif Al-Islam Gaddafi (Libya's Reply: Gaddafi Admissibility)* (n 141) 49.

under Article 32 of the 2011 Constitution and subsequent enactment into domestic law, including the Judicial System Law and the Freedoms Act.<sup>199</sup> As further evidence of the formal independence of the judiciary and its exclusive authority over criminal adjudication, the admissibility challenge pointed to the Constitutional prohibition of Exceptional Courts, which had operated by a distinct Security apparatus during the Gaddafi regime to ‘try’ people considered enemies of the regime, and which have widely been understood as bearing responsibility for systematic human rights abuses, and the return of all adjudicatory activities to the justice system.<sup>200</sup> As evidence of the active independence of the judiciary, the Challenge referred to a ruling of the Supreme Court in December 2012, which rejected the use of the People’s Court system to adjudicate criminal trials of the former regime officials, as unconstitutional, despite the ‘very high public importance and political sensitivity of the cases.’ Under the People’s Court system, criminal trials did not need to be submitted to the Accusation Chamber, where the sufficiency of evidence and its lawful collection are scrutinised and the decision taken to remit to the Criminal Trial or to dismiss the case would be made.<sup>201</sup> The Supreme Court ruled that the absence of this vital phase constituted ‘discrimination among persons in submission to law, violates the principle of equality, undermines the personal freedom, breaches the regulations of fair trial which renders it in violation of the well-established constitutional rules in this regard.’<sup>202</sup> It finally referred to a report prepared by the UK Foreign and Commonwealth Office in April 2011, where it asserted its experience of and confidence in the ministry of justice, which it described as ‘positive and constructive.’<sup>203</sup>

### **Maintenance of the former regime judicial system**

In contrast, while recognising the improvements that the interim authorities had made in guaranteeing the independence of judiciary, the OPCV considered that the measures had

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<sup>199</sup> Article 52, Judicial Systems Law, Article 31, Freedoms Act. See *Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute (Article 19 Application: Al-Senussi)* (n 37) [141].

<sup>200</sup> *Ibid*, 140-142

<sup>201</sup> *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute relating to Saif Al-Islam Gaddafi (Article 19 Application: Gaddafi)* Government of Libya ICC-01/11-01/11-130-Red, 01 May 2012 147; *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 32) 204.

<sup>202</sup> *Libyan Government’s Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya’s Further Submissions: Gaddafi Admissibility)* (n 73) 74–75.

<sup>203</sup> British Foreign and Commonwealth Office Conference Report, “Libya and Human Rights: the way forward” 11 April 2011, 2, quoted in *Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute (Article 19 Application: Al-Senussi)* (n 37) [141].

failed to address the core problems faced by the judiciary in Libya, notably that sought to assert that a systematic lack of independence and impartiality was in effect in Libya, most notably evident through the decision of the transitional authorities to '*keep in place the existing judicial system which survived the fall of the former regime.*'<sup>204</sup> Following positive reform to ensure that the Supreme Judicial Council was composed only of members of the judiciary, the OPCV considered that the interim governments' decision not to enact a draft law on the vetting of judges, prepared by the newly constituted Supreme Judicial Council, that would establish an independent committee for readmitting only those judges and prosecutors that met the proposed qualifications.<sup>205</sup> Instead, the OPCV submitted that a flawed vetting procedure had enabled former regime judges who had sat on the Extraordinary Courts to remain within the judiciary, despite having dismantled the infrastructure in which they had operated, and that this process has enabled a lack of independent judges across the phases of domestic proceedings.<sup>206</sup>

### ***Public Statements by Government Officials Assuming the Guilt of the Accused***

The Defence Counsel submitted four indicia that it considered established that the judiciary was unable to provide an independent or impartial trial for the accused, including the reappointment of Extraordinary Court judges.<sup>207</sup> First, it sought to establish that several public statements, which assumed the guilt of Al-Senussi and Gaddafi, had undermined his presumption of innocence and more importantly demonstrated the loss of independence in the judicial proceedings against him. This included statements from the Minister of Finance, the former Deputy Minister of Finance, a former Spokesperson for the Ministry of Foreign Affairs, the former Libyan Prime Minister and other Libyan officials, which assume the guilt of the accused, but the Response omitted to demonstrate the consequence or impact of the Statements on judicial independence or impartiality, in-keeping with established human rights jurisprudence.<sup>208</sup> Turning to the Political Isolation Law,<sup>209</sup> a form of lustration to

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<sup>204</sup> *OPCV Response (OPCV Response: Gaddafi Admissibility Challenge* Office of the Public Counsel for Victims 01/011-01/011-353-Red, 15 June 2013 76.

<sup>205</sup> *Ibid*, 76

<sup>206</sup> *Ibid*, 89-80.

<sup>207</sup> *Defence Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'* (n 24) 171.

<sup>208</sup> Instead, the *Defence Response* cites ECtHR case law which establishes the loss of the presumption of innocence as a consequence of official statements which announce the guilt of the accused in advance of the

exclude officials who had abused their positions under the former regime from holding public office, the Response submitted that it's widely criticised wording was discriminatory against Gaddafi-era officials and could be used to remove judges who *'attempt to issue independent decisions which uphold the rights of highly unpopular defendants'*<sup>210</sup> although it did not venture to explain how this could happen. Turning to its allegations of biased criminal proceedings against Al-Senussi's family members, the Defence argued that evidential and serious procedural shortcomings in the sentencing of Al-Senussi's daughter was evidence of biased criminal proceedings within the judiciary.<sup>211</sup>

### **Pre-Trial Chambers reasoning on the allegations of loss of independence and impartiality**

In its reasoning of the allegations by the OPCV and Defence Counsel, the Pre-Trial Chambers correctly categorised the submissions by both parties concerning official statements that assume Al-Senussi's guilt, as well as the allegations of biased proceedings against family members of Al-Senussi to be allegations of violations of other fundamental rights of the accused, rather than as tangible evidence of the loss of independence or impartiality of the judiciary. The PTC judges questioned whether such statements by public officials is relevant to admissibility under the wording of Article 17, and while choosing not to address this issue, it found the argument that the official statements could be attributed to the actual or perceived conduct of the Libyan judicial authorities to be unpersuasive, given the manner of proceedings in the case to date, and furthermore that such statements, of themselves or in combination with other factors, could not indicate the loss of independence or impartiality according to its intent requirement:

*'Given the manner in which Libya's proceedings are developing to date, the Chamber is not persuaded, in any event, that the statements referenced by the Defence can be attributed to the actual or perceived conduct of the Libyan judicial authorities that are involved in the proceedings against Mr Al Senussi. Therefore, the Chamber is not persuaded that these statements, in themselves or in combination with other factors,*

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judgment. See para 168 and footnote 258: Case of *Alenet de Ribemont v. France*, App No. 15175/89, Judgment, 10 February 1995, paras. 32-41.

<sup>209</sup> HRW, *'Libya: Reject Political Isolation Law'* 04 May 2013, Middle East Policy Council, *'Political Isolation and Libya's Future'* 17 May 2013.

<sup>210</sup> *Defence Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'* (n 24) 168

<sup>211</sup> *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* (n 39) 169.

*would indicate that these proceedings can be regarded as not being conducted independently or impartially and as being carried out in a manner which is inconsistent with the intent to bring Mr Al Senussi to justice in accordance with article 17(2)(c) of the Statute.*<sup>212</sup>

The PTC was similarly dismissive of the allegations of biased family proceedings, asserting that it was unable to draw any inferences from the conviction that assisted in the case at hand, and had they allegations of shortcomings and irregularities occurred or not, they would not indicate Libya's unwillingness or inability to carry out the proceedings against Al-Senussi.<sup>213</sup>

Turning to the inclusion of judges from the Gaddafi-era Extraordinary Courts and the Political Isolation Law, the PTC categorised the submissions as general in nature, bearing relevance as contextual information only, which could be considered *'only to the extent that such systemic difficulties have a bearing on the domestic proceedings against Mr Al-Senussi, such that it would warrant a finding of one of the scenarios envisaged under article 17(2) or (3) of the Statute.'*<sup>214</sup> Instead, the PTC was satisfied by the submission by Libya of details of its legal framework establishing judicial independence, as well as the examples provided by the Government, of the judiciary exercising these powers in areas directly relevant to the proceedings under consideration, finding the Supreme Court decision overturning the People's Courts Procedure, which occurred in the context of a trial against Abu Zaid Omar Darda, the former prime minister and former head of the External Security Agency, to be a significant factor.<sup>215</sup> Having dismissed each of the rather flimsy efforts to establish the loss of independence and impartiality in the proceedings against Al-Senussi and found them to fall far short of the fair-trial component as well as the requirement of intent, the PTC found Libya to be willing to investigate and prosecute Al Senussi, according to the legal requirements of Article 17(2).

## **5. Intent to Bring the Person to Justice**

Whereas article 17(2)(a) on the shielding of persons unequivocally requires that the abusive practice occurs for the benefit of the accused person, the undue delay of proceedings and loss

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<sup>212</sup> Ibid, 241.

<sup>213</sup> Ibid, 242.

<sup>214</sup> Ibid, 245

<sup>215</sup> Ibid, 246- 255

of independence and article impartiality does not cut such a clear cloth. Shielding a person from justice most clearly indicates a desire to benefit the person, but can undue delays and interference with the independence and impartiality of proceedings occur to prejudice a person and remain inconsistent with the intent to bring the person to justice?<sup>216</sup>

Reverting to the purpose of complementarity, where the primary obligation to prosecute rests with States, Markus Benzing disagrees: *'the normal situation envisaged by article 17(2)(c) would not prejudice the accused, but, on the contrary, would be to his or her benefit.'*<sup>217</sup> The Court he says, is not a forum to redress human rights abuses by the State against the accused. Similarly, Heller claims that the conjunctive requirements that the national proceedings lack independence and impartiality and that it is being conducted in a manner inconsistent with the intent to bring the person to justice provides an insuperable barrier.<sup>218</sup> The intent to bring a person to justice, is he claims, an expression synonymous with the intent to obtain a conviction, both within the ICC system, and in international law more generally. A trial that violates prejudices the accused, is he says, consistent with the 'intent to bring a person to justice'<sup>219</sup> despite the jus cogens status of the rights that such a process may violate.

The Ne Bis In Idem requirements of article 17(1)(3) and article 20(3) supports the same requirement of intent. The Court is barred from exercising jurisdiction over individuals that have already been tried for conduct that is the subject of the complaint, unless it was for the purpose of shielding the person, or it was 'not otherwise conducted independently 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.'<sup>220</sup> In their analysis of this requirement of article 20(3)(b) Immi Tallgren and Astrid Reisinger Coracini record the disagreement over the text during the Rome Conference, noting however that the final view was that, if criminal justice is to be done, then it must be done properly, according to international due process requirements.<sup>221</sup> One question that remains unanswered is whether the intent to bring the person to justice

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<sup>216</sup> Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (n 21) 145.

<sup>217</sup> Benzing (n 89) 607.

<sup>218</sup> Heller (n 2), 254

<sup>219</sup> Heller (n 2), 256

<sup>220</sup> Article 20(3)(b), *Rome Statute* (n 3)

<sup>221</sup> Immi Tallgren and Astrid Reisinger Coracini, *Article 20*, in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> edition, 2008, page 687.

contains a qualitative assessment of the required standards of justice, which distinguishes it sufficiently from the intent to secure conviction. An assumption also emerges in each of their accounts, where any finding of admissibility based on an applicable due process violation that prejudices the accused is considered to be a transition point from an international criminal court into a body for the protection of individuals.<sup>222</sup> The admissibility decision does not contain a remedy to the accused person and it is not the purpose of the exercise, rather it is a procedural stage towards rendering criminal justice 'properly.'

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<sup>222</sup> Ibid, 695.



## Chapter 6

### *Ability of the National Judicial System: Models of Complementarity and Emerging Indicators*

The genuine ability of a State to prosecute perpetrators of the criminal acts listed in the Rome Statute has beguiled and tantalised the concept of complementarity from the earliest moments of the Court, where concerns were raised that the judicial machinery of developing or post-conflict countries would be subjected to harsh assessment from the ICC<sup>1</sup> through to expectations that the ICC could catalyse national efforts or help develop capacity of national justice mechanisms through the development of a *positive* dimension of complementarity.<sup>2</sup> Within the ordinary realm of complementarity, discourse has looked at the ability of States through the lens of compliance with international regimes,<sup>3</sup> starting with the Rome Statute and extending to include international human rights obligations and standards.<sup>4</sup> The scope and form of the *active* dimension of complementarity has also been popularly explored,<sup>5</sup> with

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<sup>1</sup> In her comments regarding the ability criteria of article 17, issued during the negotiation process of the Rome Statute, Louise Arbour, former Prosecutor of the ICTY and UN High Commissioner for Human Rights, sought to expose the preferential biases to established, western democracies, incumbent in the construction of the ability criteria, warning that the provision for the determination of a countries inability could prejudice many territorial states, particularly those in the throws of transition. Arbour, quoted in Williams, 'Article 17: Issues of Admissibility', , *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed, Beck 2008).

<sup>2</sup> Luis Moreno Ocampo, 'A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); ICC Office of the Prosecutor, 'Prosecutorial Strategy 2009-2012' (International Criminal Court 2010); ICC Office of the Prosecutor, 'Strategic Plan June 2012-2015' (International Criminal Court 2013).

<sup>3</sup> Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 *Global Policy Journal* 127; Kai Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Larknaes (ed) (2002).

<sup>4</sup> Open Society Justice Initiative, 'International Crimes, Local Justice: A Handbook for Rule of Law Policymakers, Donors, and Implementers' (Open Society Foundations 2011); M Cherif Bassiouni, *Chicago Principles of Post Conflict Justice* (International Human Rights Law Institute 2007); Amnesty International, 'International Criminal Court: Updated Checklist for Effective Implementation' (2010) IOR 53/009/2010; Edoardo Greppi, 'Inability to Investigate and Prosecute under Article 17', *The International Criminal Court and national jurisdictions* (Ashgate 2008); Olympia Bekou, 'Crimes at Crossroads Incorporating International Crimes at the National Level' (2012) 10 *Journal of International Criminal Justice* 677.

<sup>5</sup> William W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 59; Christopher Keith Hall, 'Positive Complementarity in Action' in Mohamed M El Zeidy and Carsten Stahn (eds) (2011); Sylvia Arbia and Giovanni Bassu, 'Proactive Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Göttingen Journal of International Law* 791; Katherine L Doherty and Timothy LH McCormack, 'Complementarity' as a Catalyst for

less attention to what actually needs to be catalysed or developed within the ICC system, to 'immunise' or enable States to retain jurisdiction.<sup>6</sup> Both features of complementarity have been invigorated following the two Admissibility Challenges in the cases of *Gaddafi* and *Al-Senussi*, most notably in *Gaddafi*, where, where both aspects of complementarity were thoroughly litigated: while the admissibility of the *Gaddafi* case has been confirmed by the Appeals Chamber, it has not been without controversy or dissent, which will continue to fuel further inquiry into the interpretation and application of article 17(3) by the Court.<sup>7</sup>

This chapter will review the framework of inability in light of the recent admissibility challenges, briefly revisiting the relevance of the due process debate as part of the general assessment of ability or as a more qualified part of the specific requirements, before reviewing in turn, the emergence of indicators on the ability or status of the national justice system and its three specific requirements.

### 1. The Definition of Ability in Article 17(3)

Similar to determinations of *unwillingness*, the test for inability identifies a general or preliminary requirement followed by one or more specific requirements, in the context of a particular case or investigation. Unlike *unwillingness*, the condition of *inability* is almost universally acknowledged as a more objective criteria,<sup>8</sup> which in its entirety, declares that:

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Comprehensive Domestic Penal Legislation' (2009) 5 U.C Davis Journal of International Law and Policy 147; Mark A Drumbl, 'Policy through Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Federica Gioia, 'Complementarity and "Reverse Cooperation"' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Michael A Newton, 'The Quest for Constructive Complementarity', *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2010); Moreno Ocampo (n 2).

<sup>6</sup> Morten Bergsmo (ed), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher 2011); Payam Akhavan, 'Whither National Courts? The Rome Statute's Missing Half' (2010) 8 Journal of International Criminal Justice 1245; Frédéric Mégret, 'Too Much of a Good Thing? Implementation and the Uses of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Frédéric Mégret, 'International Criminal Justice: Systems of Horizontal Cooperation v. Systems of Vertical Integration', *Droit international pénal: précis* (2nd edition, Helbing Lichtenhahn 2012); Hitomi Takemura, 'A Critical Analysis of Positive Complementarity' (2007).

<sup>7</sup> Notably through the PTC's request for further information following the Admissibility Hearing *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* ICC Pre-Trial Chamber I ICC-01/11-01/11-239, 07 December 2012 [41–47].

<sup>8</sup> 'Article 17: Issues of Admissibility' (n 1); Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (First, Oxford University Press 2008) chapter 9.

*'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.'*

As the text shows, there is a general requirement, which consists of three distinct conditions of the national judicial system: (i) a state of total or substantial collapse; or (ii) otherwise unavailable. Satisfaction of one of the general requirements should be causally relevant to one or more of the three specific requirements of inability, through the use of the adjective 'due' which functions as a connector to the specific requirements:<sup>9</sup> (i) to obtain the accused; or (ii) to obtain the necessary evidence and testimony; or (iii) to otherwise carry out its proceedings.

In seeking to define the *ability* of national justice systems to investigate and prosecute the crimes of the Statute, publicists have drawn a wide spectrum of national standards of practice (see **Chapter 1**): at the upper threshold, States are presented with a comprehensive package of safeguards that encompass international minimum standards on the protection of all participants in the proceedings, including suspects, accused persons, witnesses and victims,<sup>10</sup> as well as the availability of substantive law that includes the crimes, liabilities, defences and general principles of the Rome Statute<sup>11</sup> while at the lower threshold, the text of the Statute has been carefully reiterated, to clarify first that the standard of national justice required by the ICC is that of *genuineness* rather than *fairness* (see **Chapter 3**) and second that the due process requirement is limited to the criteria of willingness (see **Chapter 4**).

### ***Revisiting the Due Process Thesis in the Context of Inability***

The absence of any reference to the qualities or standards of practice that must be attained by the national judicial system in its proceedings and its implications for the practice of national

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<sup>9</sup> *The Government of Libya's Appeal against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi' (Admissibility Appeal: Gaddafi)* [2013] Government of Libya ICC-01/11-01/11-350, 07 June 2013.

<sup>10</sup> Open Society Justice Initiative (n 4); Bassiouni (n 4); Doherty and McCormack (n 5); International Centre for Criminal Law Reform and Criminal Justice Policy, 'International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute' (2008) ISBN: 978-0-9730432-6-6; Commonwealth Secretariat, 'Model Law: To Implement the Rome Statute of the International Criminal Court, Adopted at the Meeting of Commonwealth Law Ministers and Senior Officials, 14 July 2011' (2011) LMM(11)17 [Provisional].

<sup>11</sup> Bekou (n 4); Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers 2008).

accountability for crimes under the Statute has been somewhat difficult to digest. Whilst the ICC may be held to a 'scrupulous' standard of fair trial guarantees it is problematic to interpret a requirement for systematic respect of due process protections or fair trial guarantees within the terms of Article 17(3).<sup>12</sup> It seems somewhat counter-intuitive for an international judicial body to require standards of practice from those under its jurisdiction that vary so markedly from the standards of practice required by other international adjudicatory mechanisms. This reality becomes all the more muddled in the context of States Parties obligation to cooperate with and provide assistance to the ICC, where, under part nine of the Statute, it is presupposed that States have the ability to arrest, surrender and interrogate suspects and accused persons, as well as other forms of assistance, and to do so according to minimum standards of the Statute.<sup>13</sup>

Despite these peculiarities, the location of the due process requirement in the chapeau of article 17(2) restricts its automatic application to the inability criteria of article 17(3) as articulately demonstrated by Kevin Jon Heller (**see Chapter 4, section 1.1**). Similarly, Jan Kleffner has considered that there is an insurmountable disconnect between an absence of due process guarantees and any of the three specific requirements of inability<sup>14</sup> whereas Heller has considered it may be possible only through a distorted interpretation of the term 'proceedings' where they would instead become a reference to 'fair proceedings.'<sup>15</sup> A more balanced approach, and indeed the one that has thus far been adopted by the Court, is to 'read-in' certain rights and protections, or more correctly, accept that the absence of specific due process rights or broader protections can remove the ability of the state to fulfil the specific requirements of Article 17(3) (**see section 3-5 below**). This approach is coherent with the text of the Statute and ensures that the application of the Statute remains within the human rights consistency vector of Article 21(3).

The Court is unlikely to avoid litigation concerning the violation of the due process rights of its suspects or accused persons, where potential, alleged or proven violations occur in the context of the ICC's own requests. Where due process rights are not respected, it should be

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<sup>12</sup> Kleffner (n 8) 155.

<sup>13</sup> Article 96(2)(d) and (f) Rome Statute of the International Criminal Court (Rome Statute) 1998 (A/CONF183/9).

<sup>14</sup> Kleffner (n 8) 157.

<sup>15</sup> Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Criminal Law Forum* 255, 260–263.

expected that harmful or prejudicial treatment of the suspect will be raised by defence counsel as grounds for annulling the case, should the suspects' case proceed to trial, as occurred in the Katanga confirmation of charges hearing.<sup>16</sup> Similarly, the ICC's own practices, most notably the length of its own investigations and trials form the subject of some international human rights procedures.<sup>17</sup>

## 2. National Justice System Requirement: Total or Partial Collapse or Otherwise Unavailable

According to a textual analysis of the general requirement, the use of the conjunction "or" between the conditions ('due to a total *or* substantial collapse *or* unavailability of its national judicial system') could indicate that three permissible conditions exist: however, the two adjectives "total" and "substantial" are conditional to the subject verb "collapse" indicating that the national judicial system must either be in a condition of (i) total or substantial collapse or (ii) be otherwise unavailable. Beyond the text of Article 17(3) the Statute provides scant additional interpretive assistance, in a three-way split between the gold-plated standards that it places upon the ICC's own judicial organs and the consequential expectation of minimum standards of States who are executing ICC requests, the preambular emphasis on ending impunity of perpetrators through criminal prosecution (which has contributed to the understanding that the ICC system justice is outcome or sentence driven rather than process driven) and the human rights consistency principle of Article 21(3).

The rules and principles of the Adhoc international criminal tribunals are also of little assistance in determining the characteristics of total or *substantial collapse* or *unavailability* despite their powers of referral through Rule 11 bis. As a framework for transferring cases of a lower gravity threshold from the ICTY and ICTR to the jurisdictional states, the scope of Rule 11 bis has been considered in **Chapter 4**, however in the context of determining the

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<sup>16</sup> See the defence counsel request for Katanga to be released due to the prolonged detention period that the accused experienced.

<sup>17</sup> For example, the UN Special Rapporteur on the Independence of Judiciary and Prosecutors has reported on the judicial practices of the ICC. See Special Rapporteur on the Independence of Judges and Lawyers, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy' (UN Human Rights Council 2008) A/HRC/8/4; 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy' (UN Human Rights Council 2009) A/HRC/11/41; 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Carina Knaul de Albuquerque E Silva' (UN Human Rights Council 2010) A/HRC/14/26.

condition of the national judicial system to which cases were being transferred some additional remarks can be made. The text of the Rule includes an explicit requirement that the standard of national proceedings against the accused must accord to a fair trial, as well as powers to order on-going protective measures for victims and witnesses and ultimately to revoke the transfer and defer the case back to the adhoc Tribunal.<sup>18</sup> It thus places an explicit expectation on the Transfer Panels to consider the fair trial provisions and practices of the receiving State, which cannot be found in Article 17, where the standard is one of genuineness, rather than fairness (**See Chapter 3**). Equally the context of the Rule is not comparable to the ICC, first as it formed part of the Tribunals Completion Strategy and eventual closure which was integrated into extensive legal and institutional reforms in the countries under the jurisdiction of the Tribunals, and second relates to cases where the accused had already been indicted before the adhoc Tribunals and with the exception of very few persons, were in the custody of the Tribunal.

Turning to the rules and principles of international human rights bodies and treaties, some guidance may be sought from the rule of effective remedy, particularly where local remedies are found to be unavailable or ineffective,<sup>19</sup> as well as legal and factual circumstances that amount to a failure to ensure adequate resources.<sup>20</sup> In elaborating the nature of States general legal obligations to the ICCPR, the UN Human Rights Committee has considered that States must provide accessible and effective remedies<sup>21</sup> through appropriate judicial and administrative mechanisms,<sup>22</sup> which has been adopted in several cases of the African Commission on Human and People's Rights<sup>23</sup> and the Inter-American Court of Human Rights. Equally, the European Court of Human Rights has confirmed that States are to be afforded some discretion in the manner and choice of form of the remedy<sup>24</sup> so long as they

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<sup>18</sup> ICTY Rules of Procedure, IT/32/Rev.44 2009 (IT/32/Rev 44) Rule 11 bis (B) and (C).

<sup>19</sup> Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (Cambridge University Press 2004); Henry M Onoria, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 African Human Rights Journal.

<sup>20</sup> *Case of Jorge, José and Dante Peirano Basso v Eastern Republic of Uruguay, Merits (Publication)* Inter-American Commission of Human Rights Report No. 86/09, Case 12.553, 06 August 2009 133, 167.

<sup>21</sup> Contrast to the Article 2(c) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 (60/147) which requires that remedies are available, adequate, effective and prompt.

<sup>22</sup> UN Human Rights Committee, 'General Comment No. 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (United Nations 2004) CCPR/C/21?Rev.1/Add.13 15.

<sup>23</sup> For a review of Commission findings on the subject see Onoria (n 19).

<sup>24</sup> *Kaya v Turkey, Judgment* European Court of Human Rights Application no. 158/1996/777/978, 19 February 1998 106.

reach a standard that makes them effective in practice as well as in law.<sup>25</sup> Early policy efforts by the ICC as well as publicists sought to build upon these rules when identifying indicators of the two general conditions of inability of the national judicial system, along with submissions from the various parties to admissibility proceedings.

## 2.1. Total or Substantial Collapse

The 2003 Informal Expert Report on Complementarity considered that, as a separate part of the inability test, the condition of the national justice system could be assessed through objective factual and evidential indicators, where for conditions of total or substantial collapse, there was a: [i] lack of necessary personnel, judges, investigators, prosecutor; [ii] lack of judicial infrastructure. Other publicists have variously described *total collapse* as a dramatic situation of over-arching problems facing the entire national justice system and quite probably the entire country,<sup>26</sup> a situation where State authorities may exercise control over a territory but the administration of justice does not occur,<sup>27</sup> or a sociological phenomenon of collapse where the bodies that maintain law and order are no longer operable.<sup>28</sup> Equally, a *substantial collapse* has been considered to be a collapse of essential criminal justice services in a geographic region that is affected by the subject matter, for example a region where the offences took place or where jurisdiction would ordinarily be held, or a country-wide collapse of one or more essential criminal justice services, such as the judiciary, police or penitentiary services.<sup>29</sup>

The submissions before the Court have been more precise. In *Gaddafi*, the OPCV largely adopted the Informal Expert Paper criteria, distinguishing between two dimensions of ‘collapse’ – infrastructure and personnel – that should be demonstrable through a ‘*lack of judicial infrastructure as well as of trained and equipped personnel responsible for carrying out the different phases of domestic proceedings.*’ Responding to the choice of adjective, they chose to define the condition of Libya’s justice system as in a state of substantial collapse,

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<sup>25</sup> *Ilhan v Turkey*, Judgment European Court of Human Rights Application no. 22277/93, 27 June 2000 97; *Kudla v Poland*, Judgment European Court of Human Rights Application no. 30210/96, 26 October 2000 157.

<sup>26</sup> Citing the experience in Rwanda, where the atrocities were noted by the UN Human Rights Field Officers to have substantially destroyed the judicial system and infrastructure. Stigen (n 11).

<sup>27</sup> Markus Benzing, ‘International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity’ (2003) 7 Max Planck Yearbook of United Nations Law 591, 614.

<sup>28</sup> Kleffner (n 8) 154.

<sup>29</sup> Stigen (n 11).

which could be measured or demonstrated by the collapse of infrastructure and personnel to be *'of such intensity that it affects a significant or considerable part of the domestic justice system [...] sufficient to paralyse the system in fulfilling its functions in relation to investigation, prosecution, trial and execution of sentences.'*<sup>30</sup> Meanwhile the Defence in *Gaddafi* sought to establish that a States' violation of its obligations under international human rights treaties would be *'symptomatic of a collapsed justice system or may render a justice system unavailable to an accused person.'*<sup>31</sup>

## 2.2. Unavailable

The OTP Informal Expert paper listed five factors that could support the determination that the national judicial system was 'otherwise unavailable' where it could be established that there was [i] a lack of substantive or procedural penal legislation rendering system "unavailable"; [ii] lack of access rendering system "unavailable"; [iv] obstruction by uncontrolled elements rendering system "unavailable"; [v] amnesties, immunities rendering system "unavailable".<sup>32</sup> In considering *otherwise unavailable* Kleffner has considered that the two categories of collapse necessarily amount to being otherwise unavailable, but that a national justice system may otherwise unavailable but not in a state of total or partial collapse. He emphasises this with two examples, first of system weakness, where the criminal justice system remains too weak to *'carry out proceedings in a safe environment for the judiciary, victims, witnesses and/or perpetrator'* and second through the withholding of external cooperation, where a second State refusing to cooperate or assist the State under admissibility review to the extent that it prevents any of the three specific criteria of ability.<sup>33</sup>

In contrast to the descriptive examples provided by Kleffner, Stigen identified four categories of *unavailability*, three of which can apply without distinction to the condition type: [i] adequacy of national legal provisions; [ii] legal obstacles to the use of the system; [iii] factual obstacles to the use of the system, while the fourth category - system incapability draws

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<sup>30</sup> *Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute* Office of Public Counsel for Victims ICC-01/11-01/11, 04 June 2012 [40].

<sup>31</sup> Summary of Defence Response in *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* [2013] ICC Pre-Trial Chamber I ICC-01/11-01/11, 31 May 2013.

<sup>32</sup> ICC Office of the Prosecutor, 'Informal Expert Paper: The Principle of Complementarity in Practice' (International Criminal Court 2003) Informal Expert Paper 31.

<sup>33</sup> Kleffner (n 8) 157–158.



heavily on the futility test of the right, and arguably introduces a third general condition of inability, as an alternative term to ‘otherwise unavailable’.<sup>34</sup>

### 3. General criteria without distinction to the type of inability

With the exception of the *Informal Expert Paper*, the Office of the Prosecutor (OTP) has preferred to develop broad indicative indicators of inability that are absent of any distinction, first between the general conditions of the national judicial system, and second between the general conditions and the three specific requirements. The indicative criteria share many of the indicators proposed by Stigen as part of the ‘otherwise unavailable’ condition:

*[i] the absence of conditions of security for witnesses, investigators, prosecutors and judges or lack of adequate protection systems; [ii] the existence of laws that serve as a bar to domestic proceedings in the case at hand, such as amnesties, immunities or statutes of limitation; [iii] or the lack of adequate means for effective investigations and prosecutions.*<sup>35</sup>

In its submissions to the two Libya cases, the Prosecutor proposed five additional limitations and conditions that should govern assessment of the general requirement of inability, again without distinction to the category of the condition, including [i] that inability should be considered according to the national legal framework only and not other external as well as international legal systems; [ii] the existence of a political situation where the holding of trials becomes impossible, [iii] a debilitating lack of judges, prosecutors and other court personnel; [iv] obstruction by uncontrolled elements that render the system unavailable; [v] public disorder, natural disasters or chaos resulting from a civil war.<sup>36</sup>

The challenges of determining whether a national judicial system is in a state of collapse or is unavailable to conduct proceedings as well as to obtain the accused, evidence, testimony or otherwise conduct proceedings were explored throughout the admissibility challenge in *Gaddafi*, but most notably, following the Admissibility hearing, where the Pre-Trial

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<sup>34</sup> Stigen (n 11) Chapter 9.

<sup>35</sup> ICC Office of the Prosecutor, ‘Draft Policy Paper on Preliminary Examinations’ (International Criminal Court 2010) 59.

<sup>36</sup> Summarising the OTP in *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 31) [143].

Chambers requested additional information on five issues from the Government of Libya in order to demonstrate 'concrete, tangible and pertinent evidence' of the national investigation into Gaddafi.<sup>37</sup> While the first three issues have been examined in **Chapter 3**, the remaining two issues have a direct bearing on the general and specific elements of inability, concerning issues on the exercise on the rights of Gaddafi, which will be addressed in **Section 4** below insofar as it pertains to the ability to obtain the accused, and issues on the capacity to investigate and prosecute. Here, the PTC requested information on the investigation resources, on witness protection and security, on the defence of the accused, the custody of the accused and capacity building activities undertaken within the national judicial system. Clearly these issues are relevant to establishing both the general ability of the judicial system and the specific requirements and can be used interchangeably: the PTC has confirmed the shared importance that factual and contextual circumstances may have upon multiple aspects of the admissibility criteria.<sup>38</sup>

As such, it can be helpful to organise the various indicators and issues that can contribute towards evaluation of ability, without a strict delineation between the general and specific requirements of inability. Having reviewed the various indicative indicators of the ability of national judicial systems (**section 2**) the vast majority of the proposed or litigated indicators and issues can be organised into legal and factual indicators, which contribute to the substantiation or repudiation of either the general requirement of ability, or the specific requirements or both. The use of factual and legal indicators is largely reflective of international human rights doctrine of effective remedy, where access to the law is required to be effective in practice as well as in law or to be accessible and effective.

### 3.1. Legal Indicators in Determining the Ability of the Case

Underpinning any review of the ability of a national judicial system to execute its criminal justice functions is the existence of sufficient law to enable it to do so. The qualities of any such legal framework, notably is adherence to international due process standards has been

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<sup>37</sup> *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* (n 7) 9.

<sup>38</sup> *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* [2013] Pre-Trial Chamber I ICC-01/11-01/11-466-Red, 11 October 2013 [169]. 'while either of the two scenarios (unwillingness of inability) is sufficient to render a case admissible, the Chamber observes that, in practice, the same factual circumstances may often have a bearing on both aspects.'

the source of much of the debate on the scope of article 17(3) while the existence of laws that prohibit or restrict criminal investigation or prosecution will also alter the ability of the national judicial system. These two dimensions of the legal framework can be organised into separate categories or indicators of the national legal infrastructure: [i] the adequacy of national legal provisions and [ii] legal obstacles to the use of the system.<sup>39</sup>

### ***Adequacy of National Legal Provisions***

Jo Stigen has established quite extensive sub-indicators to argue that the adequacy of national legal provisions should inform assessments of the ‘otherwise unavailability’ of the national justice system, adopting an ultra-compliant stance that now seems out of fashion. Referring to international human rights decisions, which establish that local remedies need not be exhausted where legislation is insufficient and that the existence of legal remedy must be certain in theory and practice, Stigen asserts that necessary legislation requires applicable law, limited excessive defences and that the conduct should of course be criminalised, but need not be defined through international crime categories, for all but a handful of specific crimes that do not have a close equivalent under ordinary crime nomenclature, such as the element of genocide of imposing measures intended to prevent births (see **Chapter 3 on the relevance of the choice of crimes under admissibility**).<sup>40</sup> In its arguments in the Gaddafi admissibility challenge, the OPCV went further than Stigen, seeking to persuade the judges that Libya was genuinely unable to investigate and prosecute the accused in part because of the lack of substantive criminal legislation proscribing war crimes and crimes against humanity.<sup>41</sup> Both arguments sought to weigh the assessment of the national legal framework according to external, international sources of law and the ability of the State to adhere to its international obligations. This argument has not been pursued by the Prosecutor in her Libya litigation and nor was it persuasive to the PTC, who have sought to restrict its assessment to the applicable substantive and procedural law in force within the State.

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<sup>39</sup> These are the category description used by Jo Stigen, which largely corresponds to the Prosecutors criteria of ‘the existence of laws that serve as a bar to domestic proceedings in the case at hand, such as amnesties, immunities or statutes of limitation.’ Stigen (n 11) Chapter 9.

<sup>40</sup> Stigen (n 11). Chapter 9

<sup>41</sup> *Response on behalf of victims on the Government of Libya’s Application pursuant to Article 19 of the Rome Statute (OPCV Response to the Admissibility Challenge: Gaddafi)* Office of Public Counsel for Victims ICC-01/11-01/11-166-Red-Corr, 04 June 2012 30–49; *Transcript of Hearing (Admissibility Hearing: Gaddafi)*, 09/10/13 ICC Pre-Trial Chamber I ICC-01/11-01/11-T-2-Red-ENG, 09 October 2012 p.64–66.

***Assessment in accordance to the applicable substantive and procedural law***

While the *Informal Expert Paper* had included the lack of substantive or procedural penal legislation as one of its factual indicators, where it rendered a national justice system as 'unavailable,' the subsequent materials of the OTP have not adopted the same approach, and indeed before the Gaddafi admissibility procedure, the Prosecutor forcefully argued that Article 17(3) must be restricted to assessment of the substantive and procedural law of the State.<sup>42</sup> In its assessment of the general requirement on the condition of the national justice system, the PTC considered that ability must be assessed in the context of its relevant national laws:

*'the ability of a State genuinely to carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures. In other words, the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi in accordance with the substantive and procedural law applicable in Libya.'*<sup>43</sup>

The decision then proceeded to review the relevant laws that establish the criminal proceedings for the accused, noting the fair trial rights accorded to the defendant under Libyan law were specific and established by law, and that the State had ratified relevant human rights instruments.<sup>44</sup> The existence of such laws, which also included rudimentary protections for witnesses and victims, provided the framework upon which to assess the ability to obtain the accused and to obtain witness testimony, where it found that despite the existence of such laws, they were not available to the accused or to certain witnesses and therefore that the national judicial system was unable to fulfil its legal duties (**see Section 5 and 6 below**). The decision of the PTC to limit its assessment to the current applicable laws of Libya, without comparison to its international obligations further reinforces the Court's relative indifference to national due process practices, albeit that the Chamber 'noted' that Libya had ratified relevant human rights instruments.<sup>45</sup>

While the PTC acknowledged the formal existence of a national legal framework that enable

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<sup>42</sup> *Prosecutor v Saif al-Islam Gaddafi and Abdullah Al-Senussi, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (Prosecution Response: Gaddafi Admissibility Challenge)* ICC Office of the Prosecutor ICC-01/011-01/11, 05 June 2012 [20–32].

<sup>43</sup> *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 31) [200].

<sup>44</sup> *Ibid*, 201–202.

<sup>45</sup> *Ibid*, 200.

the investigation and prosecution of persons according to the specific criteria of Article 17(3) in Libya, it should be understood that the absence of substantive and procedural laws applicable to the requirements of Article 17(3) would limit the capacity of the national authorities to investigate and prosecute and may therefore lead to determinations of inability.

***Laws that bar proceedings or restrict fulfilment of the specific requirements of inability***

The existence of substantive and procedural laws as discussed above is however, distinct from laws that bar proceedings. Both Stigen and the Office of the Prosecutor have included this category of legal indicators:<sup>46</sup> according to Stigen and the Informal Expert Paper, such obstacles could include amnesties and immunities as well as statutes of limitations. In many instances, it is probable that the use of amnesties by a State will be filtered out during Article 17(1) through the ‘activity test’ (see **Chapter 3**). Through selected State submissions within the preparatory works and interpretation of Article 17(1), Darryl Robinson has argued that States are provided with a ‘doorway’ under the first paragraph of Article 17 to be declared as ‘active’, where they have adopted alternative mechanisms, including restricted or partial amnesties, where it could be demonstrated that an investigation had been pursued.<sup>47</sup> Equally, the application of blanket amnesties, where no investigation or truth-seeking investigation has occurred is overwhelmingly likely to trigger a reading of inactivity and could therefore proceed to the willingness or ability tests.

It is more probable that the Prosecutor will pursue this factor where national laws prohibit or prevent the three specific requirements of inability - obtaining the accused, obtaining testimony or evidence or otherwise conduct its proceedings. This would also include legal obstacles imposed by second or third States, where their laws prevent them from executing any request pertinent to the specific requirements.<sup>48</sup>

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<sup>46</sup> Stigen (n 11) Chapter 9; ICC Office of the Prosecutor, ‘Draft Policy Paper on Preliminary Examinations’ (n 35) 56.

<sup>47</sup> Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 Eur J Int Law 481, 500.

<sup>48</sup> Kleffner (n 8) 157–158.

### ***Analysis of legal framework in Gaddafi***

Having considered that *ability* must be assessed in the context of relevant national system and procedures the Pre-Trial Chambers reviewed the Libyan Procedural Code, to note aspects of the Code that it considered to be important to its ability assessment, moving first from identifying the phases of Libyan criminal proceedings – investigation, accusation, trial, and appeal – to specific features of interest to it. This included unique legal provisions that posed challenges to the admissibility proceedings, such as the requirement that investigations remain confidential, which in the absence of sufficient legal framework on cooperation and judicial assistance had restricted the Libyan authorities in providing the concrete, tangible and tangible evidence of the steps taken to investigate Gaddafi that the PTC had requested.<sup>49</sup>

The bulk of analysis however, prioritized the rights of the defendant under domestic law, despite the absence of a due process requirement. The PTC considered that, under Libyan law, accused persons were provided with a minimum standard of protection, from the right to a lawyer during the investigation phase,<sup>50</sup> to review evidence presented against him,<sup>51</sup> to be informed of their rights and duties when in custody,<sup>52</sup> for evidence obtained through forced confessions to be inadmissible, and also, importantly for the outcome of the specific ability outcome of obtaining the accused, that a presumption exists for defendants to be held in a prison that has been prepared for that purpose, albeit that the Public Prosecutor has the discretion to decide otherwise.<sup>53</sup> Turning to fair trial rights, the PTC listed the protections provided to the accused, which include the rights to a public hearing, to have proceedings recorded, to be presented with the indictment and all evidence of the prosecution, to remain silent, to present defence evidence and the right to a written judgment.<sup>54</sup> The PTC also evaluated the framework for the imposition of the death penalty; despite Article 80, which clearly separates the ICC's own sentencing practices from those of States.<sup>55</sup>

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<sup>49</sup> Established in Article 59 of the Libyan Criminal Procedural Code, provided in *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* (n 7).

<sup>50</sup> Article 106, Libyan Criminal Procedural Code, in *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 31) 202.

<sup>51</sup> Article 435, Libyan Criminal Procedural Code, *ibid*.

<sup>52</sup> Article 9, Libyan Prisons Act, *ibid*.

<sup>53</sup> Article 4, Libyan Prisons Act, *ibid*.

<sup>54</sup> Articles 241, 247, 251, 266, 276 of the Libyan Code of Criminal Procedure, in *ibid*.

<sup>55</sup> *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 31) 202. 'Where the death penalty has been imposed, the sentence cannot be carried out until the case has been considered by the Supreme Court. Commutation of the death sentence to life imprisonment is possible where the

### 3.2. Factual Indicators of the Ability of the National Judicial System

The wide range of proposed or indicative factual indicators of ability that were summarised in **Section 2** can be expected to drive determinations of ability, both of the availability of national justice system, as well as the availability of the substantive and procedural legal framework applicable to the specific requirements of Article 17(3).

Although Stigen included factual obstacles as part of the indicators to determine the condition of being ‘otherwise unavailable’ the requirement for factual evidence on the availability of the national judicial system forms an essential component to the determination of its condition: the system must be available for the case in hand both in law and in fact. Stigen chose to assert this through the doctrine of effective remedy, but to limit its relevance to factual obstacles that are external to the judiciary.<sup>56</sup> However, the inclusion by the Prosecutor of broader indicative factors such as the lack of adequate means for effective investigations and prosecutions<sup>57</sup> or a debilitating lack of judges, prosecutors and court personnel<sup>58</sup> clearly direct the focus of factual circumstances inward, to the national justice system, as much as it considers external factual circumstances such as the absence of security conditions<sup>59</sup> or obstruction by uncontrolled elements or other external factors such as natural disaster.<sup>60</sup> This is also coherent with the questions submitted by the PTC to Libya, where it requested information on the capacity of the national judiciary to investigate and prosecute Gaddafi, on the resources allocated to the investigation, on the capacity to provide witness protection and security, the capacity to secure the custody of the accused and general capacity building activities that it had undertaken to strengthen the judicial system.<sup>61</sup>

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*family members of victims forgive the convicted person. Once the Trial Court hears the evidence of family members, they may impose a new sentence. Additional guarantees are provided under articles 31 and 33 of Libya's Constitutional Declaration.*

<sup>56</sup> Stigen (n 11) chapter 9.

<sup>57</sup> ICC Office of the Prosecutor, ‘Draft Policy Paper on Preliminary Examinations’ (n 35).

<sup>58</sup> *Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (Prosecution Response: Gaddafi Admissibility Challenge)* (n 42) 43.

<sup>59</sup> ICC Office of the Prosecutor, ‘Draft Policy Paper on Preliminary Examinations’ (n 35) 56.

<sup>60</sup> *Prosecutor v. Saif al-Islam Gaddafi and Abdullah Al-Senussi, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (Prosecution Response: Gaddafi Admissibility Challenge)* (n 42) 43.

<sup>61</sup> Decision of 07 December 2012 (n 7)

### ***Availability of Resources***

The PTC Request for Further Information (PTC Request) on the resources that were allocated to the national investigation team in the *Gaddafi* case included material and personnel resources.<sup>62</sup> In addition, reference has been made to infrastructural resources, such as the availability of court facilities, detention facilities and prisons.<sup>63</sup>

### ***Material resources***

The *PTC Request* asked for further information on the resources allocated, which could be understood as consisting of the general financial resources made available to the investigation and to necessary victim and witness protection, the equipment provided to conduct the investigation and gather evidence and testimony, and their expertise, as well as the measures that had been taken to conduct on-site investigations and to preserve evidence: this clearly moves from general personnel capacity issues to the specific requirement of ability to obtain and preserve evidence. In its response, the Government of Libya clarified that the Investigation Committee that was tasked with the investigation of Gaddafi '*benefits from all of the financial and other resources available to the Prosecutor-General's Office on a priority basis.*'<sup>64</sup> While the Libyan Response in Gaddafi and its Admissibility Challenge in Al-Senussi does not detail the material resources used to conduct investigations, both confirmed that the Investigation Committee had conducted on-site investigations of prisons and other locations of criminal acts under investigation, including exhumations of mass graves, and that 'regular criminal investigative procedures' had enabled the preservation of evidence, including the retention of documents, electronic materials, photographs and DNA samples.<sup>65</sup>

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<sup>62</sup> *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* (n 7) 41.

<sup>63</sup> *Ibid*, 27-32; *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* Government of Libya ICC-01/11-01/11-285-Red2, 23 January 2013; *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 31).

<sup>64</sup> *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* (n 63) 94(i).

<sup>65</sup> *Ibid*, 94(iv-v); *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* (n 38) 213.



### ***Personnel resources***

The absence or lack of personnel within a judicial system can clearly indicate that the system is unavailable, or in a state of substantial or total collapse, notwithstanding the existence of a legal framework establishing their powers and procedures. The Informal Expert report listed such personnel to include judges, prosecutors and investigators, but in light of the specific requirements to obtain the accused, this should also include personnel responsible for detention facilities as well as security personnel to enable all proceedings to continue unhampered.

Almost all of the participants in the admissibility proceedings in *Gaddafi* and *Al-Senussi* have considered different elements of personnel resources as well as what constitutes proof of adequacy. The PTC Request in *Gaddafi* inquired into the quantity and skills of the personnel resources, as well as the powers available to the individuals responsible for the case.<sup>66</sup> In its response Libya sought to establish that the allocation of four senior investigators and eight junior staff<sup>67</sup> assigned to the Investigation Committee on a full-time basis was sufficient in quantitative terms, although it did not elaborate whether they were allocated exclusively to the investigation of Gaddafi or the size of their general case load.<sup>68</sup> However, in the course of the admissibility challenge in *Al-Senussi* it became clear that the Investigation Committee also bore oversight responsibility for the Al-Senussi investigation, where a number of investigators (including some based in Benghazi) were conducting the investigation of Al-Senussi and were reporting to the Investigative Committee, which was in turn supervised by the Prosecutor-General.<sup>69</sup>

In addressing the expertise of the Investigation Committee, Libya simply asserted that its members provided ‘considerable expertise’ as they were drawn from senior positions within the Prosecution Services and that they had benefited from strategic advice on the planning of trials for former regime officials, by UN experts.<sup>70</sup> Despite these assertions, the OPCD sought to discredit the skills of the Investigation Committee, alleging that deficiencies in the

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<sup>66</sup> Libya’s Further Submissions: Gaddafi Admissibility) (n 63) 94(i).

<sup>67</sup> *Libyan Government’s Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya’s Further Submissions: Gaddafi Admissibility)* (n 63) 41.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* (n 38). 212

<sup>70</sup> *Ibid.*

investigative steps indicated an inability to conduct criminal proceedings, and that the general dependence on international assistance within the judicial system indicated that there was insufficient personnel resources.<sup>71</sup> Despite acknowledging the personnel resources and efforts to strengthen their skills, the PTC Decision did not elaborate on its sufficiency, instead finding that multiple challenges remained, with substantial difficulties in the exercise of its judicial powers.<sup>72</sup>

### ***Infrastructure resources***

In determining available infrastructural resources, the PTC requested Libya to provide information on the construction of courtrooms and prison facilities for the trial and detention of Gaddafi.<sup>73</sup> In its Response, Libya confirmed that it was in the process of renovating a courtroom complex and prison facility in Tripoli, known as Hadba, which would be 'capable of ensuring proper administration of justice in accordance with minimum international standards' for the trial of Gaddafi, as well as Al-Senussi, in addition to an alternative prison and Courtroom, the South Tripoli Criminal Court. They asserted that the Hadba prison facility had been refurbished to accommodate over 200 prisoners, that it provided high quality recreation and cafeteria facilities, and that its inmate rooms met international standards, including televisions<sup>74</sup> while both Court complexes were fully equipped for a high security trial.<sup>75</sup> Turning to available infrastructural resources for the Gaddafi investigation, Libya established that the Investigation Committee was allocated its own building (in the Serraj district of Tripoli)<sup>76</sup> and provided general information of its effort to rebuild judicial institutions, which the PTC took note of in its Admissibility Decision.

While Libya had described the government detention facilities in which Gaddafi would be subjected to upon his transfer from the custody of the Zintan militia as adhering to international standards, the Decision recognised that Gaddafi remained in the custody of the Zintan militia, where he was unable to benefit from such facilities and went on to consider

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<sup>71</sup> *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 31) [170–172].

<sup>72</sup> *Ibid*, 204.

<sup>73</sup> *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* (n 7) 45(iii).

<sup>74</sup> *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* (n 63) 100.

<sup>75</sup> *Ibid*, 102.

<sup>76</sup> *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* (n 63) 94(i).

the challenges to adhere to due process protections of inmates within the detention facilities, noting reports of torture (see section 3.2.5 below).

### ***Capacity to Provide Witness Protection and Security***

The availability of witness protection and security has formed an essential component of the determination of the specific requirement of the ability to obtain testimony (see **Section 5 below**). In its Request for Further Information in *Gaddafi*, the PTC inquired into the availability of protective measures for witnesses, including whether protective measures was envisaged in the case at hand and if the capacity existed to provide it, and finally whether the general security situation inhibited the progress of the investigation in certain areas.<sup>77</sup> While Libya's response referred to the existence of laws providing some protective measures, including non-disclosure, in camera witness testimony, witness anonymity and police protection, and that it envisaged implementing such measures for some witnesses, the PTC considered that the Government had failed to substantiate its claims and did not have the capacity to ensure protective measures. It found this on the bases that witness protection measures were a discretionary practice of the judges at the trial stage, and that the Government had failed to show any evidence that specific protection programs existed or how witnesses may benefit from them.<sup>78</sup> Furthermore, in its decision that Libya was unable to provide adequate witness protection, the PTC noted reports that '*conflict-related detainees, including senior former regime members had not been protected from torture and mistreatment in detention facilities*'<sup>79</sup> and that the Government did not have control over the detention facilities of two witnesses had prevented the taking of testimony.<sup>80</sup>

### ***Capacity to Give Effect to National Laws on Defence Rights***

In *Gaddafi*, the PTC acknowledged the existence of national laws that protect the interests of the accused at the pre-trial and trial phases including the prohibition of the transition from pre-trial to trial phase, where a defence lawyer has not been appointed and requested information on the measures taken to identify and secure independent legal representation for

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<sup>77</sup> Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility) (n 7) 42.

<sup>78</sup> PTC Decision, Gaddafi, para 211 Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision) (n 31) 211.

<sup>79</sup> Ibid, 209.

<sup>80</sup> Ibid, 210

Gaddafi, before the national proceedings, including the protection of counsel from reprisal and intimidation.<sup>81</sup> In its response, Libya confirmed that, where Gaddafi decided not to appoint his own counsel upon the transfer to the trial phase, the *Chambre d'Accusation* would do so, according to the relevant legal provision. The Government further declared that Gaddafi has not appointed Counsel, leading the Ministry of Justice officials to be in 'continuous high level contact with the Libyan Law Society and the Popular Lawyers Office' to secure a suitably qualified and committed counsel or team of counsels.<sup>82</sup> However, it failed to inform the PTC of the actual measures that had been taken to ensure independent legal representation, simply asserting that it had taken '*considerable steps*' to do so, and omitted to provide details on how it would protect such counsel from reprisals or intimidation.<sup>83</sup> The PTC considered that '*Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect*' which served as a '*practical impediment to the progress of domestic proceedings against Mr Gaddafi*' which contributed to the unavailability of the national judicial system.<sup>84</sup>

### ***Capacity Building to address factual issues***

In the Admissibility Challenge and Hearing, the Government of Libya introduced a breadth of capacity building programmes that it was seeking to undertake from a number of UN agencies and national governments, in order to strengthen the prosecutors and judiciary ability to adhere to appropriate international standards, to adjudicate over crimes against humanity and armed groups, with the purpose of achieving stability and providing fair trials.<sup>85</sup> The PTC did not consider this to be specific enough, and requested additional information concerned the outcomes of the capacity building proposals, asking whether

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<sup>81</sup> *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* (n 7) 43–44.

<sup>82</sup> Citing Annex 12, Public- Ministry of Justice letter regarding appointment of defence counsel, 17 January, in *Libyan Government's consolidated reply to the response of the Prosecution, OPCD and OPCV to its further submission on the admissibility of the case against Saif Al-Islam Gaddafi (Libya's Reply: Gaddafi Admissibility)* [2013] Pre Trial Chamber I ICC-01/11-01/11-293-Red2, 04 March 2013 97.

<sup>83</sup> *Ibid*, 97.

<sup>84</sup> *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 31) 215.

<sup>85</sup> Offers of assistance were received from the governments of Argentina, South Africa and Colombia, while discussion with the UN High Commissioner for Human Rights, the UN Office on Drugs and Crimes and the UN Support Mission in Libya represented interests from the UN. *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute relating to Saif Al-Islam Gaddafi (Article 19 Application: Gaddafi)* Government of Libya ICC-01/11-01/11-130-Red, 01 May 2012 46–47.

*‘Libya has effectively secured such international assistance in judicial capacity building, to the extent that such assistance will have an impact of the specific case against Mr Gaddafi.’<sup>86</sup>*

The five-page long response submitted by Libya includes a number of technical assistance and capacity building programs targeting the skills and competences of personnel within the national judicial system (including the judiciary, prosecution services, police and penitentiary) as well as with the militia groups controlling several detention facilities; programs also addressed the adequacy of national laws through legal reform and harmonisation with international law; and the development of strategic policy for conflict-related prosecutions, with the prosecution services and the judiciary.

The Government claimed that these activities amounted to *‘substantial measures of assistance’* indicating that the credibility of the providers, which were drawn from UN agencies and Governments, and the themes of assistance had *‘both direct and indirect impact on the specific case against Mr. Gaddafi.’<sup>87</sup>* Yet the examples provided are at best, of indirect relevance to the specific case against Gaddafi, as requested by the Pre-Trial Chambers. Instead, the examples provided show that a number of general technical assistance measures and capacity building programs were implemented or planned, in support of the national judicial system as whole: none of them appeared to directly target the Investigation Committee tasked with the investigation of Gaddafi or Al-Senussi, nor any of the institutions or individuals that bear responsibility for investigation, prosecution or defence of the ICC indictees.

Several assistance programs sought to address the adequacy of national laws, within a general rule of law framework, with a specific focus on transitional justice. This included general capacity building on judicial reform, led by UNSMIL,<sup>88</sup> as well as legal review of a number of Libyan laws to advise on how they could be harmonised with international instruments in

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<sup>86</sup> *Libyan Government’s Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya’s Further Submissions: Gaddafi Admissibility)* (n 63) 49.

<sup>87</sup> UN agencies included: UN Support Mission in Libya (UNSMIL), the Office of the UN High Commissioner for Human Rights (UNHCHR), the UN Office of Drugs and Crime (UNODC), and the UN Development Program (UNDP). Coordinated through the UN Focal Point, which is the Human Rights, Transitional Justice and Rule of Law Division of UNSMIL in 2011, where its Division Director is also UNHCHR Representative in Libya, responsible for transitional justice, prison reform, human rights and judicial capacity building. Governments included Denmark, Finland, Korea, The Netherlands, Morocco, Peru, South Africa, Switzerland, Tunisia, Jordan, the United Kingdom, and the United States as well as the European Union. *Ibid*, 103-105

<sup>88</sup> *Ibid*, 109.

order to resume and restart the court system.<sup>89</sup> Other multi-party activities, including technical assistance, a conference and follow-up review had taken place on the draft transitional justice law and international best practices of transitional justice including visits to Benghazi, Misrata and Zintan.<sup>90</sup> While these activities may indeed demonstrate the effort of the Government to *'integrate judicial capacity building as an essential component of Libya's democratic transition'*<sup>91</sup> they do not clearly target the challenges raised in the PTC's request for further information: they do not provide information on activities that target the subject matter of the investigations into Gaddafi, nor the procedural obstacles, such as the discretionary allocation of protective measures at the trial stage, that the PTC had expressed concern with and nor did they target the specific personnel that are responsible for the investigations or detention of Gaddafi.

Similarly, the description of capacity building efforts that sought to address personnel resources - including the skills and knowledge – have limited indirect or contextual relevance to the cases under consideration by the Court. This would include the weekly visits by UNSMIL to detention centres, including in Zintan (the city where Gaddafi remains in the custody of militia) where they advise on international standards for the security and safety of detainees, assist in facilitating transfer of detention facilities to the control of the Government authorities in Tripoli and inform the Government of the treatment of detainees.<sup>92</sup> While this practice can undoubtedly strengthen and develop the standards of treatment and may indeed contribute towards the ultimate transfer of custody of Gaddafi, the Government summary of these activities does not refer specify that the UNSMIL missions engaged with the militia responsible for the ongoing detention of Gaddafi. Equally, efforts by UNSMIL and the Jordanian Prison Service, to increase the capacity of the Libyan prison administration, including judicial police, appears to have been generic and not targeted to those responsible for the detention of those under investigation for crimes within the jurisdiction of the ICC.<sup>93</sup> This adequately demonstrates the tension that exists between satisfying the admissibility requirements of the ICC, which pertained to a restricted number of individuals, and the wider security and institutional challenges facing governments in transition.

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<sup>89</sup> Ibid, 107.

<sup>90</sup> Led by UNSMIL, UNDP and UNODC experts. Ibid, 106.

<sup>91</sup> Ibid, 112.

<sup>92</sup> Ibid, 107.

<sup>93</sup> Ibid, 108.

One tranche of capacity building activities referenced by Libya appeared to have a more direct bearing on the ICC situation cases, by addressing the subject matter of the UN Security Council referral, notably to provide advice on how to advance conflict-related criminal proceedings before the Libyan judicial system. Led by UNSMIL, the activities aimed to support the development of national strategies for the investigation and prosecution of officials of the Gaddafi regime for serious conflict related crimes, through trainings of judges and prosecutors. Part of this activity appears to have targeted 40 investigating judges and public prosecutors in Tripoli and focused on two main issues: i) to start the screening process of conflict related detainees; and ii) to prepare for the investigation and trial of those accused of serious crimes as members of the former regime or during the conflict.<sup>94</sup> However, while these training addressed the general subject matter of the Referral and of the two ICC cases, no information was provided to indicate that they directly addressed the subject matter of the ICC's two cases, and furthermore, the trainings targeted the *planning* or *preparation* for investigations of the conflict crimes or ore historic regime crimes, indicating that the investigative judges and prosecutors were not yet actively engaged in systematic investigations.

In responding to the information provided, the PTC Decision acknowledged that Libya had provided 'detailed submissions' on the measures of assistance that it has received with respect to human rights, transitional justice and the rule of law<sup>95</sup> in what it noted as '*extremely difficult circumstances*.'<sup>96</sup> Of the various international assistance measures the Libya had received, the Chamber noted those that targeted the formulation of a prosecutorial strategy, training for public prosecutors on screening and criminal investigations, training of judges and prosecutors on how to advance conflict-related criminal proceedings, national strategies for the investigation and prosecution of officials of the Gaddafi regime for serious conflict-related crimes with the Ministry of Justice and the Prosecutor-General's office, as well as aiming to enhance the investigative and forensic capability of the Libyan police

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<sup>94</sup> Ibid, 110.

<sup>95</sup> Including a 'proposed strategy towards developing an effective, accountable and affordable national police service, improving security for courts and participants in proceedings, bolstering the independence of the judiciary, increasing the capacity to investigate and prosecute crimes and reforming detention centres, in particular, by taking urgent steps to bring an end to the practice of torture.' Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision) (n 31) 183–184.

<sup>96</sup> Ibid, 204.

force.<sup>97</sup> Yet ultimately, the PTC felt that while these activities may have contributed towards the establishment of an administration of justice, *'a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr Gaddafi.'*<sup>98</sup>

In conclusion, the breadth of capacity building activities that Libya described had failed to demonstrate that a nexus existed between the activities and the perceived deficiencies associated to the fulfilment of the specific requirements of the case at hand.

### **3.3. Limited elaboration on the general condition of the national judicial system by PTC**

The two Libya admissibility challenges broke a substantial amount of new territory for the scope of the ability test: the quantity of submissions, responses and replies from the parties provided a great deal of information and interpretation and yet in its Decisions, the Pre-Trial Chambers provided a minimal analysis of the condition of the national judicial system, preferring instead to elaborate upon the specific requirements. In the only decision that asserted the inability of a national judicial system to carry out its proceedings, the Pre-Trial Chambers did not dwell on the condition of the national judicial system: in *Gaddafi* they instead preferred to assess the specific requirements before determining simply that *'a number of legal and factual issues result in the unavailability of the national system for the purpose of the case against Mr Gaddafi.'*<sup>99</sup> Equally, in the *Al-Senussi* case the PTC considered each of the specific criteria of inability in detail, finding that, as the national judicial system was able to satisfy each of these requirements it could not therefore be found to meet any of the general requirements.<sup>100</sup>

#### **4. Specific Requirements: Obtaining the accused, obtain evidence or testimony, otherwise carry out proceedings**

The general condition of the national judicial system – i.e its state of collapse or unavailability – forms the contextual part of the ability test and is relevant only insofar as the

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<sup>97</sup> Ibid, 218.

<sup>98</sup> Ibid, 215.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid, 288, 309.



three specific requirements are met. These criteria of ability – obtaining the accused, obtaining testimony and evidence and ‘otherwise carry out its proceedings’ – listed in Article 17(3) have the effect of creating the framework upon which States will be assessed as genuinely able, forming the ‘*steps that are crucial to a successful investigation and prosecution.*’<sup>101</sup> Within academic literature, these criteria are generally considered to be unproblematic and straightforward to implement, where the general condition of the national judicial system serves as a filter to distinguish between States who cannot satisfy the three criteria, and those who may be able to but choose not to.

As elaborated on above, the PTC has preferred to assess the specific criteria in detail, where in Gaddafi, it found that two of the criteria had been met, whereby the State was (i) ‘*unable to secure the transfer of Mr Gaddafi's custody from his place of detention under the Zintan militia into State authority and there is no concrete evidence that this problem may be resolved in the near future*’ and (ii) that ‘*the Chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony.*’<sup>102</sup> This section will review the submissions that led to this conclusion, comparing it to the different outcome in *Al-Senussi*, where the PTC found that the State was in fact able to satisfy each of the three criteria. This review will seek to identify the elements of ability and the levels of proof that the PTC required, in order that this may serve as a guide or framework to national justice actors.

## 5. Obtaining the accused

The ability to obtain an accused person is a vital pre-requisite of successful criminal adjudication and its inclusion in the admissibility criteria is a clear rejection of in-absentia trials. While the text refers only to accused persons, the logic of article 17(1) enables the Court to seize jurisdiction over national investigations, meaning that article 17(3) can also include the inability to obtain suspects.<sup>103</sup> This of course would include obtaining suspects or accused persons through voluntary or involuntary means, i.e. through arrest or surrender. The relevant state authority should be able to gain custody of the person involved, through the

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<sup>101</sup> Stigen (n 11) Chapter 9, section 2.6.

<sup>102</sup> Gaddafi Admissibility Decision (n 31), 215.

<sup>103</sup> Stigen (n 11) 313.

successful execution of arrest warrants, and where the person may be outside of the jurisdiction of those authorities, their extradition,<sup>104</sup> or they must be able to guarantee the voluntary surrender of the suspect or accused person.

Under the Rome Statute, the rules controlling the arrest, surrender or transfer of suspect are largely reflective of international and regional human rights treaties protections: it should be based on an arrest warrant that clearly identifies the accused person, that specifies the crimes that the person is alleged to have committed and provides a summary of the facts that allegedly constitute the crime.<sup>105</sup>

### **5.1. Adequacy of the legal framework for obtaining the accused/suspect**

The PTC has ruled that admissibility will be determined against the backdrop of the national legal framework (see 3.1.1 above). However, the cooperation framework of the ICC Statute injects certain curiosities in the assessment of national laws, in the context of obtaining the accused, as it places States Parties under an obligation to ensure that its national legislation provides all necessary procedures for the execution of arrest warrants issued by the ICC,<sup>106</sup> as well as the resources necessary to execute it. While the national legislation enabling the execution of arrests for external parties is generally considered to be administrative in nature, the Statute also allows for the Court to specify the standards that the executing State should follow, which will include the pre-trial guarantees in article 55. States therefore have a double requirement to be capable of executing arrest warrants as part of their express treaty obligations and to preclude a negative admissibility decision.<sup>107</sup> The paradox that a State may lose jurisdiction due to their inability to obtain the person and then be required to arrest, surrender or transfer the person to the ICC upon request has not been lost on many

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<sup>104</sup> At the time of the first Libyan admissibility challenge, the Government of Libya excluded Al-Senussi from the challenge, as he remained in the custody of the Mauritanian Authorities, and therefore the State accepted that they were at that point unable to obtain him, as he remained outside of Libya's jurisdiction. *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute relating to Saif Al-Islam Gaddafi (Article 19 Application: Gaddafi)* (n 85) 2–14.

<sup>105</sup> Article 55(1)*Rome Statute* (n 13); Article 9(1)International Covenant on Civil and Political Rights 1966; Article 5(1)European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; Article 6African Charter on Human and People's Rights 1981; Article 5(3)American Convention of Human Rights 1969.

<sup>106</sup> Article 88 and Article 89(1), *Rome Statute* (n 13)

<sup>107</sup> The reality is less obvious and straightforward however, as fewer than 40% of States Parties have implemented the obligation to cooperate into national law and communicated the legislation to the ICC.

practitioners, and has contributed towards some efforts to address limited abilities or capacities of States under investigation.

However, following the PTC decision to assess ability according to the national legal framework, the ability to obtain the accused should be considered in terms of domestic laws, including the protection of the pre-trial and trial rights of the accused, rather than to any international obligations that the State may be under but not putting into effect. In its review of Libya's applicable procedural law, the PTC did not discuss to the applicable laws of arrest and surrender, but referred to the pre-trial and trial protections of the accused, noting that under Article 4 of the Prisons Act, that defendants should only be held in prisons that were prepared for that purpose, '*unless the Public Prosecutor decides otherwise.*'<sup>108</sup> Within the admissibility challenge of Al-Senussi, the defence challenged the procedure of his surrender to Libya and to the conditions of his detention in Libya, arguing that the actions of the authorities in pursuing his surrender from Mauritania was illegal, where he was denied legal assistance and then held in solitary confinement.<sup>109</sup> The PTC neither assessed this claim against the applicable national framework, as a test of its adequacy, nor considered the State's ability to give effect to any legal protections that may exist under national law, although it dedicated several paragraphs to the disputed arrest or abduction of the deputy prosecutor assigned to Al-Senussi's case (**see section 5.1 ability to obtain evidence**).

## 5.2. The suspect must be in the custody of the national authorities

Although Article 17(3) does not clarify whether its assessment of the ability to obtain the accused is satisfied at the moment of arrest, it is commonly accepted that the national authorities should have control over the accused throughout the proceedings.<sup>110</sup> In contrast, the lone voice of dissent, Kevin Jon Heller considers that the ability criteria requires only that the state be unable to obtain the accused, not that they might be able to escape. In support of his argument, he adopts the Court preference for 'real time' assessments of admissibility (**see Chapter 3, Section 1**) where the conditions are assessed at the time of the challenge, and not

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<sup>108</sup> (emphasis added) Gaddafi Admissibility Decision (n 31), 202.

<sup>109</sup> *Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute' (Defence Observations: Gaddafi Admissibility)* Office of Public Defence Counsel ICC-OI/II-OI/II-190-Corr-Red, 31 July 2012 70.

<sup>110</sup> If the accused were to abscond during the domestic trial, the case could cease to be inadmissible on the grounds that it cannot proceed, although the ICC would also likely face challenges in re-obtaining the accused.

for some unspecified possible point of time in the future. If the same logic is applied to the possibility of flight risk, then the Court could not consider a state unable otherwise to carry out its proceedings, until the point in time that the person absconded.

The first grounds of admissibility in *Gaddafi*, that the accused remained outside of the custody of the state authorities, was in part, due to the loss of authority or unavailability of the national judicial system over the area where Gaddafi was detained.<sup>111</sup> Subsequent to the issuing of warrants of arrest for Saif al Islam al Gaddafi<sup>112</sup> he was captured near the Oman border, and detained in Zintan, by what the government initially referred to as local authorities<sup>113</sup> but who have subsequently been recognised as government-affiliated militia who do not operate under the sole authority of the central government. In its admissibility challenge, Libya sought to downplay both the status or affiliations of the Zintan militia, as well as the availability or frequency of access to the accused, asserting that '*since the transfer from Zintan to Tripoli has not yet taken place, [...] access is not as readily available as it would otherwise be.*'<sup>114</sup> This was challenged by the OPCV, who claimed that the failure to secure Gaddafi's transfer from the Zintan Brigade to the State authorities demonstrated its inability to investigate and prosecute the suspect.<sup>115</sup>

Following the Admissibility hearing, the PTC requested Libya to confirm who had custody of Gaddafi, *at present*, whether any agreement for transfer had been made, and if so when it would occur.<sup>116</sup> The Government confirmed that Gaddafi remained in Zintan and had not yet been transferred to either of the two prison facilities in Tripoli that were being renovated for this purpose, although efforts remaining on-going to secure his transfer to Tripoli.<sup>117</sup> As part of its effort to expedite the transfer process, Libya had implemented a policy to integrate

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<sup>111</sup> See also Kevin Jon Heller, 'Libya Challenges the Admissibility of the Cases Against Gaddafi and Al-Senussi' <<http://opiniojuris.org/2012/05/02/libya-challenges-the-admissibility-of-the-cases-against-gaddafi-and-al-senussi/>> accessed 9 July 2012.

<sup>112</sup> *The Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Arrest Warrant Decision: Gaddafi, Gaddafi, Al-Senussi)* Pre Trial Chamber I ICC-01/11-1, 27 June 2011.

<sup>113</sup> GoL, Admissibility Challenge, Para 17 *Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute relating to Saif Al-Islam Gaddafi (Article 19 Application: Gaddafi)* (n 85) 17.

<sup>114</sup> *Ibid*, 18

<sup>115</sup> OPCV in Gaddafi Admissibility Decision (n 31) 155.

<sup>116</sup> *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* (n 7) 45.

<sup>117</sup> Libya Reponse, para 98-102 *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* (n 63) 98-102.

members of the Zintan Milita into the judicial police, who would bear responsibility for the security of Gaddafi upon his transfer to Tripoli, and that this could be completed by early June 2013.<sup>118</sup> By the time of the PTC Decision, on 31 May 2013, the integration policy had failed to secure the transfer, leading the Chamber to note that Libya had not been able to secure the transfer of Gaddafi *'from his place of detention under the custody of the Zintan militia into State authority.'*<sup>119</sup> The PTC recognised the efforts of what it called the 'central Government' to obtain the transfer of Gaddafi, but that *'no concrete progress to this effect has been shown since the date of his apprehension on 19 November 2011'* leading the Chamber to conclude that the *'problem may be resolved in the near future and no evidence has been produced in support of that contention'*<sup>120</sup> and that Libya remained unable to obtain the accused.

### **5.3. Government authorities must have sufficient control of detention facilities of the suspect/accused.**

In the successful admissibility challenge in *Al-Senussi*, the factual circumstances concerning the custodial authority of the accused was not contested. While Al-Senussi had been under arrest in Mauritania for several months, and subject to the ICC warrant of arrest, Mauritania failed to transfer him to the custody of the ICC<sup>121</sup> instead transferring him to the custody of the Libyan authorities, where the OTP and Government of Libya maintained that he remained under the custody of the States central authorities. The Defence argued that the prison facility, including the guards and police of Al-Hadba Prison, where Al-Senussi was held was not in fact under control of the government and was *'in effect being run by militia groups outside of the requisite Government control.'*<sup>122</sup> The defence relied on statements by the International Crisis Group which reported that armed groups or revolutionary brigades frequently prevented the police investigators from investigating cases by refusing them access to detainees, including one statement by the head of a prison who refused to allow a

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<sup>118</sup> Ibid, 99.

<sup>119</sup> Gaddafi Admissibility Decision (n 31) 206.

<sup>120</sup> Ibid, 207.

<sup>121</sup> As the situation of Libya had been referred to the ICC by the UN Security Council, the warrants of arrest remained binding on non-States Parties, which include Mauritania. However, the State did not perform its obligation and transferred Gaddafi back to Libya in March 2012.

<sup>122</sup> *Defence Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'* Pre-Trial Chamber I, International Criminal Court ICC01/011-01/011-356, 14 June 2013 93.

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prosecutor to interview a detainee.<sup>123</sup> However, they did not prove the direct relevance of this circumstantial evidence to the specific case of Al-Senussi and the control of the detention facilities at Al-Hadba, while several Libyan Annexes provided evidence of the effective control over Al-Hadba, through an official letter from the Prosecutor General confirming his detention, statements that Al-Senussi had been interviewed on a number of occasions and NGO reports that documented the control of Al-Hadba prison by persons recognised as government officials.<sup>124</sup>

The PTC acknowledged that the existence of an *'unspecified number of detention centres yet to be transferred under the control of the central government'* may be relevant contextual fact in determining the availability of the judicial system for the case against Al-Senussi. As such, the PTC considered that the *'issue of whether Al-Habda prison is under the control of Libya is relevant to the Chamber's consideration of Libya's ability to obtain Mr Al-Senussi'* but nonetheless on the basis of the evidence presented to it from all parties, it considered that the government had adequately demonstrated that it *'exercised sufficient control of the detention facilities'* in which Al-Senussi was being held.<sup>125</sup>

#### **5.4. Resources to obtain and maintain the custody of the accused: courtroom and prison facilities**

Correlated to the requirement that the State maintains sufficient control over the detention facilities and courtroom facilities is the expectation that investigative, custodial and judicial facilities must be adequate resourced. This will require the necessary material resources, of the physical building and equipment, which must be secure enough to retain the accused, both during the trial and while in custody, as well as personnel resources, of state representatives who are mandated and have sufficient resources to prepare a satisfactory warrant of arrest, to scrutinize it and take a decision on its lawfulness, as well as to execute the arrest and maintain the detention.

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<sup>123</sup> Ibid, 102

<sup>124</sup> *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* (n 38) 264.

<sup>125</sup> Ibid.

In order to better appreciate this, the PTC requested further information of the resources available to obtain and maintain custody over the accused although it has not yet ruled authoritatively on the standard and scale of such resources. In its Request for Further Information in *Gaddafi*, they asked Libya for more details on the arrangements that had been made for building the courtroom complex and prison facility (see **section 3.2.4 above**).<sup>126</sup> The adequacy of resources for the fulfilment of the specific criteria, in this instance, the ability to obtain the accused, will also be of relevance to the general, contextual requirement of the condition of the national judicial system. The Libyan response, describing the prison facilities of Al-Hadba provides a minimal description of its material and personnel resources, providing information of the availability of televisions to inmates rather than the security resources of the prison, the number of personnel or the specific training that they may have received.<sup>127</sup> Similarly, the Government response provides little to no information on the facilities of the South Tripoli Criminal Court, where the trial was scheduled to take place.<sup>128</sup> In its response to the Libyan Submission, the OPCD asserted that the lack of adequate resources or facilities under the control of the State was causally linked to the refusal of the Zintan brigade to transfer custody of the accused and the brigade was fearful that the central authorities could not prevent supporters of Gaddafi from attempting to free him from detention. Secondly, OPCD claimed that reports of torture within state prisons would put Gaddafi at a high risk of being tortured and killed in detention.<sup>129</sup>

The PTC Decision to declare the Gaddafi case admissible to the ICC noted several factors of available resources relevant to obtaining the accused, noting the progress made to rebuild institutions and improve security conditions, notably the strategy to improve the effectiveness and accountability of the police service, security for the courts and participants and to reform detention centres to end practices of torture. Notwithstanding these reflections, the PTC did not assess the sufficiency of these resources, but instead referred to ‘multiple challenges’ and

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<sup>126</sup> *Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (PTC request for further submissions: Gaddafi Admissibility)* (n 7) 45.

<sup>127</sup> *Libyan Government’s Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya’s Further Submissions: Gaddafi Admissibility)* (n 63) 100.

<sup>128</sup> At the time of submission, the national trial against Gaddafi was proceeding before the South Tripoli Criminal Court, with the accused participating through video-link from a Benghazi court facility. See Euronews, ‘Gaddafi Appears before Court in Tripoli via Videolink on War Crime Charges’ (*euronews*) <<http://www.euronews.com/2014/05/11/gaddafi-appears-before-court-in-tripoli-via-videolink-on-war-crime-charges/>> accessed 3 June 2014; CNN, ‘Trial of Gadhafi’s Son in Libya Continues despite International Court Objection’ (*CNN*) <<http://www.cnn.com/2014/05/25/world/africa/libya-gadhafi-son-trial/index.html>> accessed 3 June 2014.

<sup>129</sup> OPCD in *Gaddafi Admissibility Decision* (n 31), 165

'substantial difficulties' to exercise its judicial powers across the territory and therefore that *'the national system cannot yet be applied in full in areas or aspects relevant to the case being thus "unavailable" within the terms of Article 17(3).*'<sup>130</sup>

### **5.5. Ability to give effect to the rights of accused when obtaining or maintaining custody**

The previous sections have considered the adequacy of the laws concerning arrest and detention of suspects or accused persons (**section 5.1**), the requirement of State custody over the accused (**section 5.2**), as well as sufficient State control over judicial facilities (**section 5.3**), and the availability of sufficient resources to do so (**section 5.4**). However, the existence of laws as well as the physical ability to deprive a person of their liberty, should not be the only criteria of evaluation of obtaining the accused or maintaining the custody. In addition to these factors, the Court should take into consideration the qualitative ability of the State to do so, arguably including assessment of minimum international human rights standards that form the States obligations under the international treaties to which it is a member of. The ability of the judicial system to give effect to the rights of those persons affected by its ability to obtain the accused (i.e. the suspect or the accused) as well as those victims and witnesses who are vital for the gathering of evidence and testimony (**see Section 6 below**) should also be considered during admissibility. Some have considered this to include assessments of the extent to which the national justice system is able to protect the accused person from incrimination, coercion and torture, to provide information on the alleged criminal conduct, as well as access to an interpreter.<sup>131</sup>

The OPCD raised similar issues in *Gaddafi*, where it suggested that the Libyan authorities lacked the capacity to implement judicial orders, such as the transfer of custody and the appointment of defence counsel, and that this demonstrated conclusively that the criminal justice system was ineffective.<sup>132</sup> They sought to assert that the State could did not have the capacity to enable the accused to exercise his rights under Libyan law, as Libya had not produced records of his interrogation, or information on the dates or subject-matter of

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<sup>130</sup> Ibid, 205.

<sup>131</sup> Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009) 561.

<sup>132</sup> Gaddafi Admissibility Decision (n 31), 172.



questioning, and that the remand orders for Gaddafi did not include references to his interrogations.<sup>133</sup> Its second tranche of concerns arose around the inability to find counsel willing to act for Gaddafi, with the consequence that he would be questioned in the absence of legal representation, and third that Libya had not demonstrated that Gaddafi had in fact waived his right to view investigative materials or confront the witnesses against him.<sup>134</sup> Finally, in relation to the standards of custody, the OPCD challenged Libya's contention that it had demonstrated it had capacity to detain Gaddafi in a secure and humane environment in Tripoli.<sup>135</sup>

The Government of Libya rejected the OPCD claims, asserting that Gaddafi's detention has been judicially approved by Tripoli based judges, that he had been visited in detention by representatives of human rights organisations on several occasions with the full cooperation of the local Zintan authorities,<sup>136</sup> that he had been questioned on several occasions, in addition to having been informed of the accusations and evidence against him and that he had chosen not to exercise his right to view the investigative materials.<sup>137</sup> Finally, Libya argued for the limitation of the scope of admissibility, claiming that:

*'admissibility enquiry requires only a consideration of whether the specific domestic proceedings are being carried out genuinely with an intent to bring the person to justice and does not extend to an exacting scrutiny of proceedings from the perspective of a human rights court.'*<sup>138</sup>

The PTC omitted to determine the relevance of these claims, or to elaborate on the extent to which national proceedings should give effect to due process protections of the accused, within the context of the State's ability to obtain them, as it preferred to simply determine who had control over Gaddafi. Instead, the Chambers chose to assess aspects of the effect of

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<sup>133</sup> *Public Redacted Version of the 'Response to the Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi' (Defence Response to Libya's Further Submissions: Gaddafi Admissibility)* Office of Public Counsel for Defence ICC-01/11-01/11-281-Red2, 18 February 2012 196–199.

<sup>134</sup> *Ibid*, 207-212, 258-268.

<sup>135</sup> *Libya's Further Submissions: Gaddafi Admissibility*, (n 63), 48-49.

<sup>136</sup> *Gaddafi Admissibility Decision* (n 31), 86.

<sup>137</sup> *Libya's Further Submissions: Gaddafi Admissibility* (n 63), 88-93.

<sup>138</sup> *Ibid*, 84.

domestic laws to protect the accused, within the third specific criteria, or otherwise unable to carry out proceedings (see section 7 below).<sup>139</sup>

## 6. Obtaining Necessary Evidence and Testimony

The second specific element of article 17(3) requires that the relevant national justice authorities are unable to obtain necessary evidence and testimony. While article 17(1) provides latitude over national adjudication from investigation through to the final decision of a case, this criteria forms part of the investigative activities of the State, as an essential component in building a case file that is capable of proving that one or more crimes have been committed by named individuals, according to the legal requirements of the criminal conduct and attributable liability.<sup>140</sup> Article 93(1) on other forms of cooperation, lists the types of evidentiary activities that it may request of States, which could inter-alia serve as a guide to the ICC in assessing the State's ability to obtain necessary evidence and testimony.<sup>141</sup>

- (a) The identification and whereabouts of persons or the location of items;*
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;*
- (c) The questioning of any person being investigated or prosecuted;*
- (g) The examination of places or sites, including the exhumation and examination of grave sites;*
- (h) The execution of searches and seizures;*
- (i) The provision of records and documents, including official records and documents;*
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.<sup>142</sup>*

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<sup>139</sup> Gaddafi Admissibility Decision (n 31), 212- 214.

<sup>140</sup> Morten Bergsmo and William H Wiley, 'Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes', *Manual on Human Rights Monitoring An Introduction for Human Rights Field Officers* (third revised, UN High Commissioner for Human Rights 2000).

<sup>141</sup> Claus Kress and Kimberly Prost, 'Article 93: Other Forms of Cooperation' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article* (Nomos).

<sup>142</sup> Article 93(1) *Rome Statute* (n 13).

The six activities outlined above are indicative of the breadth of methods and categories of evidence necessary for adjudication of core international crimes. While these practices of evidence gathering may be more or less familiar in ordinary as well as organized crime investigations, their magnitude as well as complexity escalates exponentially when applied to international crime conduct, due to the need to gather evidence of sufficient quality and probity to satisfy the criminal charges against an individual.

While the ability to obtain evidence and testimony will be tested according to the case or investigation-specific rationale of the admissibility regime, it requires that the national justice system have in place a legal framework that sufficiently governs and empowers the relevant authorities to gather evidence, as well as the resources to do so. As with the other admissibility criteria, the PTC have so far preferred to assess the State according to its domestic legal framework, thereby limiting any arguments of direct effect of either the ICC's own protections or standards governing the gathering of evidence and testimony or of external international obligations or standards.

### **6.1. Necessary evidence and testimony should be specific and sufficiently probative**

The text of Article 17(3) establishes a threshold of '*necessary* evidence and testimony' which has been understood as a synonym for sufficiency, for the purpose of securing criminal conviction only, rather than deeper purposes such as to create '*a correct and complete historical record*' which, while Stigen accepts may be a broad aim of criminal proceedings, he argues that is not the aim of the admissibility procedure, which is to check that impunity is not being protected.<sup>143</sup> A logical consequence of this is that the admissibility procedure should concentrate on the evidence that the State obtains, rather than expectations or rumour of what else may exist, and this evidence should be examined for its qualitative and quantitative sufficiency only.<sup>144</sup> Correlated to this, the admissibility assessment of the evidence and testimony should not determine if the evidence submitted satisfies the charges and liabilities under the national case file, but rather it assesses the sufficiency and probity of the evidence.

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<sup>143</sup> Stigen (n 11). Chapter 9.

<sup>144</sup> In *Al-Senussi*, the Prosecutor argued that 'the threshold under Article 17(3) is not that any evidence cannot be gathered, but that the necessary evidence and testimony cannot be obtained as a result of a total or substantial collapse or unavailability of its national judicial system.' See *Admissibility Decision: Al-Senussi* (n 38) 191.

In its admissibility challenge for the *Gaddafi* case, Libya submitted summaries of witness statements three witness categories that had been collected by competent authorities (those authorised under its CPC): close friends of Gaddafi, high ranking military commanders, civilian volunteers who accompanied Gaddafi and victims family members and largely contained information about the role played by Gaddafi. In its assessment of these summaries, the PTC considered that they provided '*some detail of the alleged evidence given by the witnesses and hence they have some inferential value about the existence and content of evidence.*'<sup>145</sup> In its review of these submissions in *Al-Senussi*, the PTC concluded that such summaries were nonetheless 'fragmented and decontextualized short summaries of isolated information' which provided 'scant level of detail' and 'a lack of specificity' which did not give '*an intelligible overview of the factual allegations investigated by the competent authorities.*'<sup>146</sup> In general, the PTC has considered that the provision of summaries of evidence or testimony, as well as letters or specially prepared materials, to be inadequate, and with little or no actual significance to the purpose of the admissibility procedures.<sup>147</sup>

In furtherance of its submission of evidence collected as part of its domestic investigation, Libya submitted three categories of testimony: witness statements drawn by local observers, military personnel or persons associated to the former regime and civilian demonstrators, several of which the PTC acknowledges as providing details of discrete aspects of incidents; documentary evidence including flight documents, medical documents and written orders several of which the Chambers considered to be relevant to the case against Al-Senussi, demonstrating concrete steps of inquiry and intercepts which they accepted in support the planning and coordination of the use of force.<sup>148</sup>

In reviewing the ability to obtain evidence and testimony, the Chamber chose to recall its findings from the first limb of the admissibility test (that the national investigative activity covered the same person and same conduct) to conclude that Libya had demonstrated that it had the ability to obtain the necessary evidence and testimony in three ways (i) the adequacy investigative steps by the Prosecutor-General's investigative team demonstrated through

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<sup>145</sup> Gaddafi Admissibility Decision (n 31), 127.

<sup>146</sup> Admissibility Decision: Al-Senussi (n 38), 87.

<sup>147</sup> Ibid, 88-99.

<sup>148</sup> Ibid, 106-157.

witnesses interviews, documentary evidence, and requests to external sources for specific information; (ii) that multiple lines of investigation were followed in order to ascertain relevant facts in determining the alleged criminal responsibility of Al Senussi; and (iii) that witnesses interviews included opportunities to identify potential exculpatory nature, to comment on other witness information or documentary evidence, and to clarify their own interviews, while victims were requested to provide supporting documentary evidence of the alleged harm suffered.<sup>149</sup> However, the PTC concluded that where such thresholds are met, the Chambers are required to consider whether ‘*there are relevant factual circumstances that would negate any such ability.*’<sup>150</sup>

To date, the admissibility challenges have provided a framework through which four factual circumstances have been identified and analysed by the Pre-Trial Chambers: methods of gathering testimony and coherence with national legal framework; adequacy of investigative measures; security and control over territory; and witness protection.

## 6.2. Methods of Gathering Testimony

The legality of the methods of gathering testimony was challenged by the OPCD during the *Gaddafi* Admissibility Challenge procedure. They claimed that the taking of witness testimony had violated the Libyan criminal code, which provides the Prosecutor with the sole authority to submit and proceed with criminal actions,<sup>151</sup> by incorporating testimonies into the case file that were gathered by voluntary committees or local council members who were outside of the authority of the Prosecutor.<sup>152</sup> This they claimed raised fair-trial concerns and demonstrated that Libya lacked the ability to gather testimony. The Government responded by rejecting the argument and sought to clarify that all witness testimonies that were included in the investigative case file were prepared in accordance to the criminal code and were taken by members of the office of the Prosecutor General.<sup>153</sup> In summarising the submissions of the parties, the PTC accepted Libya’s response, accepting that the interviews, summaries and

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<sup>149</sup> Ibid, 217.

<sup>150</sup> Ibid, 297.

<sup>151</sup> Article 1, Libyan Criminal Code.

<sup>152</sup> *Libyan Government’s consolidated reply to the response of the Prosecution, OPCD and OPCV to its further submission on the admissibility of the case against Saif Al-Islam Gaddafi (Libya’s Reply: Gaddafi Admissibility)* (n 82) 75–86.

<sup>153</sup> Ibid, 80.

statements that will be included in the national proceedings were prepared in accordance to the Criminal Code and were not conducted or prepared by committees of volunteers, thumar, or local council members.<sup>154</sup>

### 6.3. Security and Control over Territory and Judiciary

In *Gaddafi* the Office of Public Counsel for Victims (OPCV) submitted that the overall lack of territorial security and control in Libya had created problems in the physical exercise of obtaining the necessary evidence and testimony, providing protection and security for victims and witnesses, as well as maintaining trained and qualified staff, including judges, prosecutors and lawyers, who were prepared to work on such high-risk cases under the security conditions. Using reports by the UN Secretary-General's Special Representative<sup>155</sup> they sought to draw a picture of the general absence of the reach and authority of the government security apparatus, where fights amongst rival brigades would often escalate into lengthy and deadly conflicts and strain the ability of the national security forces to restrain further outbreaks of violence and restore order. Turning to the availability of the justice system, OPCV referred to the UN Special Representative's general assertion that *'the majority of courts in the country are not fully operational owing to the lack of adequate security at court premises and the continued absence from work of judges and administrative staff.'*<sup>156</sup> While the PTC recognised the very real and considerable challenges that Libya faced as a post-conflict transitioning government, they nonetheless found that the specific requirements of inability should be determined according to the specific case at hand, where such general breakdowns and challenges would be considered as contextual information in regard of the condition of the judicial system, but could not sufficiently demonstrate the inability of the specific judicial and prosecutorial units to conduct the investigation into the actions of Gaddafi.

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<sup>154</sup> Gaddafi Admissibility Decision (n 31), 194.

<sup>155</sup> Ian Martin, also head of the UN Support Mission in Libya (UNSMIL). OPCV at 33-42, cites the following statements: UN NEWS CENTRE, "Libya facing challenging transition, but authorities striving to succeed"; United Nations Webcasts, Ian Martin Reporting to the UN Security Council 10 May 2012, available at: <http://www.unmultimedia.org/tv/webcast/2012/05/security-council-meeting-the-situation-in-libya-english-5.html>.

<sup>156</sup> *Observations on behalf of victims on the Government of Libya's Application pursuant to Article 19 of the Rome Statute* (n 30) 44. Citing Report of the Secretary General on the United Nations Support Mission in Libya, U.N. Doc. SHOW1717, 11 November 2011, 27.

#### 6.4. Adequate Witness Protection

The ability to obtain necessary witnesses and testimony is largely dependent on the availability, effectiveness and neutrality of adequate protection programmes: in the absence of a witness protection programme that demonstrates each of these features, the likelihood of witnesses refusing to testify increases hugely. Within the parameters of Article 17(3) the absence of necessary witness testimony can significantly reduce the ability of the national judicial system and, as occurred in the case of Gaddafi, lead to declarations of inadmissibility. While witness protection programmes are typically grounded in the fundamental rights of individuals, in this case witnesses, they are also intimately connected to the rights of the defence, as evidenced in the transfer decisions of the ICTR (see section 5.4.1 below) and to the availability of necessary evidence to ensure an effective trial. Despite the almost obvious importance of witness protection programmes as part of the Article 17(3) evaluation, very few publicists considered its importance, not least those pursuing ultra-compliance with the ICC Statute, or the upward harmonisation of national laws and practices with international standards. This should no longer be the case: as the two Libya cases ably demonstrate (see 5.4.2 below) witness protection will form a central consideration in assessing the ability of States to obtain evidence and testimony.

##### *Obtaining Witness Testimony and Fair Trial Protections: the ICTR Transfer Decisions*

The link between the ability to obtain witness testimony and fair trial protections was repeatedly assessed by the ICTR Transfer Panel between 2007 and 2011, where witnesses refused to participate in domestic trials due to fears of reprisals or arrest. The ICTR Transfer Panels were required to assess Rwanda's fair trial procedures in order to determine if cases could be transferred back to the domestic criminal justice system. The Transfer Panels found that various deficiencies in its Witness Protection measures prevented the ability to obtain defence witnesses testimony, thereby violating the fair trial rights of the accused.

In *Uwinkindi*, the defence submitted affidavits from nine of their nationally based witnesses who declared that they would not testify before any national court for fear of harassment, threats, imprisonment or of being killed, linking their perception of threat to inadequate and

un-trusted protection schemes.<sup>157</sup> ICTR-appointed defence teams pointed to Article 58 of the domestic criminal procedural code, which barred suspects from providing witness testimony, claiming that it would reduce their ability to obtain testimony from collaborator witnesses, thereby, reducing their ability to mount a suitable defence.<sup>158</sup> International witnesses in *Hategekimana* and *Kayishema* refused to travel to Rwanda for the same fears of intimidation or arrest, not least as the travel arrangements of all witnesses were made by the Genocide Fugitive Tracking Office, a part of the Office of the Attorney General with the mandate to track all genocide fugitives.<sup>159</sup> Furthermore, while a Witness Protection Unit had been established, it too formed part of the AG Office, creating an expectation of prejudice against defence witnesses, especially as reports of abuse or intimidation committed by the Unit were to be reported to police.<sup>160</sup> The *Munyakazi* Transfer Panel heard amici briefs that contested the capacity of the unit to adequately protect witnesses, with a clear perception among Rwandan witnesses that authorities regularly breached protective measures with the effect that their willingness to testify in transferred cases did not exist.<sup>161</sup>

The government responded by offering to provide video-link facilities so that international witnesses could testify from their current location, with international funding readily provided. They eventually separated the WPU from the office of the attorney general and attached it to the office of the registrar, and created a special immunity from article 58 of the criminal procedural code for all witnesses of transfer cases.

The Transfer Panels swiftly accepted the special immunities offered to the ICTR transfer cases, which complemented other special provisions set out on the Transfer Law.<sup>162</sup> They considered that the defence witnesses' fear of using the WPU constituted a threat to the fair

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<sup>157</sup> *Prosecutor v Jean Uwinkindi, Decision on Prosecutor's request for the Referral of the Case of Jean Uwinkindi* ICTR Transfer Panel ICTR-2001-75-R11bis, 28 June 2011 70–72.

<sup>158</sup> *Ibid*, 37.

<sup>159</sup> *Prosecutor v Ildephonse Hategekimana, Decision on Prosecutor's request for the Referral of the Case of Ildephonse Hategekimana* ICTR Transfer Panel ICTR-00-55B-R11bis, 09 June 2008 40; *Prosecutor v Fulgence Kayishema, Decision on Prosecutor's request for the Referral of the Case of Fulgence Kayishema* 27–31.

<sup>160</sup> *Prosecutor v. Jean Uwinkindi, Decision on Prosecutor's request for the Referral of the Case of Jean Uwinkindi* (n 157) 118–119; *Prosecutor v. Fulgence Kayishema, Decision on Prosecutor's request for the Referral of the Case of Fulgence Kayishema* (n 159).

<sup>161</sup> *Prosecutor v Yussuf Munyakazi, Decision on Prosecutor's request for the Referral of the Case of Yussuf Munyakazi*, ICTR Transfer Panel ICTR-97-36-R11bis, 28 May 2008 at para 85 and 87.

<sup>162</sup> which included barring the death penalty as well as life imprisonment in solitary confinement as potential sentences for the transfer accused.



trial of the accused.<sup>163</sup> Turning to the use of video-link testimony as a solution for international witnesses who could not be compelled to testify in situ through mutual legal assistance programmes, the Transfer Panels were unambiguous. They declared that ‘the use of video-link testimony cannot be considered as a substitution for whole scale testimony’ in the manner proposed by the Government of Rwanda. Even its exceptional use, they continued, cannot be equated with the presence of the witness in the Courtroom, as it is widely accepted that the ability to determine the credibility of the witness is significantly challenged.<sup>164</sup> For these reasons, it would not be satisfactory to use of video link in anything other than exceptional circumstances. The reliance of either party on a significant proportion of its witness testimony through video-link, would, they concluded, violate the principle of equality of arms and thereby fail to provide the accused with a fair trial.<sup>165</sup>

While the transfer decisions clearly reveal the limitations of Rwanda’s witness protection programme to obtain witness testimony for these ICTR cases,<sup>166</sup> does it demonstrate an inability to do so? In each of the transfer decisions, the defence counsel of the ICTR, rather than the Attorney Generals’ Office or the National Bar Association, had identified defence witnesses and secured their pre-trial testimony, rather than their national counterparts. The Rwandan Bar Association had provided repeated assurances of its willingness, ability and previous experience in representing others accused of participating in the genocide and the Witness Protection Unit provided figures of the number of witnesses that it had provided protection to, showing that core services associated with witness participation existed in general. However, in the particular cases under consideration, the witnesses, whether nationally or internationally based, overwhelmingly declined to provide their testimony to the

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<sup>163</sup> *Prosecutor v Gaspard Kanyarukiga, Decision on the Prosecution’s Appeal against Decision on Referral Under Rule 11 bi* ICTR Appeals Chamber ICTR-2001-75-R11bis, 30 October 2008 87.

<sup>164</sup> *Prosecutor v Protais Zigiranyrazo, Decision on Interlocutory Appeal* ICTR Appeals Chamber ICTR-2001-73-AR73, 30 October 2006 19; *The Prosecutor v Zejnil Delalic et al (‘Celebići’), Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference* [2005] ICTY Trial Chamber IT-95-9, 28 May 1997 18.

<sup>165</sup> *Prosecutor v. Gaspard Kanyarukiga, Decision on the Prosecution’s Appeal against Decision on Referral Under Rule 11 bi* (n 163) 79–81.

<sup>166</sup> They also indicate some of the negotiation that can occur in decisions over the allocation of jurisdiction, where legislative amendments to adjust the penalties of the accused, as well as providing additional protections for witnesses etc were considered sufficient to satisfy the ICTR’s requirements. It may be foreseeable that similar sorts of specialized guarantees are provided for ICC admissibility cases, thereby creating the same tiered national justice system that has troubled some commentators in the ICTR/Rwanda cases.

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national justice system, effectively rendering the State unable to obtain witness testimony for the accused persons.<sup>167</sup>

The ICTR transfer cases illustrate some of the tensions inherent in adjudicating over the ability of a national criminal justice system to carry out proceedings, in particular of the multiplicity of norms that can be referred to in order to determine ability. The unavailability of witness protection can clearly jeopardise the ability to obtain testimony as well as to provide a fair trial and is an indicator towards the overall functioning of the justice system.

### *Adequacy of National Witness Protection Programmes*

Returning to the ICC and its tentative framework for assessing the ability requirements, the provision of an adequate witness protection programme in law and fact has been accepted as an important feature in determining admissibility. Within the two Libya cases, the adequacy of the legal framework for protecting witnesses and its availability in fact were questioned and examined.

Under Libyan Law, witness protection measures are available during the investigative phase, including non-disclosure of investigative materials, in-camera witness testimony, witness anonymity and police protection: these measures can be continued at trial, upon the discretion of the trial judge as part of their powers '*to receive evidence in whatever form he or she deems appropriate.*'<sup>168</sup> During the *Gaddafi* proceedings, both the OPCV and OPCD challenged the adequacy of Libya's legal framework for witness protection: for its failure to provide special witness protection for victims and the lack of continuity of protective measures in the transition from the pre-trial phase, where measures are compulsory, to the trial phase where they become discretionary upon the decision of the trial judge.<sup>169</sup> The OPCD claimed that the Witness Protection Program failed to provide defence orientated measures, and that the possibility of withholding the identity of prosecution witnesses the

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<sup>167</sup> Similarly, following the NATO invasion of Kosovo, large groups of people were unwilling to testify before the national courts. See Florenz, *The Rule of law in Kosovo: prospects and problems*' Criminal Law Forum, 2000, volume 11, page 130.

<sup>168</sup> *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* (n 63) 65.

<sup>169</sup> According to Article 59 of the Criminal Procedural Code. Ibid, 95.

defence would be a violation of defence rights and would nonetheless fail to protect all witnesses or prevent leaking of sensitive information from the judicial authorities.<sup>170</sup>

Equally, the PTC requested Libya to provide further information on whether it will implement protective measures for witnesses who agree to testify, if it has the capacity to do so, what steps had been taken already to achieve this and whether the security situation inhibits this.<sup>171</sup> Libya's one paragraph response to these issues was generally deemed insufficient by the PTC, although it accepted that the discretionary power of the Trial Chamber Judges existed in law:

*'further to its submission that trial judges have discretionary powers to order protective measures, Libya has presented no evidence about specific protection programmes that may exist under domestic law. It is unclear, for instance, whether the domestic law provides for the immunity of statements made by witnesses at trial. In addition, it is unclear whether witnesses for the suspect may effectively benefit from such programmes. As such, the Libyan Government has failed to substantiate its assertions that it envisages the implementation of protective measures for witnesses who agree to testify in the case against Mr Gaddafi. Therefore, and in light of the circumstances, the Chamber is not persuaded by the assertion that the Libyan authorities currently have the capacity to ensure protective measures.'*<sup>172</sup>

### ***Absence of Specific Measures: Fear of Collective Punishment and Control Over Witnesses Within Detention Facilities***

In *Gaddafi*, the Defence argued that the unrest, the on-going control of local areas by militias and brigades and the general lack of security all impacted on the ability to obtain witness testimony. Notably, the existence of a collective punishment campaign against those considered an associate of Gaddafi, as well as the public arrest of Gaddafi's defence counsel from OPCD and the seizure of confidential defence materials had deterred witnesses from testifying in defence of Gaddafi, with some evidence of irregularities in proceedings against

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<sup>170</sup> Gaddafi Admissibility Decision (n 31), 173.

<sup>171</sup> *Ibid*, 42.

<sup>172</sup> *Ibid*, 211.

other Gaddafi era officials.<sup>173</sup>

In declaring Libya unable to obtain testimony in *Gaddafi*, the Chamber expressed its concern at the lack of capacity to obtain the necessary testimony, evidenced through *'the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection.'* It went on to note that the UNSMIL reports of torture and mistreatment of conflict-related detainees including senior former regime<sup>174</sup> which has a direct impact on the ability to obtain witness testimony, including defence testimony, as it will deter prospective witnesses from coming forward and will exclude testimony from those who have been tortured or even killed. To substantiate the loss of control over detention facilities, and its impact on obtaining witness testimony, the PTC recalled Libya's Admissibility Challenge, where it envisaged that it would take two witness statements for Gaddafi's, which in the 13 month duration of the admissibility challenge had not been possible for the Libyan investigators to do as the two individuals remained in detention facilities which were outside the control of the Libyan Government.<sup>175</sup>

The PTC confirmed this approach in *Al-Senussi*, considering that:

*'in the context of a potentially precarious security situation across the country, witnesses may be afraid of coming forward or may be eliminated, ultimately causing prejudice to the domestic proceedings. The security situation of witnesses is therefore relevant to the Chamber's conclusion on whether Libya is unable genuinely to carry out the proceedings against Mr Al-Senussi.'*<sup>176</sup>

### ***Absence of Witness Protection Programme is Insufficient by Itself***

Finally, while the PTC have accepted that the failure to provide adequate provision and availability of witness protection in the case at hand can render the State unable to obtain testimony, it has also accepted that, of itself, the absence of adequate witness protection may not be sufficient to render a case admissible.

In *Al-Senussi*, the PTC returned to the issue of whether Libya had enacted a specific

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<sup>173</sup> *Ibid*, 171.

<sup>174</sup> *Ibid*, 209.

<sup>175</sup> *Ibid*, 210.

<sup>176</sup> Admissibility Decision: *Al-Senussi* (n 38), 283.

protection programme under domestic law that would be capable of protecting those witnesses necessary for the case, and found that the concern continued, as Libya had failed to provide *'new submissions [...] to demonstrate the existence and effective functioning of a witness protection programme in the country.'*<sup>177</sup> In reviewing the absence of a specific witness protection program within the context of the security situation, the Prosecutor urged the PTC to:

*'resist engaging in speculative assessments as to the outcome of possible future events at the national level; and on the other, remain vigilant to obvious obstacles, established on the basis of concrete evidence that establish a foreseeable risk that national proceedings cannot in fact be carried out.'*<sup>178</sup>

The Chamber decided to consider the issue of an ongoing absence of an effective witness protection programme in light of two relevant factors, which it identified as (i) whether credible information exists which indicates the intentional exposure of witnesses to security threats;<sup>179</sup> (ii) whether the absence of an effective protection programmes for witnesses combined with the fact that certain detention facilities are yet to be transferred under the authority of the Ministry of Justice created untenable security challenges,<sup>180</sup> before concluding that there was *'no indication that collection of evidence and testimony has ceased or will cease because of unaddressed security concerns for witnesses in the case against Mr Al-Senussi.'*<sup>181</sup> Despite the acknowledged security challenges, the Chambers reconginsed that the domestic proceedings had not been prejudiced by them, which the Chambers felt had been demonstrated though *'progressive and concrete investigative steps'* which had enabled the judicial proceedings to reach the accusation stage.<sup>182</sup>

While the ICC jurisprudence has largely addressed the ability to obtain testimony through issues of security and witness protection measures, it has also considered the ability and capacity to gather evidence, including the identification and whereabouts of persons, the location of items and the preservation of evidence.

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<sup>177</sup> Ibid, 287.

<sup>178</sup> *Prosecution Additional Observations to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute'* ICC Pre-Trial Chamber I ICC-01/11-01/11-355/Red, 14 June 2013, 24.

<sup>179</sup> Admissibility Decision: Al-Senussi (n 38), 288.

<sup>180</sup> Ibid, 297.

<sup>181</sup> Ibid, 298.

<sup>182</sup> Ibid, 299.

## 7. Otherwise Unable to Carry Out its Proceedings.

The third and final test of inability is a catch-all clause that requires States to be able to carry out proceedings in the case concerned, in addition to the two requirements expressly included in article 17(3). This provides the Court with considerable leeway in interpreting national proceedings and the ability of the national justice system to pursue them. It also shares many features with the two preceding requirements: Stigen suggests that it could include the inability to interrogate the alleged perpetrators, or to examine and analyse evidence properly, both factors that overlap with, or extend the ability to obtain accused persons testimony or evidence.<sup>183</sup> Rather than consider indicative factors of 'otherwise unavailable' Benzing considers that the criteria is *'the subordinate concept of the other two, and at the same time serves as a generic term capturing all other possible situations.'*<sup>184</sup> The criterion has also enabled the Court to consider certain due process rights as well as other features of criminal justice that may not fit directly into a strict definition of the two preceding criteria: for example, early arguments submitted to the PTC sought to argue that the ability to obtain the suspect should cease to be applicable following the capture and detention of the individual, or that the ability to obtain testimony or evidence should exclude procedural flaws. The third criterion has provided a route through which these dimensions can be considered, which the Chambers have used wisely. However generic it may appear, the general requirement of the status of the national judicial system serves to reinforce the need for such unavailability to be clearly located within the general condition of total or substantial collapse or unavailable, while the second element of the requirement restricts its application to the case at hand.

The approach of the PTC has been to use this third criterion to more fully explore due process rights of the defence, notably the fulfilment of the right to legal representation, real-time assessments, general conditions of security (see section 6.4.3) and the assertion of the authority of judicial powers, in how they affect the fulfilment of the specific requirements as well as the general condition of the national judicial system.

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<sup>183</sup> Stigen (n 11) Chapter 9, section 2.7.

<sup>184</sup> Benzing (n 27) 616.

### 7.1. Due Process Rights of Suspects and Accused Persons: the Right to Legal Representation

The due process rights of the accused figured heavily in the two Libya cases, as has been seen throughout this chapter: while the PTC often reflected on this as part of the ability to obtain the accused, these factors figured more prominently in its assessment of the national judicial system to otherwise conduct its proceedings, on the basis of its ability to adhere to its national legal framework.<sup>185</sup>

In *Gaddafi*, the challenges of securing legal representation for members of a former regime were adjudicated: while provided for under Article 106 of the Libyan Criminal Procedure Code, the accused had not exercised his right to appoint counsel, and the State was unable to secure legal representation. The Defence cautioned that the factual circumstances for defence lawyers in Libya raised ‘significant practical impediments’ due to the general security situation and the documented risks faced by lawyers who act for the former regime.<sup>186</sup> The Government provided details of its attempts to secure independent legal representation for Gaddafi, including consultation with the Libyan Law Society, the Popular Lawyer's Office in Libya as well as the Bar Associations of Tunisia and Egypt, in order to obtain suitably qualified and experienced counsel.<sup>187</sup> The inability to secure legal representation for Gaddafi had frustrated the ability for the national case to proceed, as the national legal framework requires that the accused have legal representation following the transition from the accusatory phase to the trial phase.<sup>188</sup> With this in mind, and the absence of any substantiation of how the State would overcome this impediment, the Pre-Trial Chambers found Libya otherwise unable to carry out its proceedings.<sup>189</sup>

In *Al-Senussi*, the impact of general conditions of security across Libya, such as attacks on ministries and governmental entities, as well as collective punishments against those who provided representation of former regime officials, on the ability to ensure adequate legal

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<sup>185</sup> *Gaddafi Admissibility Decision* (n 31), 212- 214 and *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* (n 38) 206.

<sup>186</sup> *Gaddafi Admissibility Decision* (n 31), 212

<sup>187</sup> *Ibid*, 213

<sup>188</sup> articles 31 and 33 of Libya's 2011 Constitutional Declaration prohibits trial from being conducted where the accused does not have legal representation. In contrast Article 106 of the Criminal Procedural Code allows interrogations to continue in the absence of legal representation, *until* legal representation has been appointed: after that moment, interrogations must occur with the legal representation present. *Ibid*, 214.

<sup>189</sup> *Gaddafi Admissibility Decision* (n 31), 212-215

representation was widely discussed.<sup>190</sup> The Chamber again emphasised that the *'alleged violations of the accused's procedural rights are not per se grounds for a finding of unwillingness or inability under article 17 of the Statute'*<sup>191</sup> and that the allegations of the modalities of unlawful rendition in the transfer of Al-Senussi from Mauritania to Libya *'do not demonstrate, or otherwise indicate, the existence of one of the scenarios envisaged under article 17(2) or (3) of the Statute.'*<sup>192</sup>

## 7.2. Real-time Assessments

The same challenge of securing legal representation was faced in *Al-Senussi*, although the judicial activities remained within the investigatory phase. The Prosecutor argued that the 'real-time' assessment of admissibility should allow the case to remain within the national jurisdiction, arguing that the Chamber *'cannot base its decision on the admissibility of the case now on possible future facts'* but that it must be satisfied *'that there is no impediment or defect that would render the future appointment of counsel impossible'* in order that Libya could be found otherwise able to carry out its proceedings.<sup>193</sup> The Defence Counsel cautioned that the right to legal representation during the investigation phase of the case is provided under national law, and that the review of the case by the Accusation Chamber, including the appointment of legal representation is 'one of the key roles' of the Accusation Chamber.<sup>194</sup>

In reviewing the facts of the submissions, the PTC considered that Libya had *'provided persuasive information'* that the investigation into Al-Senussi was being conducted in a manner that was consistent with the intent to bring Mr Al-Senussi to justice and that following the transfer of the case to the Accusation Chamber the Court found that the evidence and submissions demonstrated that Al-Senussi's right to legal representation had primarily been prejudiced by the security situation of the country and not through any malicious intent.<sup>195</sup> The Chambers found this fact relevant to its Article 17(3) determinations<sup>196</sup> before concluding that *'the problem of legal representation, while not*

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<sup>190</sup> Admissibility Decision: Al-Senussi (n 38), 228-240

<sup>191</sup> Ibid, 235.

<sup>192</sup> Ibid, 236.

<sup>193</sup> Ibid, 194.

<sup>194</sup> Ibid, 206.

<sup>195</sup> Ibid, 292.

<sup>196</sup> Ibid, 304.



*compelling at the present time, holds the potential to become a fatal obstacle to the progress of the case.*' However, as the PTC had frequently held that *'the admissibility of a case must be determined in light of the circumstances existing at the time of the admissibility proceedings'* it chose to determine whether the current circumstances, notably the security situation, provided *'a concrete impediment to the future appointment of counsel'*<sup>197</sup> before concluding that it didn't, in the present circumstances, but may well in the future, thereby determining to remain observant of the progress of the domestic proceedings through the OTP.

### 7.3. Assertion of the Authority of Judicial Powers

The final issue to form part of the assessment of the ability to carry out proceeding in the Libya cases, concerned the ability of the authorities to exert its judicial powers. Intricately linked to the general security conditions, the PTC addressed the alleged abduction or arrest of a prosecutor that the OPCD alleged was the Deputy prosecutor in Al-Senussi's case<sup>198</sup> and the subsequent attempts to secure the release of the Prosecutor, first by the Minister of Justice and then by the Attorney General. The OPCD claimed that the prosecutor was abducted, while Libya maintained that he was arrested as part of a general disturbance, along with the Investment Undersecretary and a congressman. The Chamber considered that, on the basis of information in its possession, it was unable to determine the circumstances of the Prosecutor's 'abduction' or arrest', nor whether there was any link with his involvement in the proceedings against Mr Al-Senussi.<sup>199</sup> The Chamber went on to analyse the potential impact of such targeted threats or violence against judicial authorities, adopting the view that such occurrences do not necessarily entail 'collapse' or 'unavailability' of the Libyan judicial system within the meaning of article 17(3) but that *'the existence of serious security concerns in Libya is an issue relevant to the final determination on Libya's ability to conduct its proceedings against Mr Al-Senussi.'*<sup>200</sup>

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<sup>197</sup> Ibid, 307.

<sup>198</sup> Ibid, 274; *Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute' (Defence Observations: Gaddafi Admissibility)* (n 109) 97.

<sup>199</sup> Admissibility Decision: Al-Senussi (n 38) 275.

<sup>200</sup> Ibid, 275.

In summary, the first decisions of the Court on the ability of national judicial systems to pursue investigations and prosecutions of cases under the scrutiny of its Prosecutor have helped to dispel some of the early criticisms of it, either as a mechanism to further stigmatise countries emerging from civil war or other disasters<sup>201</sup> or as a tool of rich mans' justice, where ability measures would work to protect rich, developed countries while further penalizing those conflict and poverty-racked countries that lacked the sophisticated infrastructures of their wealthier counterparts.<sup>202</sup> The reception of and adherence to international human rights norms is often caught in this paradigm, with less-developed States struggling to accommodate the sheer scale of legal and behavioural reform required to come anywhere close to fulfilling these norms in their criminal justice practice. While the Court has remained sensitive to these realities, its mandate is not to compensate for the developmental ills of the world but to determine whether a particular States' performance leaves it willing and able to adjudicate over the case or investigation under consideration.

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<sup>201</sup> M. H. Arsanjani, *Reflections of the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, in H. von Hebbel et al (eds.) 'Reflections on the International Criminal Court,' 1999, at page 70.

<sup>202</sup> See Louise Arbour and Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in von Hebbel, page 131.

## Chapter 7

### ***Defining the Goldilocks Zone: The Impact of ICC Admissibility Law and Practice on Domestic Jurisdiction***

This Chapter concludes the thesis by pulling together each of the arguments laid out in the introduction and examined in Chapters 1 to 5, in order to conclude the parameters of national criminal justice practices that are coherent to the ICC and its Statute and therefore inadmissible before it. In doing so, it is helpful to return to the astronomers Goldilocks Zone, that zone or threshold where the conditions exist to enable life to occur, to establish its international criminal justice equivalent, where the conditions of national criminal justice laws, procedures and practices enable complementarity-proof criminal justice to occur.

In doing so, this Chapter reaffirms those features or dimensions of the various models of complementarity that are applicable to the ICC Statute, concluding that the models over-emphasised the procedural and substantive law requirements of Article 17 subparagraphs (2) and (3) and overlooked the importance of Article 17(1) in shaping the complementarity contours between criminal justice activities of the ICC and States. To remedy this error, the conclusion then extrapolates the established and emerging tests of admissibility, which can serve as guidelines to national criminal justice actors. It would be a fools-errand to conclude this thesis without confronting the emergent tensions between those national criminal justice practices that satisfy the ICC's complementarity system and the rules and principles that have been established by international human rights mechanisms.

Having provided full disclosure of the international criminal justice Goldilocks Zone, this conclusion turns to the consequences of such a reality, upon the concept of positive complementarity and the role that the ICC should assume in establishing a firm and stable basis for the development of national capacity to adjudicate core international crimes. It finds that, as an intergovernmental organisation, the ICC has powers to engage in limited capacity building activities, but that in order to strengthen the legitimacy of the Court as well as to reinforce legal certainty and equality of its functioning, such actions should remain coherent to the rules and tests established by the ICC through its judicial activities. Subject to a clear

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division of labour, the thesis considers that such activities can be conducted in partnership with relevant and suitably qualified organisations.

Finally, this chapter incorporates the relevant findings of the latest Admissibility Appeal Judgment, in the case of *Gaddafi*, into each section of the Chapter, along with the separate opinion of Judge Song and the dissenting opinion of Judge Usacka.<sup>1</sup>

## **1. The Procedural and Substantive Content of the Rome Statute has Little Effect on Admissibility-Proof National Criminal Justice**

This first key-finding of this thesis is that very few of the multitude of published complementarity models are strictly applicable to the complementarity system established within Article 17 of the Rome Statute. The introduction defined complementarity models as accounts of the legal and factual requirements that States must meet in order to retain jurisdiction of cases amounting to core international crimes that are within the jurisdiction of the ICC: it equally refers to the legal and factual requirements that the ICC is expected to impose on those States that enter into its jurisdiction.<sup>2</sup> These models have largely focused on the extent to which States should implement or 'mirror' the provisions of the Rome Statute into their national legal framework of criminal justice for core international crimes, covering procedural dimensions of due process, fair trial standards and general principles of criminal law, as well as substantive dimensions of crimes and liabilities and even sentencing provisions. Influential trends have also emerged, critiquing the somewhat blind reverence to the Rome Statute, to challenge the applicability of the Rome Statute's operational parts to States in their national criminal justice practices and to refine the interpretation of the procedural and substantive legal requirements of national justice systems according to textual

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<sup>1</sup> *Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi' (Gaddafi Admissibility Appeal Judgment)* [2014] ICC Appeals Chamber ICC-01/11-01/11 OA4, 21 May 2014. *Separate opinion of Judge Sang-Hyun Song, Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi' (Gaddafi Admissibility Appeal Judgment: Separate opinion of Judge Sang-Hyun Song)* [2014] ICC Appeals Chamber ICC-01/11-01/11 OA4, 21 May 2014; *Dissenting opinion of Judge Anita Ušacka, Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi' (Gaddafi Admissibility Appeal Judgment: Dissenting Opinion of Judge Anita Ušacka)* [2014] ICC Appeals Chamber ICC-01/11-01/11 OA4, 21 May 2014.

<sup>2</sup> See Chapter 1, Section 1.1

analysis of the provisions of Article 17. Largely in favour of legal pluralism, they have argued that the Rome Statute imposes scant due process protections to defendants, that States need only to apply whatever legislation that they have in place at the time that they open an investigation and that national sentencing structures can serve as a guide to admissibility, referred to either as ‘*polymorphic repression*’ or ‘*sentencing theory*.’

The practice of the ICC has qualified significant claims of each of these models, despite its limited determinations of the two admissibility tests of willingness and ability. Most notably, to the detriment of the mirror-thesis proponents, the Pre-Trial Chambers have asserted that they will determine the ability of a State to carry out criminal proceedings on the basis of the relevant national system and procedures, thereby evaluating the ability of the State to function according to whatever national substantive and procedural laws that are applicable to the case at hand,<sup>3</sup> rather than by internationally recognised human rights, or by the Statute’s operational text. This poses a partial blow to those aiming for national legal reforms to raise or bring States criminal justice systems into line with the ICC Statute or international human rights treaties. It is not however, complete victory for Mégret’s notion of ‘whatever law is in place at the time’ as the existence of legal bars to prosecution or to the pursuit of the case at hand may still render the case admissible to the ICC, either on grounds of the unavailability of the system, or more likely, on the basis that the State is no longer able to actively pursue the case.

However, as the literature review had identified two major trends of advocacy, one engaging with the criminal procedural requirements of States law and practice, and the other engaging with its substantive framework, the conclusion will return to this format to draw these threads together. Within the procedural domain, two opposing models of complementarity focused on due process protections, rather than on evidentiary requirements: those in favour of vertical harmonisation or mirroring, such as Ellis, O’Donaghue and Rigney, as well as several NGOs have argued that the complementarity system of the ICC gives preference to States that are fully compliant with the principles of due process recognised by international law, or as defined by the Rome Statute.<sup>4</sup> On the other side of the spectrum, Heller, Mégret and Carnero-Rojo have argued that the ICC Statute actually imposes scant due process requirements on

<sup>3</sup> *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* [2013] ICC Pre-Trial Chamber I ICC-01/11-01/11, 31 May 2013 [100].

<sup>4</sup> Introduction, Section 3

States national practices, and that such protections generally exist only in circumstances where the abuse of due process protections makes it more difficult to convict the accused person or defendant. Despite what I refer to as the hypnotic attraction of the mirror thesis, this thesis has shown that the text of the Statute as well as the broader sources of applicable law<sup>5</sup> do not support a blanket application of the mirror thesis, while equally, the jurisprudence of the ICC has not fully vindicated the restrictive interpretation of Heller.

### 1.1. Fair-Trial Considerations Must Be Relevant to Admissibility Criteria

Instead, having followed the Statute's rules of interpretation, the thesis has reinforced the core findings of Kevin Jon Heller,<sup>6</sup> that the formulation and location of the phrase '*principles of due process recognised by international law*' within Article 17(2) restricts its applicability to the specific admissibility test of unwillingness and the three specific criteria.<sup>7</sup> Building on Heller's argument, this thesis incorporated the Pre-Trial admissibility decisions of *Gaddafi* and *Al-Senussi* which engaged with the scope of due process protections afforded to suspects undergoing admissibility challenges,<sup>8</sup> and compared the admissibility restrictions imposed on international courts with jurisdiction over fair-trial violations, such as the requirement of the exhaustion of domestic remedy.<sup>9</sup> Turning to the scope of Article 21(3) to super-impose due process principles into the entirety of the admissibility criteria,<sup>10</sup> it similarly found it unconvincing that the 'human rights consistency test' could apply in order to empower the ICC to seize jurisdiction solely on the grounds that a State had violated due process rights of the accused to the detriment of the individual, in the absence of a '*provision, rule or principle that, under Article 21(a) to (c) of the Statute, could be applicable to the issue at hand.*'<sup>11</sup> This has been articulated by the Chambers in two ways: first, the Appeals Chamber has found that

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<sup>5</sup> See Chapter 1

<sup>6</sup> Kevin Jon Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 Criminal Law Forum 255.

<sup>7</sup> Chapter 4, Section 1.1

<sup>8</sup> *Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Gaddafi Admissibility Decision)* (n 3); *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* [2013] Pre-Trial Chamber I ICC-01/11-01/11-466-Red, 11 October 2013.

<sup>9</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 Article 35(1); International Convention on Civil and Political Rights 1966 Article 41(1)(c); American Convention of Human Rights 1969 Article 41(1)(a); African Charter on Human and People's Rights 1981 Article 50.

<sup>10</sup> See Chapter 1

<sup>11</sup> Chapter 4, section 1.3, *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, Decision on the Practices of Witness Familiarisation and Witness Proofing (Witness-Proofing Decision: Lubanga)* [2006] ICC Pre-Trial Chamber I ICC-01/04-01/06-679, 08 November 2006.

alleged prejudices and violations against a suspect or accused person must be relevant to the criteria of Article 17 in order to be applicable,<sup>12</sup> and second, the Pre-Trial Chambers have elaborated upon this, accepting that fair trial ‘irregularities’ may be taken into account where they ‘*may constitute relevant indicators of one or more of the scenarios described in Article 17(2) or (3) of the Statute.*’<sup>13</sup>

Through analysis of the use of sources as well as the willingness of the Chambers to introduce the due process concerns of the different parties into its decisions, this thesis has shown that the Court will invite or accept into its record, a broad base of materials and facts that are grounded in due process rules and principles, which it will then analyse according to the indicators and criteria of admissibility. In part, this can be attributed to the Rules of Procedure and Evidence, where Rule 51 invited States to provide information that shows that its courts meet internationally recognised human rights for this eponymous fair trial right, without including any of the other specific criteria on willingness or inability. Despite the priority given to the independence and impartiality of national judicial systems, the Pre-Trial Chambers have incorporated many of the submissions of the parties that allege violations or irregularities of due process, both in general where there may be no explicit connection to the case at hand, as well as in the direct circumstances of the case at hand. This can be visualised as a pyramid, where the broad sweep of materials alleging fair trial irregularities and possible violations form its base and where, through a somewhat strict interpretation of Article 17(2) and (3) the materials are narrowed down to a layer of contextual information which can be further refined until only those case-specific facts or allegations remain, until the tip of the pyramid emerges with clear attributions of facts to the specific circumstances of the case at hand.<sup>14</sup>

The thesis elaborated two further obstacles to the mirroring of internationally recognised due process into the text of Article 17(2) and (3). The first obstacle has arisen in the threshold requirement of Article 17(1) which requires States be *genuinely* willing and able to pursue criminal justice in the situation or case at hand, rather than willing and able to *fairly* pursue

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<sup>12</sup> *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*” (*Admissibility Appeal Judgment: Katanga*) ICC Appeals Chamber ICC-01/04-01/07-1497 OA8, 25 September 2009, [113].

<sup>13</sup> *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* (n 8).

<sup>14</sup> *Gaddafi Admissibility Decision (n 3)* [242]

criminal justice.<sup>15</sup> The second barrier occurs pursuant to the qualifying clauses of Article 17(2)(b) and (c) which require that the undue delay or the loss of independence be inconsistent with the intent to bring the person to justice,<sup>16</sup> which has been understood as imposing a punitive, sentence-focused or outcome driven interpretation of the *meaning of justice*. In seeking to address the first obstacle, the thesis found that, despite the pre-eminence of international principles and rules that require the process of criminal justice to be fair, rather than solely outcome-driven, the Court has found it more favourable to follow arguments that States perform *genuinely* rather than *fairly* in exercising jurisdiction over ICC crimes. Turning to the second obstacle, the purposive requirement of Article 17(2)(b) and (c) demands that once an unjustified delay or a loss of independence or impartiality is determined, it must be found, in the circumstances, to be inconsistent with the intent to bring the person concerned to justice.<sup>17</sup> While the ICC has yet to authoritatively examine either criteria, it is plausible to contend that this feature of intent could be applied to further restrict the ICC's jurisdiction, due to the difficulty that the OTP, as well as victims counsel may face to obtain sufficient facts and evidence to establish intent in this regard: efforts to do so, particularly by those who favour the prevalence of State sovereignty, should be tempered by the accepted role of the ICC to reduce impunity.

Turning to the applicability of international human rights laws, rules or principles within Article 17(3) and the specific criteria of inability – obtaining the accused,<sup>18</sup> obtaining evidence and testimony<sup>19</sup> and otherwise unavailable<sup>20</sup> – this thesis has noted several qualifications from the emerging practice of the Court, in the cases of *Gaddafi* and *Al-Senussi*. The first is that while the construction of the common requirement of *ability*, as either the total or substantial collapse of the national judicial system or its otherwise unavailability, shares recognisable features with fair trial requirements such as effective remedy and the provision of adequate resources, the PTC's early analysis has not drawn on these concepts.<sup>21</sup> Instead, it has taken the existing national legal system and its procedures as its epicentre and framework upon which it will analyse the requirements of the ability

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<sup>15</sup> Chapter 2 and 4.

<sup>16</sup> Section 5, Chapter 4

<sup>17</sup> Section 3.1; 3.1.4; 4, Chapter 4

<sup>18</sup> Section 5, Chapter 5

<sup>19</sup> Section 6, Chapter 5

<sup>20</sup> Section 7, Chapter 5

<sup>21</sup> Chapter 5, Section 3.1.2



criteria. This means that the ability of the national judicial system will be assessed by its own legal framework rather than according to external, international laws, including allegations of fair trial violations or irregularities. An example of this practice emerged in the *Gaddafi* and *Al-Senussi* Admissibility Decisions, where the PTC considered whether the national laws may function as procedural bars to the domestic trials against both men from proceeding, on the basis of a national fair trial protection that prevents an investigation from proceeding to trial where the accused is unable to secure legal representation. In its analysis, the PTC eventually concluded that, where such an outcome was reached, it would be more accurate to conclude that the case had become inactive and therefore that the case was admissible under Article 17(1), rather than that the State was unable to proceed and was therefore admissible under Article 17(3). Equally, the early practices of the PTC has shown that while it is concerned with the process in which the accused is obtained, or the provenance of the evidence, it has assessed such processes according to national law and has prioritised determinations of the sufficient control over the accused and the detention facilities as well as the probative value of the evidence obtained.

One exception, which was not adequately foreseen by the academic community, but which was demonstrated in this thesis, is the importance that the PTC have placed on the requirement for adequate and specific witness protection measures, in order to ensure that both parties can obtain the necessary testimony.<sup>22</sup> Ironically, in *Gaddafi*, the PTC considered that UNSMIL reports of torture and mistreatment of conflict-related detainees, including senior former officials had a direct bearing on the ability to obtain witness testimony, on the grounds that it was deterring defence witnesses from coming forward, and would exclude the ability to obtain testimony from those who had been tortured or killed from entering the investigation or trial docket. Defined as an inability to obtain control over and provide adequate witness protection, the PTC found this sufficient to significantly reduce the capacity of the Libyan authorities to obtain necessary testimony. In *Al-Senussi* however, it considered the precarious security situation of witnesses to be relevant to its conclusions on ability but that by itself, it was insufficient to render the State as unable.

These factors have driven the discomfiting conclusion that internationally recognised due process principles do not trump the somewhat conservative status of the statutory provisions

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<sup>22</sup> Chapter 5, Section 6.4

on the willingness and ability of States to exercise jurisdiction, but that any such violation must be found applicable to the specific features of the case or situation under the ICC's scrutiny.

## **1.2. The Legal Characterisation of Conduct is Not Determinative of Admissibility**

Similar albeit qualified conclusions must also be reached in addressing the complementarity proposals that advocate for the reform of States substantive criminal laws to reflect or mirror the crimes of the ICC Statute. An overwhelming majority of publicists have considered it to be an imperative of State action to capture, define and apply international crime nomenclature in their national laws: this has consistently been wrapped up in the language of complementarity, with hints or veiled threats of the loss of jurisdiction to the ICC where the national law books remain without the ICC's full list of crimes, liabilities and general principles. There are certainly compelling reasons why criminal justice systems may want to increase the list of prohibited acts, and it is certainly foreseeable that admissibility could be found where the law books are woefully silent on conduct proscribed by the ICC Statute, or that provide procedural bars, but there are also persuasive reasons to make only light touches of adjustment.

The thesis has reiterated the obvious features of the ICC Statute as well as its differences from its international court brethren. Unlike other international treaties with which the ICC Statute shares many substantive features, the Statute does not oblige States to adopt its substantive or operational parts, a status it imposes only on cooperation and judicial assistance: nor does it refer to the legal characterisation of crimes in the admissibility criteria, referring instead to the *conduct* of the suspects or accused persons. Whereas the Court has been prudent in its assessment of national fair trial practices during admissibility, it has been forthright in its declarations of applicable substantive law. In addition to its declaration that admissibility should be determined according to the national legal framework and practice, it has steadfastly rejected any interpretation that the Statute imposes or requires States to adopt and apply the Rome Statute crimes to those it has identified as bearing individual criminal responsibility.<sup>23</sup> Developed as part of the admissibility test to determine if States are investigating the same 'cases' or 'incidents' as the ICC in the disputed 'same person same

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<sup>23</sup> Chapter 2, section 6.4

conduct' test<sup>24</sup> the PTC developed its reasoning on the legal characterisation of conduct to affirm that the application of international crime labels is '*not determinative of an admissibility challenge*'<sup>25</sup> whereby '*assessment of domestic proceedings should focus on the alleged conduct and not its legal characterisation.*'<sup>26</sup>

This is at odds with the message driven by authors such as Bekou, who argues that States need to incorporate the core ICC crimes in order to investigate and prosecute within the complementarity regime.<sup>27</sup> It contrasts sharply with the breadth of Model Laws, popularly issued by intergovernmental organisations and research institutes in the euphoria of the adoption and entry into force of the Rome Statute, revived in 2011 by the Commonwealth Secretariat in a high-profile cooperation agreement with the ICC to provide technical assistance to Commonwealth States that had not implemented the substantive parts of the Statute, as well as the parts on cooperation. While I critique this use of the ICC's powers in this instance in **Section 4.6**, and its contradiction with the judicial powers of the ICC, it is worth noting that the insistence on the mirroring of ICC crimes continues to be an elite priority.

I would like to argue forcefully against such a blanket adoption of substantive law, particularly in low-resourced, transitional or post-conflict States, but this would be a separate thesis topic. Instead I will restrict my critique to some observations of such 'vertical levitation' where such arguments attempt to cajole States into significant legal reforms without providing adequate attention to the resources that such reforms require in order to become operational, in national judicial environments that are starkly different to the Hague. This is largely restricted to States that may come under the jurisdiction of the ICC, with conflicts or widespread and systematic violations that fall within the jurisdiction of the ICC. Claims that it is easier or more thorough to import the ICC crimes to national law are often

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<sup>24</sup> See *Gaddafi Admissibility Appeal Judgment: Dissenting Opinion of Judge Anita Ušacka* [2014] ICC Appeals Chamber ICC-01/11-01/11 OA4, 21 May 2014 (n 1) [47–58].

<sup>25</sup> *Gaddafi Admissibility Decision* (n 3) [24]

<sup>26</sup> *Ibid* [85]

<sup>27</sup> Olympia Bekou, 'In the Hands of the State: Implementing Legislation and Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); 'Crimes at Crossroads Incorporating International Crimes at the National Level' (2012) 10 *Journal of International Criminal Justice* 677; Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity After Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2 *Göttingen Journal of International Law* 791; Olympia Bekou and Sangeeta Shah, 'Realising the Potential of the International Criminal Court: The African Experience' (2006) 6 *Human Rights Law Review* 499.

subjective and overly centralised, favouring ICC lawyers rather than criminal prosecutors in the midst of a conflict. Notwithstanding the complications that such legal reforms can impose on non-retroactivity, when they are adopted mid-way or post conflict, as for example occurred in Bosnia and Uganda, or was mooted in Kenya, the legislative process as well as the adoption and implementation of new or unfamiliar laws can cause delays and errors when they are implemented to deal with immediate cases.<sup>28</sup> They require adaptations in the work processes of criminal investigators, prosecutors, judges, defence counsel and clerks, from fact—finding, evidence-gathering and evaluation, to the construction of cases that can prove the existence of each of the elements of crimes and liabilities, and it requires significant education and outreach to ensure that a minimum public awareness exists about the new legal technicalities, and they nearly always require far more investment and aid than is ever planned or considered.

Several of these resource challenges were explored at length in the admissibility challenges in the cases of *Gaddafi* and *Al Senussi*, where the PTC acknowledged the substantial challenges faced by Libya, as a transitional State in the aftermath of a bloody conflict that followed decades of institutional violence, to secure detention facilities, to gather evidence and testimony, to prepare and pursue investigations, under teams of prosecutors and judges with sufficient independence and impartiality but also knowledge of criminal law and procedure. Within this environment, promises that the customary international law status of the ICC's crimes could over-ride domestic law and ensure the best type of justice appear to become ludicrous.

Arguably, many of these challenges may become minimised where legislation is adopted as a preventative measure and is done so with careful consideration of the national legal environment, as the law can become embedded into the legal community. However, such laws can also remain a Pandora's box, where the full force of its power becomes apparent once it is opened for implementation. Until there is more empirical research on the effects of such legal reforms on the pursuit of criminal justice for ICC crimes, these critiques and

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<sup>28</sup> The case-load in Uganda is an example whereby substantial legal reform on substance (including an ICC Act to implement crimes against humanity, genocide to supplement the Geneva Conventions Act of 1963, as well as Amnesty laws) overlooked the need for adequate procedural laws and rules. This led to the first case before the International Crimes Division of the High Court against Thomas Kwoyelo, being suspended upon appeal that the accused was eligible for amnesty.

defences remain somewhat hollow, based in part on (well-informed) anecdotal observation and intuition, which is ultimately an unsatisfying outcome.

### **1.3. Complementarity Models Overlooked the Importance of Article 17(1)**

The third notable feature of the Court's admissibility practice, which is absent from the models of complementarity, is its obvious adherence to the sequence of Article 17.<sup>29</sup> Its established practice has been to move sequentially through Article 17, where with the exception of the two Libya cases, all preceding admissibility challenges or proprio motu evaluations by the Court have been rendered on the basis of the status of national proceedings or their similitude to the subject matter of the ICC's investigation of case. Regulated by the provisions of Article 17(1), the Court's practice has led to a far greater emphasis being placed on the development of tests that determine the status of national proceedings and their similitude to the ICC's proceedings. This was largely unforeseen by those engaging in debate on the merits of national legal reform: this thesis sought to avoid this pitfall, by following the sequence of Article 17, through which it has been possible to clearly demonstrate the significance afforded to Article 17(1) in the early practice of the ICC.

## **2. Emerging Tests and Indicators of 'Admissibility-Proof' Practice**

This thesis has shown that the ICC will determine admissibility on the basis of existing national laws and practices, which will require greater comparative analysis between the legal requirements of a diverse array of national laws and practices and the ICC Statute. But this will occur only once the ICC is satisfied that the State's case/s overlap with those being pursued by the Office of the Prosecutor: the jurisprudence of ICC has consistently emphasised the importance of 17(1) and indeed most admissibility challenges or proprio motu reviews have not passed this phase of assessment, meaning that the tests and principles are far more developed here than in willingness and ability. Until States are better informed of the complementarity system and the approach of the ICC, the application of Article 17(1) tests of activity, timeliness, case selection and similitude between national and ICC efforts are more likely to dominate the complementarity system.

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<sup>29</sup> See Chapter 2, section 3.1; 5.1; Chapter 3

Through analysis of the admissibility jurisprudence of the Court, this thesis has gone beyond clarification of the types of complementarity models that will be applicable before the ICC, to establish its emergent tests, which can serve as guidance to national criminal justice actors. They deviate from the established discourse on complementarity: whereas the Court has established quite strict tests on the similitude between national cases and their ICC counterparts as governed by Article 17(1), it has demonstrated significant latitude and deference to the qualities of national criminal justice that are exerted over such cases, by accepting that the willingness and ability of national judicial systems to exercise their duties in the specific cases under review will be assessed according to national criminal laws and practice.

### **2.1. Temporal Features of Admissibility Challenges**

Explored in Chapter 2 and 5, the temporal features of complementarity have been quite controversial. The least contentious component emerged in the proprio-motu review of the admissibility of the cases against the six indicted Lords Resistance Army leaders in the Ugandan situation, following national efforts to establish national infrastructure to adjudicate the criminal conduct of certain levels of perpetrators. In this review, the PTC decided that admissibility should be considered in real-time, that is, that the process of reviewing admissibility must occur based on the available facts of the time, not on prospective plans, policies or laws. In *Al Senussi* this was applied to the assessment of ability, where Libyan criminal procedural law imposes a procedural bar on cases proceeding to trial where the accused does not have legal representation. While the PTC accepted that this could place an impediment on the ability of Libya to proceed, where it would become inactive and subsequently the case would become admissible to the ICC, it was not yet the reality, and that the Chamber cannot base its decision on the basis of possible future facts.<sup>30</sup>

Similarly, in the *Uganda* admissibility decision, the PTC also considered that admissibility should be an on-going process of the pre-trial phase, subject to the evolution of the relevant factual scenarios.<sup>31</sup> This facet of review, following the evolution of the factual scenario was developed in the Gaddafi Admissibility Decision and the Appeal Judgment, where the

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<sup>30</sup> *Decision on the admissibility of the case against Abdullah Al Senussi (Admissibility Decision: Al-Senussi)* (n 8) [194].

<sup>31</sup> *Decision on the admissibility of the case under article 19(1) of the Statute (Kony Admissibility Decision)* [2009] ICC Pre Trial Chamber II, ICC-02/04-01/05-379, 10 March 2009 [27–28].

majority left the door ajar for a renewed admissibility appeal, where the factual circumstances upon which the appeal was rejected have changed sufficiently.

The Appeals Chamber judgment in *Gaddafi* also identified ancillary factors of *timing*, where the Chambers warned Libya of its responsibility to ensure that the timing of its admissibility challenges be balanced between the statutory requirement to do so at the earliest possible moment, with the need to refrain from acting prematurely, before it has gathered sufficient evidence to satisfy the Court that it is active as well as willing and able,<sup>32</sup> arguing that:

*'In this regard, admissibility proceedings should not be used as a mechanism or process through which a State may gradually inform the Court, over time and as its investigation progresses, as to the steps it is taking to investigate a case.'*<sup>33</sup>

A second temporal factor was also introduced into the judicial record of the Court in the *Gaddafi Appeal Judgement*, where the majority noted that the timeliness of admissibility proceedings requires balancing between the due process that should be afforded to the appealing party to provide evidence substantiating its challenge, with the suspensive effect that the admissibility challenge has on the ICC's own investigation, noting that ultimately, the objective of the ICC to reduce impunity must mean that such procedures are not unduly lengthy.<sup>34</sup>

Equally, in the fraught admissibility challenge in the situation of *Kenya*, the use of the admissibility proceedings, as well as other statutory provisions, such as the Article 16 deferral mechanism and Article 93(10) requests for assistance, appear to be a rather more pernicious attempt to delay the development of the ICC's own proceedings and shield the named persons from criminal accountability, rather than being reflective of the willingness and ability of the State to ensure that the national judicial system had the necessary mechanisms to investigate the two ICC cases.

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<sup>32</sup> Appeals Chamber, 'Gaddafi Admissibility Appeal Judgment' (n 1) [164]

<sup>33</sup> *Ibid*, [165]

<sup>34</sup> *Ibid*, [169-178]

## 2.2. Evidence and Sources for Admissibility Challenges

The sources, qualities and probative value of admissibility evidence has also been explored in the early practice of the ICC, although it remains far from being settled or refined, while the sources and probity of evidence that the Prosecutor may rely on during preliminary examination has also come under scrutiny. Both affect national criminal justice mechanisms but for slightly different reasons: at the outset of the ICC's preliminary examinations, the Prosecutor has relied heavily on open source, public domain documents, primarily drawn from UN agencies and international NGOs.<sup>35</sup> This means that, while the procedural rules ensure that States are informed of the preliminary inquiry, the first level of identification of conduct and possible suspects and groups may largely be derived from the findings of external agencies and bodies, which may well follow thematic objectives and strategies that are different to the ICC. While the deficiencies of this approach can be ironed out during investigation, where the threshold of proof rises from a 'reasonable basis' to what is emerging as a 'sufficiency' threshold<sup>36</sup> the heavy reliance on documentation and fact-finding by external bodies, rather than by ICC Investigators, subjects the ICC to a breadth of differing investigative standards, methods and objectives that must then be corrected at the point in which the examinations proceeds to investigation.

The Court has recognised that the purpose of evidence within admissibility challenges remains distinct from the other judicial steps that the Pre-Trial and Trial Chambers undertake, as a process that requires the ICC to examine whether the evidence shows that domestic authorities are taking '*concrete and progressive steps to investigate or prosecute the same case that is before the ICC*'<sup>37</sup> to a '*sufficient degree of specificity and probative value*'<sup>38</sup> which is distinct burden of proof to the other procedures that occur at the pre-trial stage, such as the issuing of warrants of arrest, or the confirmation of charges. This may include directions, orders, decisions, internal reports, updates, notifications or case file submissions that arise from the national investigation and which demonstrates 'concrete and progressive

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<sup>35</sup> See Chapter 2, Section 4.2

<sup>36</sup> See Chapter 2, Section 4.3

<sup>37</sup> *Gaddafi Admissibility Decision* (n 3) [54]

<sup>38</sup> *Dissenting Opinion of Judge Anita Ušacka, 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' (Dissenting Opinion, Admissibility Appeal Judgment: Ruto, Kosgey, Sang)* ICC Appeals Chamber ICC-01/09-01/11-307, 30 August 2011.[61]



steps' in its domestic investigation of the 'case' under scrutiny by the ICC. However, its procedure to allow and assess such submissions of evidence was heavily contested by Libya in the *Gaddafi* case,<sup>39</sup> where the approach taken by the PTC was criticised in the dissenting opinion of Judge Ušacka in the Appeal judgment. In her analysis of the evidentiary standards of admissibility, Judge Ušacka considered the impact of the different admissibility participants on the use of evidence and burden of proof, where she disagreed with the PTC's decision to impose the burden of proof on Libya, as the admissibility appellant, to substantiate that the ICC's case was inadmissible. She considered that each participant (Office of the Prosecutor, State, Defence, Victims Counsel) may possess materials and information that is potentially relevant and that they should be required by the OTC to share this with the Court in order to give effect to complementarity. She further argued that the sui generis nature of the admissibility proceedings require that evidence and materials be taken at face value in their expression of the States intent to investigate the case, rather than undergo evaluation to determine any level of their probative value (the PTC has chosen 'sufficiency' as its marker).<sup>40</sup>

The Pre-Trial Chambers had rejected significant proportions of the batches of evidence submitted by Libya, for lacking probative value or for failing to provide credible information that investigate steps were being undertaken and that they were coherent with the subject matter of the ICC's case and the admissibility requirements of willingness and ability. The Court has also been critical of the use of evidence summaries rather than the actual evidence and its record, where in *Al-Senussi*, it considered the quality of the summaries to be '*fragmented and de-contextualised*,' providing a scant level of detail that taken together failed to '*give an intelligible overview of the factual allegations*.'<sup>41</sup> In assessing the PTC's analysis of the same or similar witness summaries in *Gaddafi*, the Appeals Chamber confirmed the PTC's approach to assess the contents of the summaries, rather than their authenticity and that they were correct to raise concerns over the question of the accuracy of the summaries to the original testimonies.<sup>42</sup>

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<sup>39</sup> *The Government of Libya's Appeal against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'* (Admissibility Appeal: *Gaddafi*), ICC-01/11-01/11-350, 07 June 2013 [120–140].

<sup>40</sup> *Gaddafi Admissibility Appeal Judgment: Dissenting Opinion of Judge Anita Ušacka* (n 24) [60–63].

<sup>41</sup> *Decision on the admissibility of the case against Abdullah Al Senussi* (Admissibility Decision: *Al-Senussi*) (n 8) [154].

<sup>42</sup> *Gaddafi Admissibility Appeal Judgment* (n 1) [126].

In accepting this approach, the majority view of the appeals chamber is more persuasive than the dissenting opinion, but one feature of the PTC that warrants criticism is, in my view, their omission to respond to Libya's request to visit the investigative team in Tripoli in order to have access to the complete case file. While the offer undoubtedly came at an advanced stage of the admissibility challenge, and could have reduced the expeditiousness of the challenge,<sup>43</sup> such rigidity and formalism would appear to be inconsistent with the PTC's acceptance of the post conflict transitional reality that the government and state criminal justice facilities operated under, as well as its acknowledgment of the 'rapid strides' taken towards establishing sufficient and necessary criminal justice infrastructure and resources to adjudicate this and other cases. This serves to further distance the ICC from its national judicial colleagues and has done little to dissipate allegations of a Court of diplomats and international criminal justice dilettantes, rather than a confident and professional international criminal court versed in the judicial exigencies of its situation States.

However, despite the dissenting opinion of Judge Ušacka, the Court continues to find that evidence submitted to substantiate admissibility challenges must be specific to the case at hand, and that factual indicators may be relevant to more than one of the admissibility criteria, where for example, evidence of insufficient steps in an investigation could be factually relevant for both inability (to obtain evidence for example) as well as unwillingness (through shielding).

### **2.3. Core Dimensions of Admissibility Challenges: the case or incident, the suspect and the conduct**

The thesis also chartered the development of the ICC's efforts to define the subject matter of the admissibility challenge, in clarification of the ambiguous referencing to the 'the case,' 'the person' and 'conduct' in the three scenarios of Article 17(1) where national judicial activity would render ICC pursuit of adjudication to be inadmissible.<sup>44</sup> The early decisions quickly confirmed that the national criminal justice system must be actively engaged in order for the remaining admissibility criteria to be considered, but contrary to the expectations or

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<sup>43</sup> The Appeals Chamber considered that the Court must be cognizant of the need for expeditious proceedings, without undue delay, and accepted that the PTC had taken sufficient account of the rapidly evolving circumstances in Libya. See *Gaddafi Admissibility Appeal Judgment* (n 1) [169-178].

<sup>44</sup> See Chapter 2, Section 5

hopes of many mirror-theorists, the ICC rightly limited the scope of its inquiry into the judicial activity of the State which concerns the subject matter of the ICC's own inquiries. This has been defined as an *investigation* of the ICC, where admissibility is challenged before the investigation has defined clear suspects and conduct, and a *case* of the ICC, subsequent to the issuance of a warrant of arrest or other measure which define the parameters of a potential criminal crime. These parameters consist of the suspect and the conduct that forms the object of reference. Whereas the inclusion of the suspect has been uncontested,<sup>45</sup> the scope of the 'conduct' has proven contentious and divisive on the degree of similitude that is required between the conduct established by the ICC and that of the State, and the extent to which the State must substantiate this, which has been defined as existing between 'discreet aspects' of the national case and its 'actual contours.' The Court's exclusive reliance on conduct as the determinative element of the subject matter of the case has also been challenged.<sup>46</sup>

Litigation over the extent of the overlap of attributed conduct between the ICC's case and the national one has generated a series of dicta that may inform national criminal justice actors. The first dicta declared that States must demonstrate that they are investigating the 'same person and same conduct' of the case before the ICC.<sup>47</sup> An attempt to contest this was subsequently made in *Katanga*, on the basis that the national investigation overlapped with the ICC's charges on one count, but this was rejected on the basis that the national investigation had ceased to be active. In *Gaddafi*, the State contested that the 'same conduct' test should in fact require 'substantially the same conduct' which could consist of an overlap of incidents and underlying facts.<sup>48</sup> The PTC responded by requiring a similitude between the underlying conduct of the States investigation with the ICC's, defined in case at hand within the warrant of arrest and decision, but that the same conduct should not mean '*exactly the same acts*.'<sup>49</sup> The Appeals Chamber developed this by asserting that the extent of overlap or 'sameness' will depend on the facts of the specific case, where identical underlying incidents would lead to inadmissibility, and where no underlying incidents would amount to a totally

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<sup>45</sup> See Chapter 2, Section 5.5

<sup>46</sup> *Gaddafi Admissibility Appeal Judgment: Dissenting Opinion of Judge Anita Ušacka* (n 24). [47-58]

<sup>47</sup> *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, Warrant of Arrest, (Warrant of Arrest Decision: Lubanga)* [2006] ICC Pre-Trial Chamber I ICC-01/04-01/06, 10 February 2006 5 [31].

<sup>48</sup> *Libyan Government's Further Submissions on Issues Related to the Admissibility of the case against Saif Al-Islam Gaddafi (Libya's Further Submissions: Gaddafi Admissibility)* Government of Libya ICC-01/11-01/11-285-Red2, 23 January 2013 [27].

<sup>49</sup> *Gaddafi Admissibility Decision* (n 3) [83]

different case and would therefore be admissible. In an effort to provide guidance on the expansive grey zone between these two extremes, the Chambers considered that the degree of overlap should be substantial in order that the case be inadmissible. One exception to this was foreseen, where a small overlap may exist, but where the overlapping or substantially similar conduct of the national case would form the crux of the ICC's case.<sup>50</sup>

#### 2.4. ICC Case Selection Reduces the Quantity of National Cases

The final essential and perhaps overlooked clarification concerning the complementarity of cases between the ICC and national jurisdictions is that of case selection by the ICC, constructed largely through the concept of gravity, and implemented as an additional safeguard to filter out peripheral cases from the courtrooms of the ICC.<sup>51</sup> This thesis explored the contours and contradictions of the ICC's case selection criteria, through its policies, preliminary examination reports and jurisprudence to conclude that a minimal level of predictability existed in the application of selection criteria by the Office of the Prosecutor, and that the criteria themselves provided some certainty to States to define the level of threshold of cases that could be considered by the ICC as the most serious.

By following such a process, it argued that the practice of case selection by the ICC can inform the exercise of national criminal justice in post-atrocity countries, including national case selection strategies,<sup>52</sup> the adoption of alternative or other justice measures<sup>53</sup> as well as the allocation of resources to criminal accountability. It finds that States can reasonably establish accountability policies that differentiate between different types of accountability mechanisms and remain outside of the judicial contours of the ICC, by prioritising those cases that satisfy the ICC's selection criteria for criminal prosecution, and adopting

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<sup>50</sup> *Gaddafi Admissibility Appeal Judgment (n 1)* [71-73]

<sup>51</sup> See Chapter 3.

<sup>52</sup> Two routes appear to have emerged: (1) deferral to ICC selection (with some type of forum sharing): Uganda, DRC, CAR, Cote d'Ivoire, supposedly Guinea; (2) Challenge to ICC selection/forum-preservation: Libya, Kenya; while a third could be suggested where the ICC selection criteria be used as a framework to prevent ICC intervention (a version of model 2) which seems to be occurring in Colombia and Guinea.

<sup>53</sup> As addressed elsewhere, States will remain in compliance with the Rome Statute if the cases that fall below the ICC's selection threshold are addressed through other accountability measures. See *Ambos – Alternatives* Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 J Int Criminal Justice 695; Gregory S Gordon, 'Complementarity and Alternative Forms of Justice: A New Test for ICC Admissibility' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); FICHL, 'Abbreviated Criminal Procedures for Core International Crimes Cases'.

whichever alternative mechanisms best suited its national reconciliation or transitional requirements for those cases or suspects outside this threshold.

This thesis has thus far demonstrated the essential qualities and quantities that national criminal justice must meet in order to satisfy the complementarity system of the ICC. This zone of national criminal justice performance is significantly lower than the expectations and aspirations of many publicists and advocates, and it creates tensions with as well as contradictions to several obligations and standards of international human rights treaties, which are directly relevant to the *positive* dimensions of the complementarity system.

### **3. Tensions and Contradictions with International Human Rights Treaties and Treaty Bodies**

The similarity between the operational parts of the Rome Statute and other international treaties with the status of external sources of applicable law under article 21(1)(b)<sup>54</sup> has been widely accepted and even posited as justification or rationalisation for many of the mirror-thesis proponents. The gist of their argument has been that if the ICC Statute reiterates the obligations that States may otherwise have, then the States should be reminded and cajoled into fulfilling them. This is undoubtedly a noble and prudent enterprise, but an attempt to squeeze the two together under the guise of the requirements of complementarity is inaccurate. International treaties are not wet cement that can be combined or mixed together to fill or reinforce gaps in the wall of international obligations. Nor is the ICC a cuckoo child of the other international treaties, to be given the obligations and duties of other treaties as if its own, to enforce and impose. Metaphors aside, the ICC Statute does not live up to the extremely high, human rights and accountability expectations that surrounded it from its negotiation and signature until its entry into force.

The thesis has reiterated that the role of the admissibility procedure and of complementarity more broadly, is to allocate jurisdiction between the ICC as an international criminal tribunal and relevant national counterparts, and that similar to other international treaties, it can impose procedural bars that may limit its functions. In some areas however, this thesis has shown that the ICC will impose lower requirements of States than international human rights

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<sup>54</sup> See Chapter 1

bodies and that it may even stand silent where jus cogens rights are being violated. One such example of lowered practices can be seen in the length of the ICC's own investigations, prosecutions and trials, as well as its interpretation of justified delays. While international human rights jurisprudence has steadfastly avoided numerical gradation of justified to unjustified delay, the practice of the ICC itself, and the frequent assertions by the Prosecutor that States should not be held to a higher standard than the Court when it comes to the length of proceedings<sup>55</sup> may serve to expand the threshold of justified delay.

Perhaps the most significant or challenging tension between the ICC's complementarity system and international human rights treaties concerns the limited applicability of fair trial protections to the admissibility procedure. While Rob Cryer, Haken Friman and Darryl Robinson are technically correct to distinguish the subject matter of the ICC from a human rights court and to assert that these bodies and not the ICC should deal with fair trial violations, it is resoundingly distasteful to the principles upon which the ICC is founded. Instead of remaining silent, or waiting until a clear violation of the international fair trial rights of an ICC suspect or accused person who is undergoing an admissibility challenge occurs, such as their torture or death while in custody, this thesis considers that the adoption of interim measures could serve to mitigate such possibilities.

Equally, the practice of case selection by the ICC and the legitimate effect that this may have on national criminal justice policies will need to be balanced against the right to effective remedy and equality before the law, as it manifests in the different treaty bodies to which the State may be held accountable and can be guided by established and emerging norms of transitional justice. Within the ICC system of complementarity, these issues are being comprehensively assessed and advocated in Colombia, while aspects of selection and prioritisation have informed criminal justice policies in DRC and Uganda.<sup>56</sup>

This thesis has demonstrated that the adoption of substantive and procedural laws and the consequential allocation of resources to ensure their effectiveness that are not connected to

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<sup>55</sup> *Prosecutor v Saif al-Islam Gaddafi and Abdullah Al-Senussi, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (Prosecution Response: Gaddafi Admissibility Challenge)* ICC Office of the Prosecutor ICC-01/011-01/11, 05 June 2012.

<sup>56</sup> Similar challenges have also been faced by countries that have been subjected to the scrutiny of other contemporary international criminal tribunals, including in Bosnia and Rwanda.

complementarity, is unnecessary and inconsistent to the requirements of the ICC Statute. The early practice of the Court has shown that it is prepared to function within a plural legal order and that it does not require States to exercise their criminal jurisdiction as a form of mimicry of the ICC, but largely according to the national laws and practices in place at the time. This shifts the emphasis away from a heavily centralised or harmonised complementarity system based on the ICC's own legal framework towards a more pluralistic system of complementarity. This means less emphasis on harmonising the national legal framework with the crimes and liabilities of the Statute and more emphasis on the selection of cases as well as the capacity to exercise criminal jurisdiction. As a concept of the ICC, and one that is so heavily indebted to its unique form of jurisdiction, Positive Complementarity should remain coherent to this zone of admissibility-proof practice.





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