Note

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

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

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5. See id. at 2270.
the leaders of the Gaddafi regime. While the ICC has initiated an investigation into the Gaddafi era crimes, Libya believes that justice can be delivered domestically and has filed a formal Admissibility Challenge disputing the ICC’s jurisdiction to investigate or prosecute the matter.

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

I. ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court ("Rome Statute"), which effectively established the permanent ICC, was signed on July 17, 1998. The ICC was created in response to a recognized need for an independent and permanent criminal court that could help bring those committing the most serious crimes against humanity to

6. See Kersten, supra note 3.
7. Id.
justice. The ICC’s jurisdiction is limited to four specific crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

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

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

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

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

11. See id. art. 25(2)-(3), at 15–16.

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

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

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

15. See id.

16. Rome Statute, supra note 8, art. 27(1), at 16 (“This statute shall apply equally to all persons without any distinction based on official capacity. In
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traditional state immunities based on official capacity.\textsuperscript{17} To eliminate further impunity, the Rome Statute holds military commanders criminally responsible for the acts of their subordinate forces.\textsuperscript{18} In certain situations, superiors in other fields can be held responsible for the crimes of their subordinates as well.\textsuperscript{19}

**A. JURISDICTION AND THE PRINCIPLE OF COMPLEMENTARITY**

The ICC may exercise jurisdiction over Article 5 crimes in three situations: (1) when a State party refers a situation to the ICC Prosecutor ("Prosecutor");\textsuperscript{20} (2) when the Security Council acting under Chapter VII of the U.N. Charter refers a situation to the Prosecutor;\textsuperscript{21} or (3) when the Prosecutor initiates an investigation of a situation in accordance with Article 15.\textsuperscript{22} The

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  \item particular, official capacity . . . shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
  \item Id. art. 27(2), at 16.
  \item See id. art. 28(a), at 16–17.
  \item Id. art. 28(b), at 17 (stating that a superior shall be held responsible for crimes committed by subordinates under his or her direct control where "the superior either knew or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; [t]he crimes concerned activities that were within the effective responsibility and control of the superior; and [t]he superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.").
  \item Id. art. 27(2), at 16.
  \item Id. art. 28(a), at 16–17.
  \item Id. art. 28(b), at 17 (stating that a superior shall be held responsible for crimes committed by subordinates under his or her direct control where "the superior either knew or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; [t]he crimes concerned activities that were within the effective responsibility and control of the superior; and [t]he superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.").
  \item Id. art. 13(a), at 10. Article 14 further provides:
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      \item A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
      \item As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.
    \end{itemize}
    \item Id. at 11.
  \item Id. art. 13(b), at 10.
  \item See id. art. 13(c), at 10. Allowing the Prosecutor power to initiate an investigation on his own was controversial during the drafting of the Rome Statute. Proponents believed that the Court’s credibility and independence would be improved and pointed out that recent Tribunals had granted the Prosecutor that power. Opponents were worried about prosecutorial power and wanted measures to hold the Prosecutor accountable. The result was a compromise where the Prosecutor required approval from the Pre-Trial Chamber before investigating on his/her own. See Gurule, supra note 9, at 11.
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ICC may only establish jurisdiction through the consent of the State where the crime occurred (the territorial State) or the State of which the accused is a national (the nationality State). Consent is imputed to a State when it has ratified the Rome Statute. The only situation where the ICC may exercise jurisdiction without State consent is when the Security Council has referred the situation regarding a non-party national or where a non-party state has accepted the ICC’s jurisdiction to the specific case in question.

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

23. Rome Statute, supra note 8, art. 12(2), at 10.
24. Id.
26. Remigius Oraeki Chibueze, The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute, 12 ANN. SURV. INT’L & COMP. L. 185, 187 (2006) (observing that the compromises needed to ratify the Rome Statute which centered on the principle of complementarity, significantly diluted the aspirations of the ICC). The first express reference to a principle of complementarity in the Rome Statute appeared in the 1994 Draft Statute in which the preamble stated that the “court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.”
27. JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 73–74 (Ruth MacKenzie, et al. eds., 2008). The complementarity provisions of the 1994 Draft Statute were regarded as insufficient and the Ad Hoc Committee in April 1995 elaborated on the principle further. Id. at 76–79.
28. Chibueze, supra note 26, at 191 (quoting WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85 (2d ed. 2004)).
The principle of complementarity was included in the Rome Statute when the United States and other countries voiced concern about national sovereignty. In practice, this principle forces the ICC to defer to national jurisdiction when appropriate.

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

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

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

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  \item \textsuperscript{36} Rome Statute, supra note 8, art. 18(1), at 12.
  \item \textsuperscript{37} Id. art. 18(2), at 12.
  \item \textsuperscript{38} Id.; See Pre-Trial Division, INT’L CRIM. CT., http://www.icc.cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/Pre+Trial+Division/ (last visited Oct. 27, 2001) (detailing the Pre-Trial Chambers role as the judicial body handling cases until the confirmation of charges, when a Trial Chamber is convened).
  \item \textsuperscript{39} Chibuze, supra note 26, at 192 (quoting Daniel D. Ntanda Nsereko, Article 18: Preliminary Rulings Regarding Admissibility, in COMMENTARY ON THE ROME STATE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 627, 632 (Otto Triffterer 2d ed. 2008)).
  \item \textsuperscript{40} Id. at 192–93; See Rome Statute, supra note 8, art. 18(2)–(3), at 12–13 (outlining the procedures for jurisdiction, including the fact that the Prosecutor must, upon notification from a State of its intent to investigate, defer review for six months or at any point when a significant change of circumstances toward the State’s willingness to genuinely carry out the proceedings has occurred).
  \item \textsuperscript{41} See Pichon, supra note 33, at 188 (explaining that admissibility is distinguishable from jurisdiction and that a case can be inadmissible before the ICC even though it has jurisdiction).
  \item \textsuperscript{42} Rome Statute, supra note 8, at 12.
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further action by the ICC.\textsuperscript{43} Notably, Article 17 assumes admissibility before the ICC except when one of these four situations occur.\textsuperscript{44} If none of these conditions are met, a case is \textit{de facto} admissible.\textsuperscript{45} If the Rome Statue had been drafted with a presumption of inadmissibility, its objective of ending impunity\textsuperscript{46} would be undermined as an accused could escape punishment through State inactively alone.\textsuperscript{47} Therefore, a State is required to make a good faith attempt to investigate or prosecute the case before it can divest the case of admissibility before the ICC.\textsuperscript{48}

\section*{B. Exceptions to the Inadmissibility of a Case under Article 17 of the Rome Statute}

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

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\item \textit{Id.}
\item KKLEFFNER, \textit{supra} note 26, at 104–05; see MOHAMED M. EL ZEIDY, \textsc{The Principle of Complementarity in International Criminal Law: Origin, Development and Practice} 159 (2008) (noting that Article 17 is drafted in a negative form).
\item EL ZEIDY, \textit{supra} note 44, at 159.
\item See Rome Statute, supra note 8, at 2 (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”).
\item KKLEFFNER, \textit{supra} note 26, at 105 (noting that an assumption of inadmissibility would be contrary to the object and purpose of the Statute to bring effective prosecution and end impunity for the most serious of international crimes).
\item \textit{Id.} (“[C]omplete inaction on the national level would thus allow the ICC to take up a case without having to enter into an assessment of the admissibility criteria . . . .”).
\item Rome Statute, supra note 8, art. 17(1)(a), at 12 (emphasis added).
\item See El ZEIDY, \textit{supra} note 44, at 161–62 (noting the ICC’s support of this proposition in their 2006 decision in the \textit{Thomas Lubanga Dyilo} case).
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prosecution, thus giving rise to admissibility before the ICC.\textsuperscript{51} In practice, this exception allows the ICC to intervene when national judicial proceedings are merely a pretense to shield the accused from criminal responsibility.\textsuperscript{52}

1. Criterion of “Unwillingness”

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

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

\textsuperscript{51} See Rome Statute, supra note 8, art. 17, at 12.
\textsuperscript{52} Gurule, supra note 9, at 7–8.
\textsuperscript{53} El Zeidy, supra note 44, at 163; see also, Nidal Nabil Jurdì, The International Criminal Court and National Courts 13 (Mark Findlay & Ralph Henham eds., 2011) (“Many states did not want the ICC to function as a court of appeal.”).
\textsuperscript{54} See El Zeidy, supra note 44, at 163 (noting that the use of criteria such as “apparently well founded” or “ineffective” trial procedures were rejected as being too subjective).
\textsuperscript{55} Id. at 163–64 (“[T]he drafters compromised by adding the word ‘genuinely’ as the least disagreeable and most objective term.”); see Rome Statute, supra note 8, art. 17(1)(a), at 12 (explaining that a case is inadmissible if being investigated by the State “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”) (emphasis added).
\textsuperscript{56} See Chibueze, supra note 26, at 194 (noting that “genuinely. . . appears to invoke a requirement of good faith on behalf of the State”); El Zeidy, supra note 44, at 164–65 (“[T]he most resemblance to genuineness is perhaps the concept of good faith.”).
\textsuperscript{57} See Jurdì, supra note 53, at 13.
\textsuperscript{58} Rome Statute, supra note 8, art. 17(2), at 12 (outlining conditions
The first criterion of the determination retains a subjective element, requiring the ICC to evaluate the State's intention in the proceedings. The second two elements retain a notion of objectivity in their determination. Some scholars have noted that the three scenarios listed in Article 17(2) which present a clear indication of “unwillingness” are not exhaustive, but merely illustrative of the conditions that would lead to a determination of “unwillingness.”

When considering a State’s unwillingness to investigate or prosecute a crime, the ICC is to consider the situation with “regard to the principles of due process recognized by international law.” This language raises the question of whether a violation of due process alone can be determinative of a State’s “unwillingness” or “inability” to conduct the investigation or prosecution. The ensuing question is whether a State which is investigating the case, but in breach of certain due process guarantees, can be declared unwilling (or unable) to investigate, even if this seems to be a contradiction where a State will be determined to be unwilling: “a) The proceedings were or are being undertaken or the nation decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”; see Wilt & Lyngdorf, supra note 34, at 40 (“Unjustified delays, sham trials which serve to shield the perpetrator from criminal responsibility, or proceedings lacking independence or impartiality are indicative of unwillingness . . . .”).

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

60. El Zeidy, supra note 44, at 168.

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

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

63. See Pichon, supra note 33, at 191 (noting that the language of Article 17(2) in combination with Article 17(2)(c) may indicate that a lack of due process can lead to the admissibility of a case before the ICC).
in terms.”\textsuperscript{64} Most international criminal law scholars believe that if the ICC determines that a State will not provide a defendant with due process, the case is admissible. These scholars argue that under those circumstances, the State is “unable” to investigate or prosecute (“Due Process Theory”).\textsuperscript{65} However, it remains to be seen whether the Prosecutor will secure admissibility of a case simply on the basis of a lack of national due process.\textsuperscript{66}

2. Criterion of “Inability”

The second ground for the ICC to rebut a State’s contention of inadmissibility is when a State is “unable” to carry out the investigation or prosecution.\textsuperscript{67} Article 17(3) defines “inability” as a situation in which “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”\textsuperscript{68} Agreement on the definition of “inability” was achieved more easily than the definition of “unwillingness” because of the

\textsuperscript{64} Id. at 191.

\textsuperscript{65} See Mark S. Ellis, The International Criminal Court and Its Implication for Domestic Law and National Capacity Building, 15 FLA. J. INT’L L. 215, 241 (2002) (“If states desire to retain control over prosecuting nationals charged with crimes under the ICC Statute, they must ensure that their own judicial systems meet international standards. At a minimum, states will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants.”); see also, Kevin Jon Heller, The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, 17 CRIM. L.F. 255, 257–59 (2006) (“[I]s a case admissible under article 17 if the Court determines that the State asserting jurisdiction over it will not provide the defendant with due process? The overwhelming consensus among international criminal law scholars is that the answer is ‘yes’. Indeed, I have not found a single scholar writing in English who does not accept the due process thesis.”); see also Frank Meyer, Complementing Complementarity, 6 INT’L CRIM. L. REV. 549, 567 (2006) (“Impunity could also result de facto from conduct under the color of law. Thus, minimal standards [of national practices] have to be satisfied.”); see also Pichon, supra note 33, at 192 (“A multitude of international criminal law scholars uncritically agree that the principle of complementarity is applicable to all questions of a due process.”).

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

\textsuperscript{67} See Rome Statute, supra note 8, art. 17(1)(a), at 12.

\textsuperscript{68} Id. art. 17(3), at 12.
more objective nature of the determination.\textsuperscript{69} “Inability” of a State can arise in two separate ways: through either a substantial collapse\textsuperscript{70} or the unavailability of the judicial system.\textsuperscript{71} In order for the ICC to rule a case admissible, the inability must manifest itself in one of the following situations: 1) the State is unable to secure the custody of the perpetrator; 2) the State is unable to gather the evidence and testimony needed; or 3) the State is otherwise unable to carry out the proceedings.\textsuperscript{72} The third scenario was added “to serve as a catch-all clause for all sorts of situations that might arise in the course of the domestic process.”\textsuperscript{73}

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

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

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

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

\textsuperscript{72} See Rome Statute, supra note 8, art. 17(3), at 12.

\textsuperscript{73} EL ZEIDY, supra note 44, at 224.

\textsuperscript{74} Chibueze, supra note 26, at 194.

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

\textsuperscript{76} Gurule, supra note 9, at 8–9 (noting that one possible solution would be to require a “clearly erroneous” standard of review or a “no reasonable basis” test before the ICC upsets its deference to State prosecution).
of the ICC.\textsuperscript{77} As such, the ICC has the potential of becoming a default criminal jurisdiction for developing countries that are unable to prove the worth of their legal systems.\textsuperscript{78} These States will inevitably view the ICC as a pawn of western countries who are free from accountability before it, tainting the legitimacy of the ICC as an independent international judicial institution.\textsuperscript{79}

If the ICC has any doubts regarding the admissibility of a case, it may, “on its own motion, determine the admissibility of a case” under Article 19.\textsuperscript{80} Furthermore, challenges to the admissibility of a case or the jurisdiction of the ICC may be brought by: “(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) A State from which acceptance of jurisdiction is required under article 12.”\textsuperscript{81} This challenge must occur prior to the commencement of trial and may occur “only once by any person or State.”\textsuperscript{82} Until the recent challenge by Libya, an admissibility challenge of this nature had never been brought before the ICC.\textsuperscript{83}

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

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

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

\textsuperscript{78} See id.

\textsuperscript{79} See id.

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

\textsuperscript{81} Id. art. 19(2), at 13–14.

\textsuperscript{82} See id. art. 19(4), at 14.

\textsuperscript{83} See Press Release, Security Council, International Criminal Court Chief Tells Security Council Libya Wants Domestic Courts to Handle Proceedings Against Son of Former Libyan Leader Qadhafi, U.N. Press Release SC/10651 (May 16, 2012), \textit{available at} http://www.un.org/News/Press/docs/2012/sc10651.doc.htm (recognition by ICC Prosecutor Luis Moreno-Ocampo that Libya’s admissibility challenge was “the first time in the Court’s history that such a challenge had occurred”).
of the situation in Libya to the ICC on February 26, 2011, the Prosecutor opened a formal investigation on potential crimes committed during the uprising. Although recognizing that Libya is not a party to the Rome Statute and thus not bound by the jurisdiction of the ICC, the Security Council urged Libya to “cooperate fully with . . . the Court and the Prosecutor.” On May 16, 2011, after only two months of the investigation, the Prosecutor sought arrest warrants from the Pre-Trial Chamber for alleged crimes committed by Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi. Moving remarkably quickly, the Pre-Trial Chamber accepted the Prosecutor’s application on June 27, 2011. The Pre-Trial Chamber determined that there were reasonable grounds to believe that the three men were criminally responsible for one count of murder as a crime against humanity under Article 7(1)(a) of the Rome Statute and one count of persecution as a crime against humanity under Article 7(1)(h). As such, the

85. See id. ¶ 5, at 2.
86. See, e.g., Mark Kersten, Whither ICC Deterrence in Libya?, JUST. IN CONFLICT (Mar. 6, 2012) http://justiceinconflict.org/2012/03/06/whither-icc-deterrence-in-libya/ (discussing that two month is a very short period of time for investigation before an application to the Pre-Trial Chamber for arrest warrants and speculating that the ICC moved quickly hoping to prove its effectiveness at deterrence if the conflict was terminated) [hereinafter Kersten, Whither ICC Deterrence]; see also, Kersten, supra note 3 (“With unprecedented speed, the Court opened an investigation in early March and, in June 2011, issued arrest warrants . . . .”).
87. See Pre-Trial Division, supra note 38 (describing that the Pre-Trial Chamber of the ICC is in charge of authorizing the investigation, determining whether a reasonable basis for jurisdiction exists, issuing warrants of arrest, and conducting other preliminary matters before charges are confirmed and the case moves to the Trial Chamber of the ICC).
90. Rome Statute, supra note 8, art. 7(1)(h), at 5 (“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in
Pre-Trial Chamber issued warrants for the arrest of the three men.91 Based upon the scope of the Security Council referral, the ICC warrants only cover conduct beginning on February 15, 2011.92

On July 4, 2011, the ICC filed its request93 for Libya to arrest and surrender the accused men in accordance with the directive of U.N. Security Council Resolution 1970.94 Muammar Gaddafi was killed by Libyan forces on October 20, 2011,95 causing the ICC to terminate proceedings against him shortly thereafter.96 On November 19, 2011, Saif al-Islam Gaddafi (“Saif”) was captured in an attempt to flee to Niger, arrested, and taken to Zintan where he remains in militia custody.97
four days later, the Libyan Government initiated an investigation into Saif's alleged crimes of corruption and other financial crimes, but not the same crimes of murder and persecution the ICC warrant covered. Not until January 8, 2012 did the Libyan Prosecutor begin investigating the crimes of murder and rape allegedly committed by Saif during the 2011 Libyan revolution.

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

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

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

99. Id. ¶ 25.

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

101. Admissibility Challenge, supra note 98, ¶ 27.
being detained in Libya by the current authorities.

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

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

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


104. Id. ¶ 38–39.

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

106. Gaddafi Spy Chief Abdullah al-Senussi Held in Mauritania, BBC
warrant seeking custody of the single man said to know the
darkest secrets of Gaddafi’s regime.\textsuperscript{107} French President
Nicolas Sarkozy also requested extradition from Mauritania for
al-Senussi based on his conviction and pending life sentence in
France.\textsuperscript{108} In addition, Libya demanded that Mauritania hand
al-Senussi over to face trial for his alleged crimes in connection
with the 2011 uprising.\textsuperscript{109} Following his arrest, on April 3,
2012, Libyan officials began to investigate al-Senussi for both
financial crimes and crimes against the person under Libyan
law.\textsuperscript{110} Despite the competing requests for extradition,
Mauritania surrendered al-Senussi to Libya on September 5,
2012.\textsuperscript{111} Based on the ongoing competing ICC investigation into
al-Senussi and Saif’s crimes, on May 1, 2012, the Libyan
Government formally filed an admissibility challenge of the
Al-Senussi}.\textsuperscript{112}

\section*{II. ANALYSIS OF ADMISSIBILITY OF THE CASE OF SAIF
AND AL-SENUSSI BEFORE THE INTERNATIONAL
CRIMINAL COURT}

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

\begin{footnotesize}
\begin{enumerate}
\item 107. Ian Black, \textit{Abdullah al-Senussi: Spy Chief Who Knew Muammar
Gaddafi’s Secrets}, \textsc{Guardian}, Sept. 5, 2012,
http://www.guardian.co.uk/world/2012/sep/05/abdullah-al-
se
nussi-libya-secrets.
\item 108. Al-Senussi had been convicted and sentenced to life imprisonment in
France for his involvement in a 1989 attack that killed 170 people on a French
plane. If al-Senussi had been extradited to France, it is likely that France
would have been obligated to surrender him to the ICC. See BBC \textsc{News}, \textit{supra}
note 106 (“Already sentenced to life in prison in France; President Sarkozy
says French authorities involved in arrest; but France may be obliged to hand
[Al-Senussi] to ICC.”).
\item 109. \textit{Id.}
\item 110. Admissibility Challenge, \textit{supra} note 98, at ¶ 23.
\item 111. \textit{See Mauritania Deports Libya Spy Chief Abdullah al-Senussi}, BBC
(noting that Al-Senussi was extradited to Libya based on Libyan assurances that he
would receive a fair trial). Mauritania is not a signatory to the Rome Statute
and was not obligated to surrender Al-Senussi to the ICC although many
hoped it would, ensuring that he would receive a fair trial. BBC \textsc{News}, \textit{supra}
note 106.
\item 112. Admissibility Challenge, \textit{supra} note 98.
\end{enumerate}
\end{footnotesize}
to establish their identity in the international arena. While the ICC desires to legitimize itself as an effective international judicial institution, the new Libyan government seeks to demonstrate its sovereignty and ability to prosecute those behind the mass human rights abuses which characterized the Gaddafi regime. Part II seeks to examine the Admissibility Challenge in light of these competing goals. First, Part II.A begins by evaluating the arguments made by Libya in the Admissibility Challenge and explains why a lack of national due process on its own is not grounds for admissibility of a case before the ICC. Part II.B then explains how Libya's failure to provide Saif with due process rights remains relevant to the discussion of admissibility. Part II.C concludes by addressing how the ICC should respond to the Admissibility Challenge and what changes need to be made for the ICC to remain a relevant and effective international judicial body. At the onset, it should be noted that Libya's Challenge is primarily directed only at the admissibility of the case concerning Saif, not al-Senussi.

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

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

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

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

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

116. See Rome Statute, supra note 8, art. 17(1)(a), at 12.
the Pre-Trial Chamber that the Libyan authorities are willing and able to conduct Saif’s investigation domestically and that to deny them of this opportunity would be “inconsistent with the object and purpose of the Rome Statute.”

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

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

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

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117. Admissibility Challenge, supra note 98, ¶ 2.
118. See id. ¶¶ 39–67.
119. THE CONSTITUTIONAL DECLARATION, Mar. 8, 2011, Part 4, art. 31–32 (Libya).
120. See Admissibility Challenge, supra note 98, ¶ 55 (noting that an independent judiciary is guaranteed in Article 52 of the Judicial System Law and Article 31 in the Freedoms Act).
judiciary authorities near the litigants and shall guarantee the swift determination on lawsuits;
vii. Laws shall not provide for the prohibition of judiciary authority to control any administrative decree.\textsuperscript{121}

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

Despite Libya’s assurances that Saif has these due process guarantees under Libyan law and that their investigation complies with these rights, the general consensus remains that Saif will not have a fair trial if it is conducted in Libya.\textsuperscript{125} Several respected independent agencies have documented widespread and serious human rights abuses by militia leaders across Libya since the collapse of the Gaddafi regime, leading Amnesty International to declare that “[l]awlessness still pervades Libya a year after the outbreak of the uprising.”\textsuperscript{126}

When Amnesty International delegates visited eleven detention centers across Libya in January and February 2012, they found torture and ill-treatment of suspected Gaddafi loyalist detainees in ten of those locations.\textsuperscript{127} Despite being alerted of

\textsuperscript{121} \textit{The Constitutional Declaration}, Mar. 8, 2011, Part 4, art. 31–32 (Libya).
\textsuperscript{122} Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Libyan Government’s Filing of Compilation of Libyan Law Referred to in its Admissibility Challenge, Annex B, art. 106 (May 28, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1418882.pdf (“[I]nvestigator may not interrogate any accused or confront him with other accused persons or witnesses except after summoning his lawyer to appear . . . .”) [hereinafter Compilation of Libyan Law]; \textit{id.} art. 161 (“Indictment shall automatically appoint an advocate for any accused of a felony . . . if he did not elect an advocate to defend him.”).
\textsuperscript{123} See Admissibility Challenge, \textit{supra} note 98, ¶ 2.
\textsuperscript{124} See Compilation of Libyan Law, \textit{supra} note 122, arts. 241, 247, 251, 266, 276.
\textsuperscript{125} See Leanos, \textit{supra} note 4, at 2295 (Noting that after four decades of repression and disregard for the independency of the legal system, “observers worry that Libya lacks a viable judicial system”).
\textsuperscript{127} See \textit{id.} at 6 (“Detainees are often tortured immediately after being seized by militias and subsequently during interrogation, including in officially recognized detention centres. To date, detainees have not been allowed access to lawyers, except for rare cases in eastern Libya. . . . Some detainees were too scared to speak – fearing further torture if they did so – and were only prepared to show Amnesty International delegates their torture
the ongoing militia abuses, the Libyan transitional government has been unwilling to recognize the problem and has failed to take any action to hold the militia responsible. The Amnesty International Report summarizes that:

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

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

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

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

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

129. Id. at 7.
130. Id. at 6–7, 10.
131. Kersten, Whither ICC Deterrence, supra note 86.
provided no information regarding their plan to conduct a fair and safe trial for him in the midst of ongoing instability in Libya.\footnote{See Walt, supra note 106 (quoting Ms. Taylor as saying that “we have not had any ability to contact Mr. Gaddafi and none of his friends and family have been able to contact him”).} Most in the international community question Libya's ability to give Saif a fair trial, especially in light of reports concerning his current treatment.\footnote{See Heller, supra note 66 (“I don’t know many people who work in [international criminal law] who actually believe that Libya intends to give Saif and Al-Senussi trials that comport with international standards of due process, regardless of its protestations to the contrary.”); Amnesty International, Libya Must Seek Justice Not Revenge in the Case of Former Al-Gaddafi Intelligence Chief, (Oct. 18, 2012), http://www.amnesty.org.uk/news_details.asp?NewsID=20390 (“Trying al-Senussi in Libya where the justice system remains weak and fair trials are still out of reach, undermines the right of victims to seek justice and reparation. Instead, he should face the ICC’s charges of crimes against humanity in fair proceedings.”).} Despite the new statutory and constitutional guarantees in Libyan law, Libya's guarantees mean nothing unless they are actually observed. The international community has witnessed similar conundrums. Iraq's failed guarantee that it could provide a fair trial for Saddam Hussein because of the formal legal procedures governing the Iraqi High tribunal still resonates with the international community; many fear a repeat situation in Libya.\footnote{See Heller, supra note 66 ("[It] wasn’t so long ago that Iraq guaranteed it would give Saddam Hussein a fair trial and defended that guarantee by pointing to the (ostensible) formal adequacy of the law and procedure governing the Iraqi High Tribunal. And we all know that that trial turned out.").} Unfortunately, as many in the international criminal law community realize, “the statutory and constitutional right to a fair trial does not guarantee that a defendant will actually receive a fair trial.”\footnote{Id.}

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

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

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

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

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

135. Id.
In order for a case to be admissible before the ICC despite an ongoing investigation or prosecution by a State, it must be shown that the State “is unwilling or unable genuinely to carry out the proceedings.”\textsuperscript{136} Article 17(2) of the Rome Statute states: “In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist . . .”\textsuperscript{137} Although these “principles of due process” have not been clearly defined, this phrase has been interpreted as setting some minimum standards of conduct that a State must satisfy in order to show that it is “willing” to investigate or prosecute a particular case.\textsuperscript{138} Reading a due process requirement to the complementarity doctrine creates a safety net for situations when a deferral to State jurisdiction would expose the accused to national judicial systems that are unable to guarantee due process.\textsuperscript{139} Unfortunately, this fallback does not exist in the true complementary regime designed by the Rome Statute. Article 17 still requires the ICC to defer to the jurisdiction of a State in situations where unfair trial proceedings (a lack of due process guarantees) are used to make the accused easier to convict.\textsuperscript{140} Due Process Theory advocates point to the “independent” and “impartial” language in Article 17(c) to support the claim that Article 17 creates a due process requirement.\textsuperscript{141} These advocates argue that proceedings in which an individual is easier to convict because of violations of his due process guarantees are proceedings not conducted independently or impartially.\textsuperscript{142} A reading of Article 17(2)(c) in its entirety however, refutes this premise. Article 17(2)(c) states that in order to determine unwillingness the ICC shall consider whether: “The proceedings were not or are not being conducted independent or impartially, and they were or are being

\textsuperscript{136} Rome Statute, \textit{supra} note 8, art. 17(1)(a), at 12.  
\textsuperscript{137} \textit{Id.} 17(2), at 12 (emphasis added).  
\textsuperscript{138} \textit{See} KLEFFNER, \textit{supra} note 26, at 127 (“The Statue does not identify [these principles] and the drafting history of Article 17(2) does not elucidate what the drafters of the Statute had in mind when including the notion of ‘principles of due process’ in the provision.”); Meyer, \textit{supra} note 65, at 567.  
\textsuperscript{139} Heller, \textit{supra} note 65, at 256.  
\textsuperscript{140} \textit{Id.} at 257.  
\textsuperscript{141} \textit{Id.} at 260.  
\textsuperscript{142} \textit{Id.} (“[W]e would not describe a proceeding that violates due process in order to make the defendant easier to convict as either ‘independent’ or ‘impartial.’”).
conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”143 The use of the coupling term “and” indicates that both requirements must be met in order for the ICC to determine a state to be “unwilling” and a case therefore admissible.144

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

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

143. Rome State, supra note 8, art. 17(2)(c), at 12 (emphasis added).
144. Heller, supra note 65, at 261.
145. Id.
146. See Pichon, supra note 33, at 193 (pointing out that Article 17(2)(c) only applies to national proceedings which aim to make the accused harder to convict). See also Heller, supra note 65, at 260–61.
147. Heller, supra note 65, at 261.
148. Id. at 262.
149. Id. at 262–63.
150. Id.
151. See Rome Statute, supra note 8, art. 17(2)(a), at 12 (unwillingness is found if the proceedings were undertaken “for the purpose of shielding the person concerned from criminal responsibility”); id. art. 17(2)(b), at 12 (unwillingness is found if there has been an unjustified delay “inconsistent with an intent to bring the person concerned to justice”); id. art. 17(2)(c), at 12
A Due Process Theory based on the Article 17(3) “inability” determination is likewise flawed.\textsuperscript{152} To declare a State “unable” to investigate or prosecute a case, the ICC “shall consider whether due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”\textsuperscript{153} A judicial system that is missing due process guarantees is not one that has collapsed or is no longer able to obtain the defendant, evidence, or testimony.\textsuperscript{154} The “inability” determination more appropriately applies in situations where an investigation or prosecution is not practically possible.\textsuperscript{155} The Informal Expert Paper written by the ICC Office of the Prosecutor confirms this interpretation, listing factors such as a lack of judges or investigators, a lack of judicial infrastructure, or a lack of access as being relevant to a determination of “inability.”\textsuperscript{156} Therefore, “inability” is satisfied only by a collapse of unavailability that prevents an effective investigation or prosecution, not a collapse that prevents a fair investigation or prosecution.\textsuperscript{157} In conclusion, no matter what basis the Due Process Theory is rooted in, “the principle of complementarity only addresses situations where breaches of human rights standards, more precisely the right to an independent and impartial judiciary, work in favour of the accused.”\textsuperscript{158}

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

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

152. Heller, supra note 65, at 263.

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

154. Id. at 264.

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


157. Pichon, supra note 33, at 192.

158. Id. at 194.
17 does not support this proposition. Despite Libya’s devotion of much of their Admissibility Challenge to persuading the ICC that they will provide Saif with the due process guarantees afforded to him under Libyan law, Libya’s Challenge is fundamentally based on the notion that Article 17 does not make an absence of national due process a ground for admissibility. The Challenge points out:

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

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

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

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


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

162. See Chibueze, supra note 26, at 196 (discussing how the court would be viewed as a vestige of western countries by developing countries if the court
This was not the intention of the drafters of the Rome Statute for the ICC. In fact, the delegates to the Rome Conference specifically rejected a draft version of Articles 17 that would have allowed a consideration of whether “the said investigations or proceedings...were or are conducted with full respect for the fundamental rights of the accused.”163 As such, the ICC should not use a lack of national due process as the only grounds for admissibility of a case before it, no matter the unpleasant implications that may follow.

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

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

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


165. Rome Statute, supra note 8, art. 17(2)(c), at 12. See Heller, supra note 164 (promulgating the idea that the State’s failure to provide a suspect with due process rights demanded by national law means that the State is conducting the proceedings in a manner which will make it more difficult to bring the accused to justice).
17(2)(c) requirements for declaring a State “unwilling” would be
met and a case would be admissible before the ICC.166

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

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


166. See Heller, supra note 164.
167. See, e.g., Amnesty International, supra note 126; Prosecutor v. Saif Al-
Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Public
Redacted Version of the Corrigendum to the “Defence Response to the
‘Application on Behalf of the Government of Libya Pursuant to Article 19 of
the ICC Statute’”, ¶ 75 (July 31, 2012), http://www.icc-cci.int/iccdocs/doc/doc1446165.pdf (emphasis added) [hereinafter Defence
Response].
168. See Heller, supra note 161.
171. Id. (emphasis added).
null, also affects any consequences of that procedure. The existence of these provisions means that a violation of the due process rights afforded to Saif under Libyan domestic law should lead to a nullity of the procedure. For Libyan domestic courts to hold otherwise would be an indication of the lack of independence or impartiality of the judiciary.

Unfortunately, Libya’s treatment of Saif thus far violates not only international law but Libyan law as well. The OPCD’s response to the Admissibility Challenge is riddled with examples of breaches of Saif’s fundamental due process rights guaranteed by Libyan law. Any one of these breaches is grounds for Libyan domestic courts to declare that an essential provision of the law was not followed, thereby necessitating that they dismiss the case against Saif. Not only are these violations alleged by the OPCD, but they are confirmed by respected international organizations. Saif’s lack of access to a lawyer is just an example of one such confirmed violation. During the investigation phase of the case, the phase Saif remains in, Article 106 of the Libyan Criminal Procedure Code provides that Saif has a right to an attorney both in interrogations with the investigator and when being confronted with witnesses. Despite this right, Human Rights Watch, etc.
the U.N. International Commission on Libya, the OPCD, and Saif himself have complained about Libya’s disregard for this due process guarantee. The overwhelming evidence that Saif has been denied access to legal representation is but one example of Libya’s failure to provide due process guarantees to Saif which are demanded by its own domestic law.

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

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178. See Abrahams, supra note 176 (confirming that Saif has been left in total isolation without any access to legal consultation).
179. Human Rights Council, Rep. of the Int’l Comm’n of Inquiry on Libya, ¶ 787, U.N. Doc. A/HRC/19/68 (March 2, 2012) (“Until now he [Saif] has been held by thuwar in Zintan, without any access to a layer or to his family.” (emphasis in original)).
180. See Defence Response, supra note 167, ¶ 196 (“[T]he OPCD was informed that it would not be possible for Mr. Gaddafi to have privileged communications with a lawyer, whilst he is being detained in Zintan”); Walt, supra note 106 (“[Melinda] Taylor [Saif’s OPCD counsel] said Libya has denied Saif access to meet with lawyers, regarded as a basic right under international law. ‘We have not had any ability to contact Mr. Gaddafi and none of his friends and family have been able to contact him’ . . . .”).
181. See Defence Response, supra note 167, ¶ 6 (“There will be no truth if I [Saif] am kept locked up and silenced in a remote mountain village, with no or very limited possibility to speak to my lawyers in order to convey my defense.”).
182. Heller, supra note 165.
184. Id. ¶ 218.
185. See generally Rome Statute, supra note 8, art. 17(2)(c), at 12; id.
C. THE NEXT STEPS FOR THE INTERNATIONAL CRIMINAL COURT

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

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

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

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


188. See Heller, supra note 66 (“I don’t know many people who work in [International Criminal Law] who actually believe that Libya intends to give Saif and Al-Senussi trials that comport with international standards of due process, regardless of its protestations to the contrary.”).
to justice, this goal should not be pursued without regard to due process. If the ICC surrenders jurisdiction to Libya and Saif ends up facing a sham trial and quick execution, the ICC stands to be viewed as an ineffective international judicial body capable of doing little to supplement domestic judicial systems. As Saif himself said:

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

III. CONCLUSION

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

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

189. See Rome Statute, supra note 8, at 2 (“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . .”).
190. See Defence Response, supra note 167, ¶¶ 6–8.
more difficult for a Libyan domestic court to convict Saif and therefore, meets the Article 17(2) requirements for the ICC to declare Libya “unwilling” to prosecute. The ICC has proper grounds to deem Saif’s case admissible and must do so if it is to retain its legitimacy as a court of international significance.