# The local impact of a global court : assessing the impact of the International Criminal Court in situation countries

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## Chapter 2: Systemic Effect I: The Flaws of Complementarity

"*Courts are built to do justice, but to insist on trials in The Hague is to use justice to build a court.*" Timothy Waters[422]

## I. Introduction

"Systemic effect" refers to the impact of the Rome Statute and the International Criminal Court on domestic legal systems. Systemic effect is closely related to, but not synonymous with complementarity. The Rome Statute does not refer directly to complementarity or the Court's intended effect on domestic legal systems, but it does refer to national proceedings within its admissibility framework in Articles 17-19.

"Complementarity" is often used as shorthand for a principle that encourages national systems to conduct their own investigations and trials. Legally the term means exactly the opposite, i.e. the complementarity regime allows the Court to conduct investigations and trials in situation where national systems are unwilling or unable genuinely to conduct investigations or prosecutions.[423] However, "positive" complementarity, in the sense of strengthening domestic legal systems, assumed such prominence amongst the ASP and supporters of the ICC that it was retroactively coined as one of the main intended effects of the Rome Statute.[424] In the words of Burke-White: "encouraging national prosecutions within the "Rome System of Justice" and shifting burdens back to national governments offers the best and perhaps the only way for the ICC to meet its mandate and help end impunity."[425] Thus the Rome Statute was retrospectively re-interpreted by the mandate-providers to put the onus of investigation and prosecution firmly on domestic systems.

This Chapter argues that the systemic effect that can be seen on the domestic level is not necessarily due to the effective functioning of a complementarity regime. The interpretation of complementarity that has prevailed on behalf of the Court is too intrusive. Instead of allowing States to a "margin of appreciation" to conduct their own trials for Rome Statute crimes, application of the complementarity framework often generated an adversarial relationship with States. While there are limited pockets of potential "positive" complementarity, many measurable "systemic

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[422] Waters, Timothy. *Let Tripoli Try Saif Al-Islam. Why the Qaddafi trial is the wrong case for the ICC, Foreign Affairs*, 9 Dec. 2011.
[423] Seils, Paul. *Putting complementarity in its place, Law and Practice of the International Criminal Court,* edited by Carsten. Oxford University Press (2015) at pp. 305-327.
[424] Stahn, Carsten. *Taking Complementarity Seriously,* The International Criminal Court and Complementarity: From Theory to Practice Vol. I (edited by Carsten Stahn and Mohamed El-Zeidy), Cambridge University Press (2011) p. 234.
[425] Burke-White, William W. *Proactive Complementarity: The International Criminal Court and National courts in the Rome System of Justice,* Harvard International Law Journal, Vol. 49 (2008) p. 53.

effects" are implemented by States independently or even in spite of the Court. At the same time, complementarity as currently applied yields unsatisfactory results, such as an excessive focus on very few perpetrators or allowing countries to conduct unfair trials.

## II. The Flaws of Complementarity

### A. "Positive" Complementarity?

#### *1. A Court-Centric Conception of Complementarity*

The full history of complementarity has been explored in many writings and will not be explored in detail here.[426] In the lead-up to the adoption of the Rome Statute, States parties heavily debated the notion. Many States wanted a strong presumption favoring national jurisdictions.[427] Likewise, the concept of "unwillingness" was controversial and difficult to negotiate, due to States' concerns about sovereignty.[428] After all, state representatives who negotiated the Statute were mindful of state sovereignty and did not want a "primacy" model as represented by the ICTY. On the other hand, States also wanted to create an effective and credible court, able to act where States were ineffective.[429]

However, as the concept of complementarity developed in the jurisprudence and amongst the writings of academics and activists, notions of sovereignty were sometimes diminished. From the establishment of the Court, those tasked with formulating the Court's policies on the principle of complementarity took a Court-centric approach, defined through concepts such as division of labor, uncontested admissibility, the impunity gap, and positive complementarity.

In 2003, an informal expert group convened in The Hague to discuss the principle of complementarity. The vision of the relationship between the Court and States Parties foreseen in the report did not anticipate antagonism.[430] Instead it sketched a

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[426] For an in-depth analysis of the topic see Stahn, Carsten and Mohammed El-Zeidy (ed), *The International Criminal Court and Complementarity: From Theory to Practice* Vol. I, Cambridge University (2011). See also Kleffner, Jan. *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press (2008).

[427] Williams, Sharon A.and William A. Schabas, *Commentary on the Rome Statute of the ICC*, Ed. Otto Triffterer, 2nd ed. Beck/ Hart (2008) p. 608.

[428] Ibid. p. 610.

[429] Dissenting Opinion of Jude Anita Usacka, *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Appeals Chamber Judgement on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11 OA4, 21 May 2014, para. 16.

[430] Schabas, William. *Complementarity in Practice: Some Uncomplimentary Thoughts*, Criminal Law Forum 19 (2008) 5-33 p. 6.

"cooperation-based vision of complementarity."[431] The experts saw the Court as a gentle giant, and mentor for domestic justice systems through a combination of "partnership" on the one hand and "vigilance" on the other. The paper argued that:

> Partnership highlights the fact that the relationship with States that are genuinely investigating and prosecuting can and should be a positive, constructive one. The Prosecutor can, acting within the mandate provided by the Statute, encourage the State concerned to initiate national proceedings, help develop anti-impunity strategies, and possibly provide advice and certain forms of assistance to facilitate national efforts.[432]

Increasingly, Court-centric notions started to dominate the vision of complementarity. Another policy document envisaged a "division of labour" between trials of high- and low-ranking perpetrators:

> The Court is an institution with limited resources. The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who will bear the most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators.[433]

Much-discussed over the years was the potential for a division of labor between the ICC and domestic prosecutions in situations where a State makes a referral or does not contest admissibility, and when it may be "willing to become able." One vision of this approach argued that "the parallel action of two judicial systems will be seen as complementary, and not in terms of inferiority/ superiority, although there may be differences between the two systems (in salary, resources, prison conditions, etc.) that may suggest such a (potentially damaging) hierarchy."[434] Some scholars subsequently spoke of the Rome Statute creating a "shared responsibility".[435] Some actively promoted the idea that the ICC ought to engage in capacity building.[436] In the context of Libya, it was argued, "the overriding benefit of the ICC is that when national authorities are not yet in a position to conduct genuine investigations and prosecutions, the Court can step in to investigate and prosecute some cases in

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[431] Stahn, Carsten. *Taking Complementarity Seriously,* in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy (2011) p. 261.
[432] Informal expert paper: The principle of complementarity in practice, ICC-OTP 2003 para. 3. The author was a participant in one of the expert group's meetings.
[433] OTP Paper on some policy issues before the Office of the Prosecutor, Sept. 2003 p. 3.
[434] Conference report: Vancouver Dialogue on the Impunity Gap, Liu Institute Global Justice Program and ICTJ, 4 April 2004.
[435] Stahn, Carsten. *Taking Complementarity Seriously,* The International Criminal Court and Complementarity: From Theory to Practice, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy), p. 263. See also Carsten Stahn, *Libya, the International Criminal Court and Complementarity, A Test for "Shared Responsibility",* Journal of International Criminal Justice (2012) p.1-25.
[436] Stromseth, Jane. *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?* Georgetown University Law Center (2009) at p. 89.

accordance with fair trial standards."[437] However, this ignores the fact that ICC trials might in fact be disempowering to domestic justice actors. As argued by Timothy Waters, "the sight of English-speaking judges listening to Arabic on headphones would leave Libyans doubtful that their stories were being told, much less understood."[438]

This vision of complementarity demanded that the Court should be the centerpiece, leaving national jurisdictions to try secondary offenders or "remnants".[439] In another scenario, it was suggested that countries may voluntarily forego doing justice due to lack of capacity or if "groups bitterly divided by conflict may oppose prosecution at each other's hands and yet agree to a prosecution by a Court perceived to be neutral and impartial."[440] While this has happened to a degree, with referrals, instead the perception has grown that the Court is not neutral and impartial, as will be discussed in Chapter 6.

The notion of deferred jurisdiction also linked to "uncontested admissibility", used in self-referrals and became a central part of the Court's approach. This in turn linked to the development of the two-prong test to admissibility in the jurisprudence, with "inaction" i.e. failure to open an investigation being the first prong.[441] The fact that the Court can act when domestic jurisdictions fail to do so greatly enhanced the scope of the Court's role in different situations.

In April 2004, a group of experts convened in The Netherlands to discuss what was then termed the "impunity gap", through a process called the "Vancouver Dialogue." Participants included senior UN officials from the Office of the Prosecutor and the ICC Presidency. The impunity gap was defined as "the base of a pyramid of perpetrators (i.e. those other than the top-echelon offenders) who are not likely to be the focus of attention for the ICC."[442] It was noted that: "this depends on how the complementarity regime will develop in practice, leading some to describe the impunity gap as a "complementarity challenge."[443] The experts however did conclude that: "most questions on the impunity gap should be addressed at the

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[437] O'Donohue, Jonathan and Sophie Rigney. *The ICC must consider fair trial concerns in determining Libya's application to prosecute Saif Al-Islam Gaddafi nationally*, EJILtalk.org, 8 June 2012.
[438] Waters, Timothy. *Let Tripoli Try Saif Al-Islam. Why the Qaddafi trial is the wrong case for the ICC,* 9 Dec. 2011.
[439] See for instance Jonathan O'Donohue, *Libya's defining moment: Justice or Revenge? Gadaffi-regime officials must be tried in the International Criminal Court to Ensure a Fair Trial*. Al Jazeera, 22 Sept. 2013. O'Donohue argues: "While the two most high-profile cases are conducted at the ICC, the national authorities can focus on continuing its efforts to improve the security situation and strengthen the national justice system."
[440] OTP Paper on some policy issues before the Office of the Prosecutor, Sept. 2003 at p. 5.
[441] Stahn, Carsten. *Taking Complementarity Seriously", The International Criminal Court and Complementarity* in From Theory to Practice Vol. I (ed. Carsten Stahn and Mohamed El-Zeidy), Cambridge University Press (2011) p. 241.
[442] Conference report: Vancouver Dialogue on the Impunity Gap, Liu Institute Global Justice Program and ICTJ, 4 April 2004.
[443] Ibid.

domestic level. Domestic prosecutions and other mechanisms should be the cornerstone of any systematic approach to reducing impunity."

*In situ* ICC trials were considered in a number of contexts, including DRC, Kenya, and Libya, but to date they have not materialized, as they proved too difficult to achieve both from a political or security perspective. Judge Fluor describes the preparations that were made for *in situ* hearings in the Lubanga trial in an old hanger on a MONUC base, where opening statements of the trial were due to be given. But the Minister of Justice ultimately refused, because the presence of the Court could be destabilizing.[444] Similarly, civil society in Kenya opposed *in situ* hearings on the grounds that these were unlikely to be able to adequately safeguard the safety of victims, witnesses and affected communities.[445] A plenary of judges of the ICC eventually decided against an *in situ* trial, as well as against using the ICTR premises.[446]

As early as 2004, the Chief Prosecutor coined a groundbreaking new term when he said he would be taking "a positive approach to complementarity. Rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible."[447] In its Strategy, the OTP specified that this would be achieved through encouraging national proceedings; reliance on national and international networks; and participating in a system of national cooperation as central to positive complementarity.[448] The OTP referred to itself as a channel for implementation, and referred to its ability to catalyze national proceedings, including in countries under preliminary examination. The Prosecutor also said it would support a comprehensive strategy to fight impunity at the domestic level.[449] At the Review Conference in Kampala in 2010, the Assembly of States Parties reaffirmed the importance of the principle of complementarity, but emphasized that the Court itself would not play a central role in positive complementarity, mainly due to resource constraints.[450] At the same time, the dominant view remains that of

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[444] Fulford, Judge Sir Adrian. *The Reflections of a Trial Judge*. Criminal Law Forum 22 (2011) p. 216.
[445] Kenyans for Peace, Truth and Justice, Open Letter to the President of the International Criminal court (ICC) on the Decision on William Ruto's Excusal from Continuous Presence at his Trial and the Forthcoming Decision on In Situ Hearings, 9 July 2013.
[446] Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sa*ng, ICC, 26 August 2013.
[447] Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps in The Hague, Netherlands, 12 Feb. 2004.
[448] ICC-OTP, Report on Prosecutorial Strategy (14 September 2006).
[449] Ocampo, Luis Moreno. *A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor* in The International Criminal Court and Complementarity: From Theory to Practice Vol. I (ed. Carsten Stahn and Mohamed El-Zeidy), Cambridge University Press (2011) p. 26.
[450] The ASP Bureau Report redefined positive complementarity as "all activities/ actions by which national jurisdictions are strengthened and enabled to conduct genuine investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity-building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis. "ASP Report of the Bureau on Stocktaking: Complementarity, Resumed eighth session, 18 March 2010 ICC-ASP/8/51 at p. 16.

view national systems as complementing the ICC, rather than the ICC complementing national systems, and positive complementarity was seen as "an instrument to strengthen the goals and impact of the Court."[451]

### *2. The "Case Snatcher": A Court Competing for Cases*

The current so-called "two-prong" approach of the Court to admissibility, which allows the Court to investigate in cases of "inaction",[452] gives considerable leeway to the ICC to meet the admissibility threshold, considering the inactivity and delay in pursuing domestic cases at the domestic level, particularly in countries in conflict. Furthermore, the requirement that an admissibility challenge should be filed as early as possible and in principle only once, according to Article 19, means that that once the Court opens an investigation, it becomes very difficult for the country to "win the case back." The net result is that the Court competes for cases with national jurisdictions.[453]

Thomas Lubanga was already in custody awaiting trial for crimes against humanity and genocide before a national court.[454] This resulted in the well-known ruling by the Pre-Trial Chamber that the "national proceedings must encompass both the person and the conduct which is the subject of the case before the Court."[455] The ICC charged Lubanga only with the recruitment of child soldiers. In response to criticism about the narrowness of these charges, the former Prosecutor (over) emphasized the gravity of the crime of child recruitment and said "forcing children to be killers jeopardises the future of mankind."[456] Katanga and Ngudjolo Chui too had been arrested and held in custody on national charges, but all were "referred" to the Court. In the case of the Central African Republic, legal proceedings had been

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[451] Stahn, Carsten. *Taking Complementarity Seriously* in *The International Criminal Court Complementarity: From Theory to Practice*, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy), p. 277.

[452]Schabas, William. *The Rise and Fall of Complementarity*. *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy), p.158.

[453] Clark, Phil. *Law, Politics, and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*. In Courting Conflict: Justice, Peace and the ICC in Africa, Royal African Society (2008) p. 37- 46.

[454] Schabas, William. *Complementarity in Practice: Some Uncomplimentary thoughts*. Criminal Law Forum (2008) p. 11.

[455] *Prosecutor versus Thomas Lubanga Dyilo,* Appeals Chamber, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19 (2) (a) of the Statute of 3 Oct. 2006, ICC-01-04-01/06-772, 14 Dec. 2006, para. 37.

[456] Statement by Luis Moreno Ocampo, Press Conference in relation with the surrender to the Court of Mr. Thomas Lubanga Dyilo." 18 March 2006. Paul Seils wrote said that the Court asked for Lubanga at a time when he could have been released and that child recruitment charges were the only ones that were ready at the time: Seils, Paul. *The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court,* in *Case Selection and Prioritization*, ed. Morten Bergsmo, FICHL, Publication Series No. 4 (2010) p. 74. Seils also argues that the DRC had no intention of trying Lubanga.

commenced against Bemba, the *Court de Cassation* made a decision that it was unable to investigate and prosecute and the Court took the case. [457] As concluded by Schabas, "neither the Uganda nor the Democratic Republic of Congo situations have been addressed by the Court in a manner aimed at best encouraging the national system to assume its duties under international law."[458]

The Prosecutor visited Libya in November 2011, to convince Libyan authorities to surrender Saif Al-Islam to the ICC, although he stated during his visit "I respect that it's important for the cases to be tried in Libya … and I am not competing for the case."[459] This left many Libyans with the impression that the ICC would quickly cede way to their claim, not realizing that this would require a judicial decision.[460] He also suggested alternative options, including sequencing the proceedings at the ICC and in the domestic courts according to Article 94 or the possibility of an *in situ* trial.[461] However, the Court decided differently. On 21 May 2014, the Appeals Chamber upheld the Trial Chamber decision on the admissibility of the case of *Saif Al-Islam*.

It could be said that the "same person same conduct" violates the spirit of complementarity. As is demonstrated in the case of *Saif Al-Islam*, the test leads to several distortions. First, the national investigations must precisely mirror ICC charges, even if the latter were put together in considerable haste, as was the case with *Saif Al-Islam*. It therefore forces local, ill-equipped prosecutors in transition countries to quickly build complex cases which mirror ICC crimes and modes of liability. Moreover, the mounting of international pressure of a pending ICC arrest warrant may cause States to bring complementarity challenges before these are fully prepared. In the words of one author: "If the objective of the exercise is to address impunity, the fact that an offender is being held accountable for serious crimes should satisfy the requirements of international law."[462]

The "same person same conduct" test was questioned in the Dissenting Opinion of Judge Anita Usacka in the case of *Saif Al-Islam*: ""the problem lies with the test itself, which, contrary to the express language of the chapeau of article 17 (1) of the Statute, disregards the principle of complementarity … the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity

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[457] Schabas, William. *Complementarity in Practice: Some Uncomplimentary thoughts.* Criminal Law Forum (2008) p. 12.
[458] Ibid. p. 27.
[459] BBC World News, *Ocampo: Saif Al-Islam case is huge responsibility for Libya*, 23 Nov. 2011. http://www.bbc.com/news/av/world-africa-15866040/ocampo-saif-al-islam-case-is-huge-responsibility-for-libya.
[460] *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Request to Disqualify the Prosecutor from Participating in the Case Against Saif Al-Islam Gaddafi, ICC-01/11-01/11, 3 May 2012.
[461] Prosecutor's Submissions on the Prosecutor's recent trip to Libya, Gaddafi and Al-Senussi, (IC-01/11—1/11-31), OTP, 25 November 2011. The author met with the Prosecutor during this trip.
[462] Williams, Sharon A. and William A. Schabas, *Commentary on the Rome Statute of the ICC,* Ed. Otto Triffterer, 2nd ed. Beck/ Hart (2008), p. 616.

and threatening the integrity of the Court. [463] Judge Usacka argues that if the test prompted Libya to bring narrower charges against Saif Al-Islam than it intended, that this would be harmful for Libyan victims and that they would be better served by domestic investigations and prosecutions.[464] She proposed that "conduct" be given a much wider definition, and should not be construed so narrowly as to mean the same material and mental elements as the Court has charged.[465]

Yet the "same accused same conduct" test was repeatedly upheld in the subsequent jurisprudence, albeit that it was softened to "substantially the same conduct."[466] Mégret and Samson observe that "it is important to remember that depriving a state of its criminal jurisdiction over cases that it has a perfectly legitimate case to try under ordinary principles of jurisdiction, particularly ones that it will (to put it mildly) feel strongly about, is an exorbitant prerogative."[467] Nonetheless, this is the situation in regard to the Court's jurisprudence today.

### *3. Amicable or adversarial?*

In spite of attempts to the contrary by the Office of the Prosecutor, the relationship between national jurisdictions and the Court often developed into an adversarial one, which limited opportunities for positive cooperation. While complementarity is conceived as "largely based on incentives, and "carrots and sticks" rather than coercion",[468] this is not reflected in practice. The cases of Uganda, Kenya, and Libya all resulted in litigation on admissibility.

While originally the Ugandan authorities were supportive to the ICC while it was investigating the LRA, this changed during the Juba negotiations with the LRA in 2006-2008, when President Museveni took the position that the arrest warrants ought to be lifted. When the International Crimes Division was established in Uganda, the Pre-Trial Chamber itself initiated an admissibility assessment under Art. 19 (1) of the Statute. The Ugandan Government submitted, "The War Crimes Division of the High Court is meant to supplant the work of the International Criminal Court, and accordingly those individuals who were indicted by the

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[463] Separate opinion of Judge Anita Usacka, *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Appeals Chamber Judgement on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11 OA4, 21 May 2014, paras. 47-48.
[464]Ibid., para 55.
[465] Ibid., para. 58.
[466] *Prosecutor versus Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgement 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 of the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19 (2) (b) of the Statute", ICC-01-09-02/11-274, 30 May 2011.
[467] Mégret, Frederic and Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials*, 11 Journal of International Criminal Justice 11 (2013) p. 578.
[468] Stahn, Carsten. *Taking Complementarity Seriously*, in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy (2011 ), p. 250.

International Criminal Court will have to be brought before the War Crimes Division of the High Court for Trial." Nonetheless, the Pre-Trial Chamber found that Uganda was in a continued state of inaction and that the case remained admissible. The Appeals Chamber upheld this.[469] Cooperation between the ICC and the ICD is limited.[470] More recently, Museveni personally has displayed a great deal of antipathy to the ICC. He is one of the most vocal leaders of the AU opposition against the Court, after arrest warrants were issued against Al-Bashir and Kenyatta. He invited Al-Bashir to Uganda and attended Kenyatta's inauguration where he said:

> I was one of those that supported the ICC because I abhor impunity. However, the usual opinionated and arrogant actors using their careless analysis have distorted the purpose of that institution … what happened here in 2007 was regrettable and must be condemned. A legalistic process, especially an external one, however, cannot address those events.[471]

On the other hand, the Ugandan authorities supported the surrender of Dominic Ongwen to the ICC in February 2015. They issued a statement to say that they supported his trial at the ICC rather than the ICD due to the "cross-border nature of the crimes."[472] The Government is giving full cooperation in the case. At the same time, President Museveni continued to attack the ICC: in his inauguration in 2016 he referred to the ICC as a "bunch of useless people," prompting Western Ambassadors to walk out.[473]

In Kenya, the Prosecutor first attempted to entice cooperation, particularly by supporting the creation of a Special Tribunal for Kenya through a benchmark agreement, failing which Kenya agreed they would refer a case.[474] When Kenya failed to establish a Special Tribunal, the Prosecutor announced on 30 September 2009 that he favored a three-prong approach, consisting of the ICC prosecuting those bearing the greatest responsibility; national proceedings would target secondary perpetrators; and other reforms plus the TJRC would address underlying

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[469] *Prosecutor v. Kony et al.,* Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009.

[470] Interview with the late Joan Kaghezi, Kampala, Feb. 2014. The Head of the Prosecutions Division and the Head of the Police team made working visits to The Hague of several weeks. The ICD Prosecution and OTP shared evidence in non-ICC cases and also shared best practices. The shared evidence raised some technical concerns, in that transcripts of ICC interviews are not necessarily admissible in Uganda. The fact that some persons are ICC witnesses can be a complicating factor because the ICC instructs them not to talk to anybody else. However, some of the information on LRA command structures gathered by the ICC was useful to Uganda prosecutors.

[471] International Justice Monitor, Tom Maliti, U*gandan President Attacks ICC During Kenyatta Inauguration*, 9 April 2013.

[472] Statement by the Government to the public on the Dominic Ongwen Case at the ICC: http://www.mofa.go.ug/data/dnews/139/Statement-by-the-Government-to-the-public-on-the-Dominic-Ongwen-case-at-the-International-Criminal-Court.

[473] The Guardian, *Walkout at Ugandan President's Inauguration over ICC remarks,* 12 May 2016.

[474] Stahn, Carsten. *Taking Complementarity Seriously,* in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy (2011), p. 259.

causes of the violence.[475] He then requested a *proprio motu* investigation to be opened on 26 Nov. 2009, which was approved by the Pre-Trial Chamber on 31 March 2010. Originally the Government of Kenya took a cooperative position to the ICC. The Prosecutor issued summons for the six accused, all of who came to confirmation of charges hearings. Kenya then filed an admissibility challenge under Art. 19, in March 2011, but failed to demonstrate that it was acting against the six accused. Its argument, that judicial reforms should be taken to constitute evidence of investigation or prosecution for the purposes of Art. 17 (1), was rejected by the ICC.[476] The cases against the six accused proceeded. Since that time, the relationship with Kenya dramatically deteriorated during the course of the trials of President Kenyatta and Vice-President Ruto.

The relationship between the post-Revolution Libyan authorities and the Prosecutor also began as amicable, but soon clashed over the admissibility of cases. Originally, the NTC did whatever it could to facilitate the evidence gathering of the Office of the Prosecutor. Nevertheless, after the capture of Saif al-Islam it became obvious that the Libyans intended to conduct their own trials. In the words of one of their spokespersons at the time:

> We will not accept that our sovereignty be violated like that. We will put him on trial here. This is where he must face the consequences of what he has done. We will prove to the world that we are a civilized people with a fair justice system. Libya has its rights and its sovereignty and we will exercise them.[477]

On 30 April 2012, Libya filed an admissibility challenge before the ICC, arguing that it had opened an investigation against Saif al-Islam and should be allowed to proceed. On 31 May 2012 the Pre-Trial Chamber ruled on the admissibility challenge filed by Libya in the case of Saif Al-Islam, finding it admissible.[478] The

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[475] Chistine Alai and Njonjo Mue, *Complementarity in Kenya,* in *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy, p. 1228.

[476] Hansen, Thomas Obel. *Prosecuting International crimes in Kenyan Courts?* Paper presented at "The Nuremberg Principles 70 Years Later: Contemporary Challenges", 21 November 2016.

[477] Words of Col. Ahmed Bani cited in Chulov, Martin*. Libya insists Saif Al-Islam should be tried at home,* The Guardian, Oct. 29, 2011, quoted in Kersten, Mark, *Justice After the War: The ICC and Post-Gaddafi Libya*, available online.

[478] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Public Redacted Decision on the Admissibility of the case against Saif Al-Islam, ICC-01/11-01/11, 31 May 2013. The ICC considered Libyan authorities unable to carry out the proceedings against Saif Al-Islam for the three reasons. First, it considered that the Libyan government could not secure his transfer from Zintan into state custody. Secondly, it judged the judicial system unable to obtain witness testimonies, exercise full control over detention facilities and provide adequate witness protection. Thirdly, it saw significant impediments to securing legal representation for Saif Al-Islam, given the security situation in Libya and the risks faced by lawyers representing former government figures. The Trial Chamber concluded that it had not been able 'to discern the actual contours of the national case against Saif Al-Islam so that Libya had not demonstrated that that the domestic investigation covers the same case that is before the Court, a legal requirement in order to succeed at an admissibility challenge before

Appeals Chamber upheld this on 21 May 2014. On the contrary, on 11 October 2013, in deference to domestic proceedings, the ICC decided that the case against Abdullah Al-Senussi was inadmissible. The Pre-Trial Chamber found that the Libyan investigations against Al-Senussi include the same conduct as was being investigated by the ICC. It concluded that Libya is willing to bring him to trial, in spite of the fact that he remained unrepresented, and in spite of the poor security situation, the absence of witness protection, and the inability of the government to exercise control over certain detention facilities. The decisive factor that differed from the case of Saif Al-Islam, was that the Libyan authorities had custody over Al-Senussi. Saif was being held by a militia in Zintan. Also, the Libyan authorities had gathered far more evidence against Al-Senussi than against Saif Al-Islam.[479]

In spite of the adversarial relationship around admissibility, the ICC retains a degree of cooperation with the Libyan authorities. In her remarks to the Security Council in November 2013 the Prosecutor announced that she had signed a "burden-sharing" Memorandum of Understanding with the Libyan government, "to ensure that individuals allegedly responsible for committing crimes in Libya as of 15 February 2011 are brought to justice either at the ICC or in Libya itself."[480] But the scope of this arrangement seems to be effectively restricted to investigating Qadhafi era officials, as evidenced by the arrest warrant against Al-Tuhamy Mohammed Khaled issued on 24 April 2017. Most recently, the Prosecutor has said cooperation was extended to cases involving illegal migration. In August 2017, the Prosecutor issued an arrest warrant against *Saiqa* Commander Mahmoud Al-Werfalli, but General Haftar has refused to hand him over to the ICC.[481] When in February 2018 Al-Werfalli reportedly went to hand himself in, he returned home pursuant to protests in his favor. Protestors reportedly held signs that read: "We are all Major Mahmoud Al-Werfalli."[482] In short, all these examples demonstrate an adversarial relationship between national authorities and the ICC.

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the ICC. It also noted that Libya, assisted by national governments and regional and international organizations, had deployed significant efforts to rebuild institutions, restore the rule of law and to enhance capacity, with respect to transitional justice in the face of extremely difficult circumstances."

[479] *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public Redacted Decision on Admissibility of the Case Against Abdullah Al-Senussi, ICC-01/11-01/11, 11 Oct. 2013.

[480] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011) Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court, New York, 14 November 2013. The OTP will prioritize those who are outside of the territory of Libya, whereas the Libyans will prioritize those inside of its territory. The MoU also covers information sharing, subject to confidentiality and witness protection. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011) Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court, New York, 14 November 2013.

[481] The Libya Observer. *ICC wanted killer Al-Werfalli defies arrest warrant and executes 5 prisoners.* 7 Sept. 2017.

[482] Al-Jazeera, *Libya Commander Wanted by ICC hands himself in,* 8 February 2018. Reuters, *Libyan Commander Wanted by ICC freed after protest,* 8 February 2018.

B. Complementarity and Broader Rule of Law Challenges

### *1. Complementarity cannot address broader rule of law challenges*

Complementarity is narrow in scope and cannot claim to address the systemic problems of domestic legal systems in countries where Rome Statute crimes have occurred. The scope of those problems is described by the United Nations:

> Helping war-torn societies re-establish the rule of law and come to terms with large-scale pas abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming task.[483]

National legal systems battling with ongoing conflict or emerging from conflicts are often in a chronic state of disrepair. In contexts as varied as Colombia, Libya, and Afghanistan, countries face the dilemma of being called on to deliver justice in a potentially large number of cases at a time, when the justice system is struggling to recover from decades of dictatorship or conflict, or both. In Libya and Colombia, a significant number of alleged perpetrators of high and low levels are in custody.

In other cases, such as Afghanistan, impunity is widespread, yielding a very different set of challenges. Afghanistan is in a continuous state of conflict and insecurity, which poses big challenges to the legal system. To illustrate, Afghanistan's legal system remains weak in spite of fifteen years of rule of law programming on behalf of the national authorities assisted by the international community to strengthen it as part of a general state-building strategy. In 2010 the International Crisis Group said that Afghanistan's justice system is in a "catastrophic state of disrepair', with "many courts inoperable", and "insecurity, lack of proper training and low salaries" driving judges and prosecutors from their jobs.[484]

Corruption is another endemic identified factor. The Taliban operates a parallel justice system in many areas under its control. Many Afghans turn to traditional non-state dispute resolution in the form of *shuras* and *jirgas*.[485] Afghanistan remains bottom of the list (175th) on Transparency International's corruption perception index, a place it shares with North Korea and Somalia.[486] Afghanistan produces 90 percent of the world's opium. NATO and the US consider drug traffickers as

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[483] Secretary-General's Report. *The rule of law and transitional justice in conflict and post-conflict society*, S/2004/616, 23 August 2004 at para. 3.: "It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights, and more generally, a lack of peace and security."

[484] International Crisis Group, *Reforming Afghanistan's Broken Judiciary*, 17 Nov. 2010.

[485] The USIP has estimated that up to 80% of civil and criminal disputes are handled by these mechanisms.

[486] See Transparency International: cpi.transparency.org/cpi2013/results/.

combatants, because they provide funding to the Taliban.[487] In 2010, the executive director of UNODC said that drugs and bribes combined correspond to about half of the country's illicit GDP.[488]

The Head of the Supreme Court, Adbel Salem Azimi, remained in place three years beyond the expiry of his appointment.[489] The Taliban has committed many attacks on the judiciary. The Supreme Court itself was targeted in a Taliban attack in June 2013, in a suicide bombing that killed 17. Hartmann, a rule of law practitioner with many years of experience in Afghanistan, concludes:

> The international community has failed to help establish the necessary preconditions for the long-term legal and political development necessary to make the justice system a source of legitimacy, predictability and protection for the wider society. Among these, none is more fundamental, as has belatedly been recognized, than checking corruption and ending impunity for the powerful.[490]

Broader rule of law challenges also exist in other countries, though perhaps on a different scale to those in Afghanistan. With the shrinking of political space in Uganda, in recent times the judiciary itself has come under increased political pressure.[491] In 2013, the Chief Justice was due to retire at the end of his term because he has passed the constitutional retirement age, President Museveni wants to reinstate him. Human rights violations such as arbitrary detentions, torture and extrajudicial killing are on the increase in Uganda. NGOs and human rights defenders too have come under pressure with new restrictive laws, as have the opposition.

Libya's justice system after the Revolution was impeded by the volatile security situation. While almost all judges and prosecutors initially reported back to duty, in most parts of the country, judges are reluctant to hold regular court sessions, except in family and civil law cases. Prior to the recent violence, in the east of Libya (Benghazi and Derna), there were numerous physical attacks on court buildings as well as assassinations of prominent judges and prosecutors. In February 2014, the first pro-Qadhafi General Prosecutor, Abdel-Aziz Al-Hassadi, and a main interlocutor with the ICC, himself was assassinated in Derna.

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[487] Hartmann, Michael E. *Casualties of Myopia,* in *The Rule of Law in Afghanistan: Missing in Inaction,* ed. Whit Mason, Cambridge University (2011) p. 176.
[488] Ibid. p. 175.
[489] Interview with Supreme Court Judge, Head of General Criminal Division, Kabul, 18 March 2014. The Judge said he himself decided around 6000 criminal cases per year. Interview with Afghan Representative of Afghanistan Justice Sector Support Program, Kabul, 20 Nov. 2013.
[490] Hartmann, Michael E. *Casualties of Myopia,* in *The Rule of Law in Afghanistan: Missing in Inaction,* ed. Whit Mason, Cambridge University Press (2011) p. 172.
[491] International Bar Association, *Judicial Independence Undermined: A Report on Uganda*, Sept. 2007. In March 2007, elite government forces known as the Black Mambas invaded the trial of opposition leader, Dr. Kizza Besigye, charged with terrorist offences in relation to the LRA.

The enormous challenges that exist at the domestic level require a response that goes far beyond complementarity, and form a challenge for development actors such as the United Nations. [492] Complementarity is pursued by mainly by diplomats and scholars who support the Court but who lack experience in international development.[493] While some of the specialized jurisdictions created to pursue complementarity, described below, may create "islands of competence" within these faulty legal systems, the limits of the complementarity approach becomes clear in situations where the rule of law is largely absent, such as Libya and Afghanistan.

### *2. Complementarity's Distorting Effect*

Scholars usually speak of the "catalyzing" effect of complementarity, focusing on the fact that the ICC may serve to encourage criminal trials that may otherwise not have taken place. But complementarity tends to narrow the debate on a wide range of challenges common to justice systems in post-conflict scenarios, to focus on the fate of a few individuals, either those who are under arrest warrants, or those who potentially could be. Complementarity can therefore have a "distorting effect" i.e. it puts the focus on a very limited number of cases while ignoring the general context. In addition, the Court's "own ability to hold large numbers of trials undercuts the incentive for states to hold their own trials."[494]

This effect is demonstrated for instance in the Libya case. The focus of the international community after the Revolution was exclusively on Saif Al-Islam and Abdullah Al-Senussi, but there are a large number of other senior regime figures also in custody. This prompted the Minister of Justice to ask why the attention of the international community is only on two out of 7000 detainees.[495] Similarly in

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[492] In 2000, the United Nations published a seminal report on peace operations that concluded that "where peace-building missions require it, international judicial experts, penal experts and human rights specialists, as well as civilian police, must be available in sufficient numbers to strengthen rule of law institutions." Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809, 21 August 2000 at para 39.

[493] The focal points on complementarity and the ICTJ convened several meetings at Greentree in order to foster links between the supporters of the ICC and the development community. Reports of the Greentree meetings are at http://ictj.org/sites/default/files/ICTJ-Global-Complementarity-Greentree-2010 -English.pdf.

[494] Wippman, David. *Exaggerating the ICC*. Cornell Law School Research Paper No. 04-018, available online.

[495] After Tripoli fell, hundreds of perceived Qadhafi loyalists, including former members of the regime and security apparatus, were systematically rounded up, in most cases without arrest warrants. Brigades arrested over 8,000 persons throughout Libya and detained them both in prisons and informal detention centers throughout the country. Those arrested included perceived Qadhafi supporters; suspected mercenaries; and many Tawergha accused of atrocities in Misrata; but they also include senior members of the former regime. Many detainees were kept in poor conditions, mistreated, and denied access to medical facilities or a legal process. Torture has been particularly prevalent in Misrata but numerous cases have also been uncovered by the United Nations in Zawiya, Zintan, and Tripoli. UNSMIL and OHCHR, *Torture and Deaths in Detention in Libya*, October 2013.

Uganda, a conflict that had resulted in mass displacement over 2 decades was reduced to a discussion of what should happen to the five LRA leaders who were subject to arrest warrants. In Kenya a great deal of attention focused on the arrest warrants against Kenyatta and Ruto, instead of on the plight of the victims of post-election violence.[496] The Court can therefore serve to distract from broader justice questions or from taking measures that benefit victims.

### *3. Is Complementarity an illusion? Is it in fact parallelism?*

Proponents of the ICC often argue that the Court is necessary precisely because domestic legal systems are so flawed.[497] Systemic problems are often cited as evidence that national systems are not capable to conduct their own trials.[498] The Court and national systems are therefore conceived of as symbiotic: where the one fails, the other steps in. This creates the illusion that the Court can "complement" or deliver when national systems cannot.

In practice however, the ICC is often confronted with exactly the same challenges. In fact the ICC often inherits the weaknesses of domestic systems. The Achilles heel of the ICC is its lack of enforcement powers and its reliance on state cooperation. State cooperation can be hindered by either unwillingness or inability. Where either of these factors prevent national jurisdictions from moving forward with genuine investigations or prosecutions, it will be equally difficult for the Court to make significant advances. It may therefore be more appropriate to speak of "parallelism" than of complementarity in most situations.

Two prominent examples of unwillingness to proceed with any form of investigation or prosecution are the two Security Council referrals for Sudan and Libya. Neither has resulted in those subject to arrest warrants being surrendered to the ICC, with the exception of the Darfurian rebels. In both of these cases, the Court is hamstrung from moving forward, in spite of bringing pressure to bear via the Security Council or other political avenues. While the involvement of the Court in these situations may continue to play an expressive function in condemning the crimes of those under arrest warrants Al-Bashir, Saif Al-Islam or al-Werfali, it is not clear whether these cases will ever end up in The Hague.

But inability too brings its pitfalls. Inability can arise when a country itself has limited abilities to enforce law in its own territory, and this will often be the case in States that are in active conflict. Again, current experience is replete with examples. For instance, the Ugandan referral was prompted in large part by the fact that Uganda was unable to arrest persons who might bear the greatest responsibility for

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[496] See Chapter 3.
[497] See 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*, EJILtalk.org, 8 June 2012.
[498] Ibid.

the relevant crimes.[499] However, years after the issuance of arrest warrants, and in spite of extensive UPDF operations on Congolese soil; direct assistance to the UPDF by US military advisors, and an increased public campaign on behalf of Invisible Children over the years, the ICC has not been able to orchestrate the arrest of Joseph Kony.

State institutions themselves may render the enforcement of arrest warrants, or the effective protection of witnesses impossible. In the aftermath of the post-election violence in Kenya, a main reason why a Special Tribunal for Kenya was not set up is because of the direct role of the police itself in PEV, which gave rise to fears about effective witness protection.[500] The Waki Commission found widespread problems with the Kenyan police, including their involvement in PEV.[501] Fears about the safety of witnesses also meant that the Court was not able to hold *in situ* hearings in Kenya.[502] Predictably, this same inability to protect witnesses has hampered the work of the ICC. The Kenyan government proposed the establishment of an International Crimes Division, but it is quite clear from the context that this mechanism too cannot effectively protect witnesses and does not constitute a real opportunity for victims of post-election violence.

The absence of basic security in countries in conflict also hampers the enforcement powers of governments. In Afghanistan, the ICC cited the security situation and difficulties of conducting in-country investigations in its reports on preliminary examinations, to account for lack of progress.[503] But the same conditions hamper Afghanistan's own efforts in seeking accountability for crimes of the Taliban (though not for government actors).

In situations of inability, the ICC would most serve its complementary purpose if it were able to act as an incubator of domestic proceedings. Other scholars refer to this as "catalyzing effect", but have concluded that this effect is limited.[504] Indeed, the Court's, and certainly the ASP's ambitions to allow the Court to develop into

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[499] Schabas, William. *Complementarity in Practice: Some Uncomplimentary thoughts*. Criminal Law Forum (2008) p. 10.

[500] Alai, Chistine and Njonjo Mue, *Complementarity in Kenya,* The International Criminal Court and Complementarity: From Theory to Practice, Vol. I (Ed. by Carsten Stahn and Mohamed M. El-Zeidy), Cambridge University Press (2011) p. 1232.

[501] Open Society Institute, *Putting Complementarity into Practice: Domestic Justice for International crimes in DRC, Uganda, and Kenya* (2011) p. 90. I travelled to Kenya in 2008 to advise on the establishment of the Special Tribunal.

[502] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of ICC, ICC-01/09-01/11-875, 26 Aug. 2013.

[503] OTP's Report on Preliminary Examinations, 2015 at para. 133: "In October 2015, the Office carried out a security assessment mission to Kabul. To date, however, the Office's planned mission for admissibility assessment purposes has been frustrated by the non-permissive situation in the country."

[504] Nouwen, Sara. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan.* Cambridge University Press (2013).

such an incubator, are limited by resource constraints. But the other factors referred to in this Chapter serve as further inhibitors, including the Court-centric conception of complementarity that has prevailed (including misguided ides of the division of labour); the Court's role as a "case-snatcher"; its often adversarial relationships with states under its scrutiny; its inability to address the broader contextual challenges in which domestic proceedings take place; and its focus on a small number of individual cases, which has a distorting effect. The net result is that when the situation on the ground is hampering the progress of national proceedings, be it the inability to arrest, challenges due to the security situation, absence of political will, or any other such issues, the same problems are likely to hamper the ICC:

> No technical assistance can overcome unwillingness and even in situations of inability the question arises whether the ICC is the most appropriate institution for the facilitation of domestic proceedings and whether the Court should be involved in such matters in the first place. In situations of absolute inability, the ICC cannot remedy the essential obstacles to domestic proceedings.[505]

In this respect, complementarity creates an illusion. It promises that the Court will deliver if countries do not, but often the Court proves unable to do so for the very same reasons.

### C. Complementarity's Blindness vis-à-vis Due Process

Complementarity is often still treated as a means of increasing the quality of proceedings at the domestic level, according to what Kevin Heller referred to as the "due process thesis" of complementarity.[506] While many would agree that it is desirable for a successful challenge to admissibility to require the observance of human rights standards, the question is whether the Rome Statute requires it. While supporters of the Court would like to think of the ICC as an institution that seeks to promote procedural fairness, the complementarity framework, and the decisions of the Court in the Libya cases, cast doubt on this.

The due process thesis is based different interpretations of the Rome Statute. Proponents argue that references in Art. 17 (1) to genuineness, unwillingness or ability all require States to observe fairness principles. Others interpret the reference in Article 17(2) to due process standards to extend to national proceedings. Yet others argue that the reference to "independence and impartiality" in Art. 17(2) require the observance of due process standards. Supporters of the

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[505] Nouwen, Sara. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan.* Cambridge University Press (2013) p. 401.
[506] Heller, Kevin Jon. *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome statute on National Due Process.* Criminal Law Forum (2006).

"due process theory" also cite Art. 21 of the Statute, which states, "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights …" Some argue that this means that domestic proceedings held under Art. 17 must also meet international human rights standards.

International human rights organizations are strong proponents of the "due process theory," and argue that domestic systems ought to implement not just substantive provisions, but also "principles of criminal responsibility" as found in Part 3 of the Rome Statute; procedural requirements; elimination of immunities; provision on victim participation and reparations; and abolition of the death penalty.[507] Amnesty International argued in the context of the Juba Peace Agreement in Uganda, "The International Criminal Court may not defer to national courts unless it is satisfied that the proceedings are consistent with an intention to bring those responsible to justice, the suspect will receive a fair trial and that the suspect will not be subjected to torture or other cruel, inhuman or degrading treatment.[508]

Variations of the due process theory include the argument that States should provide for victim participation or reparations as part of complementarity. As stated by the ASF in the context of Uganda, "Since Uganda is a state party to the Rome Statue, its domestic legislation should reflect its international obligation within the Statute to have applications for reparations in the ICD."[509] Others argue that the possibility of the application of the death penalty should render the case inadmissible.[510] Supporters of this view cite the Appeals Chamber dictum in *Lubanga* that "Human rights underpin the Statute; every aspect of it, including the exercise of jurisdiction."[511] Or, in a slightly lesser version: "Of course, although the ICC is not a "human rights court," human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely."[512]

However, the due "due process theory" is not supported by the text of Article 17 of the Statute. As remarked by Mégret and Samson, "to apply this provision as a basis

[507] Amnesty International Checklist for Effective Implementation; Human Rights Watch (HRW), *Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute* (2001).
[508] Amnesty International, *Ugandan Agreement and Annex on Accountability and Reconciliation Fall Short of a Comprehensive Plan to End Impunity.* 1 March 2008.
[509] Advocats Sans Frontiers, *Evaluation of Knowledge and Expertise in International Criminal Justice in Uganda*, Baseline Survey Report, November 2011.
[510] The Uganda ICC Act 2010 makes no specific provision on whether the death penalty should apply or not. JLOS/PILPG National Consultations on the International Crimes Bill, 6th – 7th August 2009, Entebbe.
[511] *Prosecutor versus Thomas Lubanga Dyilo,* Appeals Chamber, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19 (2) (a) of the Statute of 3 Oct. 2006, ICC-01-04-01/06-772, 14 Dec. 2006, para. 37.
[512] Informal expert paper, The principle of complementarity in practice, ICC-OTP (2003) para. 23.

for the Court to insist upon admissibility is a considerable stretch."[513] Heller argues a plain reading gives rise to a different interpretation.[514] For instance, the requirement of "independence and impartiality" must be considered in conjunction with whether a proceeding is "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice." Similarly, the reference to due process in the chapeau of Art. 17(2) should be read not as a separate requirement. Furthermore, there is nothing in the explanations of genuineness, willingness or ability in the Statute that refers to a due process requirement.[515] Holmes in his commentary notes that; "many delegations believed that procedural fairness should not be a ground for the purpose of defining complementarity."[516]

Heller examines the drafting history of the Rome Statute and notes that Italy tried to introduce a clause that would require the Court to consider whether proceedings were "conducted with full respect for the rights of the accused" but that "many delegations believed that procedural fairness should not be a ground for defining complementarity." [517] Heller convincingly argues that a textual interpretation of Art. 17 (or the remainder of the Statute) does *not* support a due process theory. [518]

On inability, the Rome Statute sets a very low threshold, namely that of examining 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 is otherwise unable to carry out its proceedings."[519] This means that the Court gives significant deference to national legal systems: "the standard for showing inability should be a stringent one, as the ICC is not a human rights

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[513] Mégret, Frederic and Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials,* 11 Journal of International Criminal Justice 11 (2013) at p. 575.
[514] Heller, Kevin Jon. *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome statute on National Due Process.* Criminal Law Forum (2006).
[515] For an opposite view, see 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, EJILtalk.org, 8 June 2012: "Safeguarding the rights of the accused is at the heart of a functional legal system. In the absence of such protection, there simply is no ability to carry out proceedings which deliver justice."
[516] Holmes, J. T. *The Principle of Complementarity, in the International Criminal Court: the Making of the Rome Statute*, Issues, Negotiations, Results, ed. Roy. S Lee, Kluwer Law International (1999) p. 50.
[517] Heller, Kevin Jon. *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome statute on National Due Process*. Criminal Law Forum (2006) citing Holmes, *The Principle of Complementarity, in The International Criminal Court: The Making of the Rome Statute*, *Issues, Negotiations, Results*, ed. Roy S. Lee, Kluwer Law International (1999) at p. 50.
[518] Kevin Heller in fact argued that there is a "shadow side" of complementarity: Complementarity is thus a double-edged sword. On the one hand, ICC deferrals will reflect the willingness of States to take the lead in bringing the perpetrators of serious international cries to justice. On the other hand, those deferrals will expose perpetrators to national judicial systems that are far less likely than the ICC to provide them with due process, increasing the probability of wrongful convictions. Heller, Kevin Jon. *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome statute on National Due Process*. Criminal Law Forum (2006) at p. INSERT
[519] Rome Statute, Art. 17(3).

monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards.[520]

### *1. The Libyan Admissibility Decisions*

The consequence of not accepting a due process theory of admissibility is that the ICC essentially has to allow for unfair trials under the Rome Statute framework, if these meet the lower standards of admissibility. This is demonstrated in the Libya admissibility decisions.[521] On 16 May 2011, the Prosecutor of the ICC requested the issuance of arrest warrants against Muammar Qadhafi, Abdullah Al-Senussi, and Saif al-Islam Qadhafi, for "crimes against humanity" including persecution and murder allegedly committed from 15 February 2011 until at least 28 February 2011. The ICC's Pre-Trial Chamber issued the arrest warrants on 27 June 2011.

After the death of Qadhafi on 20 October 2011, Saif Al-Islam and Al-Senussi remained at large until their capture, on 19 November 2011 near Sabha, Libya and 17 March 2012 at Nouakchott airport in Mauritania respectively. On 5 September 2012, Abdullah Al-Senussi was extradited to Libya from Mauritania. As described, the ICC Prosecutor paid a visit to Libya in November 2011, a month after Qadhafi's death, to persuade the Libyans to surrender him to the ICC, but the Libyan authorities remained adamant that they wished to hold the trial of Saif Al-Islam in Libya.

In February 2012, the Libyan General Prosecutor's Office released a directive to indicate that it would prioritize the trials of senior regime figures, pursuant to advice given by UNSMIL. It authorized a special team of investigators to start working on those cases.[522] The ICC Prosecutor said in the Security Council on 8 May 2013 that if Libya can conduct fair trials of alleged perpetrators, these could constitute Libya's "Nuremberg moment."

The senior Qadhafi-era figures thus appeared before the ordinary court, i.e. the Tripoli Court of Assize. A fierce international debate erupted on whether Libya would be able to guarantee a fair trial. For instance, O'Donohue and Rigney argued that a plain reading of Article 17 of the Rome Statute, the interpretation of Article 21(3), and a teleological approach all confirm that a case will not be admissible if judges are not satisfied that the fair trial rights of the accused will be respected

[520] Group of experts, The Principle of Complementarity in Practice, ICC OTP (2003).
[521] See Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016) pp. 145-155.
[522] The author had several meetings with this ICC team of investigators during 2012-2013 in her capacity as UNSMIL's transitional justice advisor.

within a domestic system.[523] The authors argue that genuineness requires a certain quality of the proceedings, including "ensuring the rights of the accused.[524]

However, the Prosecutor himself stated: "We are not checking the fairness of the proceedings. We are checking the genuineness of the proceedings."[525] The Pre-Trial Chamber in the case of Abdullah Senussi further clarified the issue:

> The Chamber emphasizes that alleged violations of the accused's procedural rights are not *per* se a ground for a finding of unwillingness or inability under article 17 of the Statute. In order to have a bearing on the Chamber's determination, any such violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute.[526]

Since that, the Appeals Chamber put the matter to rest when it upheld the Pre-Trial Chamber decision in the case of Abdullah al-Senussi:

> The Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights … Had this been the intention behind article 17, the Appeals Chamber would have expected this to have been included expressly in the text of the provision … Other less extreme instances may arise when the violation of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all. Whether a cases will ultimately be admissible in such circumstances will necessarily depend upon its precise facts."[527]

Later on, the Appeals Chamber reiterates the test: "violations of the rights of the suspects are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect." [528] As observed by Mégret: "The ICC's complementarity scrutiny is quite far removed from a human

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[523] O'Donohue, Jonathan and Sophie Rigney: "The ICC must consider fair trial concerns in determining Libya's application to prosecute Saif Al-Islam Gaddafi nationally," EJILtalk.org, 8 June 2012.
[524] Ibid.
[525] Ibid. citing Luis Moreno Ocampo.
[526] *Prosecutor versus Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public redacted Decision on the admissibility of the case against Abdullah Al-Senussi, 11 Oct. 2013 ICC-01/11-01/ 11 at para. 235.
[527] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgement on the appeal of Mr. Abdullah Al-Senussi against the decision of the Pre-Trial Chamber I of 11 October 203 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi 24 July 2014 at para. 219, 230.
[528] *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Judgement on the appeal of Mr. Abdullah Al-Senussi against the decision of the Pre-Trial Chamber I of 11 October 203 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi, 24 July 2014 at para. 230.

rights compliance analysis."[529] He concluded: "just because the ICC does not exercise jurisdiction over cases on grounds of due process violations does not mean that those accused have nowhere to turn. Rather, they should be encourages to seek human rights remedies both at home and, where applicable, internationally."[530]

These decisions were made before the Libyan proceedings had been concluded. The conclusion of those proceedings has given rise to renewed debate whether the admissibility decision in the case of Al-Senussi should be reviewed under Art. 19 (10) of the Statute, which states, "If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which a case had previously been found inadmissible under Article 17."

### *2. Libya's National Proceedings (Case 630)*

On 24 March 2014, the General Prosecutor opened joint proceedings against 37 senior regime figures for a wide variety of crimes committed during the Revolution in 2011. Among the accused were Saif al-Islam Qadhafi and Abdullah al-Senussi, but they also included a number of other senior accused. The charges included a wide variety of charges, including many charges not relevant under the Rome Statute: the murdering and bombardment of civilians during the 2011 revolution, including through the use of fighter jets; including through several meetings deciding to squash and kill demonstrators in Tripoli and prevent them from reaching Green Square at any cost; murder and bombing of Eastern region; the detentions of thousands of Libyans without trial, accused of opposing the regime; recruiting mercenaries from Africa, and giving them Libyan citizenship; trafficking and distributing illicit drugs and psychotropic substances among soldiers and volunteers; corruption or embezzlement of public funds by using state funds without detailed invoices from suppliers; and organized sexual violence as a means to suppress the revolution, carried out against men and women. The charges also included "starting a civil war in the country, undermining national unity, dividing the Libyan citizens" [531] and "publicly humiliating the Libyan people" by describing them as "rats and traitors" or "dirty groups, agents of Israel and America."[532] All these acts (some of which may not constitute crimes) were charged under the Penal Code of Libya, a well as particular additional laws.

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[529] Mégret, Frederic, *Too much of a good thing? Implementation and the Use of Complementa*rity, The International Criminal Court and Complementarity: From Theory to Practice, Vol. I, Ed. by Carsten Stahn and Mohamed M. El-Zeidy), p.385.
[530]Mégret, Frederic and Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials,* 11 Journal of International Criminal Justice 11 (2013) p. 578.
[531] UNSMIL/ OHCHR Report on the trial of 37 former members of the Qadhafi regime (Case 630/ 2012), 21 February 2017 p. 19. The author was one of the main authors of this report.
[532] Ibid. p. 20.

On 28 July 2015, after a trial that lasted over a year, the Court of Assize in Tripoli issued its judgment in the case of 37 former members of the Qadhafi regime, in relation to charges linked to the 17th of February Revolution. Nine defendants were condemned to death by firing squad (including Saif al-Islam and Abdullah al-Senussi); 8 other defendants received life imprisonment; 15 received sentences from 5-12 years, and 4 were acquitted. Saif al-Islam Qadhafi was tried *in absentia,* which means that he will be entitled to a retrial if arrested.[533]

The Libyan proceedings suffered from a dogmatic application of antiquated domestic law to a complex criminal case, and hence fell short of international due process standards. It is difficult to discern whether the international scrutiny by the ICC and others, including the UN, led to improvements to the process.[534] The case is still under review by the Cassation Chamber of the Supreme Court, but cassation does not include a review of the facts or the evidence.

A monitoring report by UNSMIL found that some of the accused were reportedly held in solitary confinement or incommunicado – without access to the outside world – for many months.[535] In the case of Saif al-Islam Qadhafi, he was held in virtual isolation for a period of over three years before the trial, with only a few meetings with external actors. The bulk of the Prosecution case against the accused was composed of interrogation records or confessions of persons in detention, including the accused themselves, taken in unclear circumstances and by persons who were not prosecutors or judicial officers. [536] Some were not represented by a lawyer while they were interrogated, neither is there evidence that they were informed of their rights not to self-incriminate. Some defendants told the Court that they were called in as witnesses and subsequently found themselves as accused.[537]

Torture is widespread in detention facilities in Libya. Many of the detention facilities were run by armed groups, which assumed law-enforcement functions.[538] Several of the accused alleged that they were mistreated or tortured.[539] The court however dismissed such concerns, and did not consider the evidence as inadmissible. Instead, it put the burden of proof on the accused to prove torture or mistreatment. [540] On 2 August 2015, a film appeared on the internet showing the mistreatment of Al-Sa'di

[533]Ibid.
[534] The author was the UNSMIL advisor who offered assistance to the Libyan authorities.
[535] Ibid. pp. 22- 25.
[536] Ibid. p. 32.
[537] Ibid. p. 32.
[538] UNSMIL/ OHCHR, Torture and Deaths in Detention in Libya, October 2013.
[539] UNSMIL/ OHCHR Report on the trial of 37 former members of the Qadhafi regime (Case 630/ 2012), 21 February 2017 at p. 26- 31.
[540]Ibid. Allegations of mistreatment at Al-Hadba, where many of the accused were held and where the trial took place, came to the fore when a video surfaced showing the mistreatment of Saadi Al-Qadhafi and other prisoners

Qadhafi at al-Hadba, adding further credence to these claims.[541]

Beyond the charges themselves, the accused were not provided with information that identifies the material facts alleged against them.[542] The Prosecutor alleged that the accused were part of a "criminal plan" in which each one "played a role" but did not specify beyond that.[543] These facts may have been buried in the written dossier, but many of the accused and their lawyers reportedly only received the dossier shortly before the trial and had insufficient time to consider all its contents.

In the session on 27 April, one of the lawyers representing Abdelmajid al-Mezewghi, Abuajila Mas'ud, and Amer al-Abani asked to separate the trials and said he could offer better legal advice if the trials were conducted separately, but the Prosecutor argued it is not possible because all the defendants are part of the same criminal plan. The court dismissed the request of the defense.

The Libyan authorities did make efforts to publicize the trial mainly by means of televising it. [544] Prior to the start of the trial on 24 March 2014, Article 241 of the Libyan Code of Criminal Procedure was amended to state that a trial session would be considered public if it was broadcast live on satellite T.V. channels, on public screens or any other method. Accordingly, local media had access to the trial and most of the Court's sessions were broadcast live on al-Nabaa television. UNSMIL monitors were granted access to the trial from the outset. Since the outbreak of violence in Tripoli, few observers were able to attend, and UNSMIL did not attend a session since 22 June 2014.

Most of the accused complained that they had insufficient access to their lawyers and have only been able to meet with them on a handful of occasions.[545] Some lawyers mentioned in court that they did not have adequate time to meet their client, nor were able to meet with their client in private. Lawyers who received the dossier maintain that they did not necessarily have time to adequately investigate or respond to the evidence. [546] The political climate in Libya made it very difficult for lawyers to represent these accused, particularly senior former regime figures. At the same time, foreign lawyers who were willing to represent the accused did not get authorization from the Court.

The case itself was held in al-Hadba, a former police academy formally under the Judicial Police of the Ministry of Justice, but under *de facto* control of an armed group, which constituted an intimidating environment for defendants, families and their lawyers.[547] Several defence lawyers claimed that they were attacked, harassed

[541] Ibid. p. 30.
[542] Ibid. pp. 32-34.
[543] Session of 27 April 2016.
[544] Ibid. pp. 34-36.
[545] Ibid. pp. 36-39.
[546] Ibid. pp. 39-42.
[547] The author visited one of the accused, Baghdadi Al-Mahmoudi, in Al-Hadba in the summer of 2013. Ibid. p. 21.

or threatened. Defence lawyers said that some of their witnesses were reluctant to appear. An UNSMIL observer was arrested and briefly detained in May 2014.[548]

Saif al-Islam Qadhafi was not connected to the trial since the session of 22 June and subsequent session took place without his presence as required under Article 243, nor was any lawyer representing him. In total, he only attended four sessions. Several other accused were also absent from individual hearings, including one who missed at least half the trial.[549]

The Prosecutor gave an oral presentation of only about 45 minutes of its case in Court, on 22 June 2014. The Prosecutor indicated that there are 238 witnesses and referred specifically to the testimonies of about 10 individuals. None of the Prosecution witnesses were presented in court, as this is not required under Libyan law.[550] At least one accused asked to hear prosecution witnesses but the Court did not respond to this request. Many lawyers questioned the credibility of the evidence. In addition to raising serious concerns about the fairness of the proceedings, the lack of presentation in court of the Prosecution evidence constituted a crucial missed historical opportunity, depriving the victims and the public from the opportunity to confront and reflect on the crimes of the former regime.

The rights of the defense were further undermined when the Court limited them to calling two to three witnesses per defendant.[551] For example, in the hearing on 30 November 2014, two defense witnesses were heard, but the Court only devoted a few minutes to the testimony of each. Moreover, on several occasions defense counsel put forward arguments which should have been considered in detail but appear to have been summarily dismissed by the Court, including complaints that the trial was being rushed; that they were obeying superior orders or existing laws; or that they had left the regime before 2011. In the verdict, however, the Court did give justifications for its decision, based largely on the confessions and testimony collected by the prosecution.[552]

Case 630 was part of a much broader docket.[553] The realm of charges that are being

[548] Ibid. p. 35.
[549] Ibid. p. 45-47.
[550] Ibid. pp. 42-45. See Art. 159, 244 and 245 of the Libyan Criminal Procedure Code.
[551] Ibid. p. 44.
[552] Ibid. p. 48.
[553] On 5 June 2012, the trial of former Chief of the External Intelligence and Libyan Permanent Representative to the United Nations, Abu Zaid Dorda, opened in Tripoli. Dorda was accused of ordering the use of live ammunition against demonstrators during the 2011 Revolution. On 12 November 2012, the Special Criminal Division of the Tripoli Appeal Court convened the first hearing in the criminal trial of Baghdadi Al-Mahmoudi, former Secretary of the General People's Committee under Qadhafi. Al-Mahmoudi was charged with 'committing actions jeopardizing national security. On 17 July 2012, an investigation of three prominent individuals affiliated with the former regime, Ahmad Ibrahim, Mansour Daw and Khalid Tantush, opened in Misrata. Ibrahim Mansour was sentenced to death in July 2013 but at the time of writing, the death penalty had not been enforced.

brought against accused were much broader than those pursued by the ICC. Libyan prosecutors are also pursuing a variety of financial crimes, some of which showed deficiencies in compiling a sound prosecutorial strategy.[554] The former Justice Minister, Salah Marghani, gave assurances that the trial would be fair: "How we will be judged in history is how we dealt with the Qhadafi regime … We will not have Mickey Mouse trials under this government- we had Mickey Mouse trials in the past and we saw the results."[555]

Since the trial began, Libya slipped into increasing chaos, and poor security impeded their work. Public prosecutors and judges faced consistent threats and intimidation. In the summer of 2014, increased fighting between two broad military coalitions, known as Operation Dawn in the West and Operation Dignity in the East, threatened to split the country entirely.

The Libyan example shows the pitfalls of proceeding under national laws without adequate fair trial safeguards. While this is an undesirable outcome, the complementarity regime as currently interpreted by the Appeals Chamber allows for it. After all, the trial and conviction can be said to constitute a genuine attempt to investigate and try the accused for their crimes.

Some argue the view that the ICC should re-examine the admissibility of the Al-Senussi case under "new facts." The International Bar Association argued, "Shortcomings in the proceedings and the volatile security situation have severely compromised the fairness of the trial."[556] Ellis argued that the test adopted in the Al-Senussi case is too high, and that the fair trial violations in this case are so serious that they should amount to "new facts", so that the ICC itself is not tarnished by the outcome of the Libyan trials. Others however point to the fact that the legitimacy of the Rome Statute will be eroded, if the Court were to exceed the Rome Statute by taking on fair trial and death penalty cases.[557]

A "glass half full" analysis would indicate that the international scrutiny that accompanied the ICC intervention, albeit mostly focused on the cases of Saif Al-Islam and Abdullah Al-Senussi, may have played a role in preventing a scenario of "rough justice" with quick trials and summary executions, and has made the Libyan authorities sensitive to the scrutiny of the international community. The UN

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[554] For instance, the former foreign minister Abd al-Ati al-Obaidi, and his head of parliament Belgassem al-Zwai, were charged with mismanaging public funds by compensating families of victims of the 1988 Lockerbie attack, for which Libya accepted responsibility in 2003. Libya eventually paid relatives of the victims $2.7 billion in compensation. The two men were acquitted of these charges.

[555] Stephen, Christopher. *Judicial Performance in the Midst of Chaos*, International Justice Tribune No. 157, 16 April 2014.

[556] Ellis, Dr. Mark. *Trial of the Libyan regime: An investigation ito international fair trial standards.* Nov. 2015.

[557] IBA Expert Roudtable, Fair Trials and Complementarity, The Hague 6 July 2017.

expressed serious concerns about the fairness of the trial while it was ongoing.[558] UN monitoring of the trial and detention facilities may have contributed to the trial proceeding more slowly and deliberately, and with more safeguards than may otherwise have been the case. This may over time result in more understanding and internalization of fair trial standards. Moreover, until now, none of the death sentences handed down have resulted in executions. Recently, rumors abound that Saif Al-Islam was released from detention.[559] Other accused too have been encouraged to participate in reconciliation processes. The accused are likely seen as more valuable alive than dead by the warring factions.

### *3. Core assumptions about national systems by international lawyers*

While the challenges facing national systems in conducting fair trials of Rome Statute crimes are real and pervasive, supporters of the Rome Statute in general show considerable skepticism towards national legal systems. Sometimes this results in international justice actors using inflammatory language that alienates domestic lawmakers. One lawyer described the detention of Saif Al-Islam in Zintan to the BBC as "Libya's Guantanamo Bay".[560] On another occasion he said about the Libyan authorities: "they just want a show trial and be done with it."[561] Emmerson, counsel for Abdullah Senussi, said the following in the context of the admissibility proceedings: "The ICC has ordered an immediate halt to Libya's unseemly rush to drag Mr. Al-Senussi to the gallows before the law has taken its course. Libya's rebel authorities need to understand that the days of show trials and summary executions are over."[562] While the trial of Al-Senussi has certainly been flawed, it is not exactly a rush to the gallows.

This skepticism was also apparent during an incident in which a Libyan militia detained four members of the Court's Office of Public Defence Counsel and the Registry in Zintan in early June 2012. The Libyan authorities accused Australian lawyer Melinda Taylor of breaching Libyan state security. Libya published its version of events in a letter, arguing that: "on 6 June 2012 … Ms. Taylor handed over to the accused documents which content constitutes a threat to the Libyan National security … One of these documents was a coded letter sent by Mohammed Ismael who had been working as the main aid to the accused, as well as a close security and intelligence assistant to the former Head of Intelligence Service Abdullah Al-Senussi." The Libyans also alleged that members of the delegation were carrying spying devices and a recorder.

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[558] UNSMIL/ OHCHR Report on the trial of 37 former members of the Qadhafi regime (Case 630/ 2012), 21 February 2017.

[559] See ww.dailymail.co.uk/news/article-3678568/Colonel-Gaddafi-s-son-Saif-al-Islam-walks-free-prison-just-one-year-sentenced-death-Tripoli-court.html.

[560] BBC News Africa, *Lawyers appointed for Saif Al-Islam Gaddafi*, 2 May 2013.

[561] Welt, Vivienne, *Libya's Disaster of Justice: The Case of Saif Al-Islam Gaddafi Reveals a Country in Chaos*, 28 June 2013.

[562] Bowcott, Owen. *Libya ordered to hand over Lockerbie mastermind*, The Guardian, 7 February 2013.

The circumstances of the Public Defence Council visit remained unclear in terms of the application of privileges and immunities. Libya is not a member of the ICC Agreement on Privileges and Immunities. Moreover, interview with Saif Al-Islam took place in a non-privileged environment. Eventually, the ICC President travelled to Zintan in the company of several foreign Ambassadors and issued the following statement:

> The ICC deeply regrets any events that may have given rise to concerns on the part of the Libyan authorities. In carrying out its functions, the Court has no intention of doing anything that would undermine the national security of Libya. When the ICC has completed its investigation, the Court will ensure that anyone found responsible for any misconduct will be subject to appropriate sanctions.[563]

## III. Conclusion: Parallelism?

When the limitations of Hague-based courts such as the ICTY and ICC became more apparent, complementarity became the vessel that encompassed the hope of creating a new legal order, or in the words of Stahn, "a structural principle of a new system of justice."[564] But rather than staying true to the vision of the ICC as a court of last resort, supporters often promoted the Court as the centerpiece of a global justice order. Rather than deferring to domestic jurisdictions, the Court resorted to "snatching" cases, leading to an adversarial relationship with states rather than "positive "complementarity.

Rebuilding the rule of law in post-conflict societies is an ambitious and large-scale exercise, as shown in the experience of the United Nations.[565] The World Bank has estimated that rebuilding institutions after conflict and re-establishing the rule of law can take between 17 and 41 years: "Transforming institutions – always tough- is particularly difficult in fragile situations… Creating the legitimate institutions that can prevent violence is, in plain language, slow. It takes a generation."[566] The ICC, with limited resources, is unlikely to contribute significantly to this process.

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[563] ICC Statement on Detention of Four ICC staff members, ICC Weekly Update #133, 25 June 2012. Even so, Kevin Heller still wrote that: "A court that cares about defence attorneys ant the rights of defence does not make this statement." Heller, Kevin. *The ICC Commits Cooperation Seppuku,* Opinio Juris, week roundup, 16-22 June 2012.

[564] Stahn, Carsten*. Introduction: bridge over troubled waters? Complementarity themes and debates in context.* The International Criminal Court and Complementarity: From Theory to Practice, Volume I, Cambridge University Press, 2010 at p. 1.

[565] The United Nations gave renewed emphasis to rule of law in the Brahimi report a.k.a. the UN Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305- S/2000/809 of 21 August 2000.

[566] World Development Report, Conflict, Security and Development (2011) at p. 36, 38. See Table 2.1.

Moreover, complementarity as a concept may create an illusion that it can deliver where national systems cannot. Practice shows that where domestic legal systems are unable to investigate or prosecute, such as in Uganda, Kenya or Afghanistan, the Court inherits the same obstacles. After all, effective enforcement and state cooperation is the Court's Achilles heel, and it readily inherits the problems that situation-countries themselves face in this regard. This leads to parallelism rather than complementarity. Furthermore, complementarity may have a distorting effect, by focusing investigations and prosecutions on a few individual cases. States can thus invest a lot of resources in individual cases, creating disparity between cases without addressing systemic problems. While many domestic systems are undoubtedly flawed, the discourse around the ICC can serve to further alienate those affiliated with domestic jurisdictions.

At the same time, complementarity leaves space for national systems to conduct trials are sub-standard in terms of international standards of due process, thus leaving human rights advocates frustrated that the Court is not a "standard-bearer." Such are the flaws of complementarity.