American University International Law Review

Volume 33 | Issue 1 Article 2

2017

Beyond a Flawed Trial: ICC Failures to Ensure International Standards of Fairness in the Trials of Former Libyan Regime Members

Mark S. Ellis
International Bar Association, London

BEYOND A FLAWED TRIAL: ICC FAILURES TO ENSURE INTERNATIONAL STANDARDS OF FAIRNESS IN THE TRIALS OF FORMER LIBYAN REGIME MEMBERS

MARK ELLIS*

* Dr. Mark. S. Ellis is Executive Director of the International Bar Association, London. He would like to thank Mariya Pejkova and Gabriella Carpentieri for their excellent assistance in preparing this article. Dr. Ellis is the author of the report *TRIAL OF THE LIBYAN REGIME: AN INVESTIGATION INTO INTERNATIONAL FAIR TRIAL STANDARDS* (Int'l Bar Ass'n 2015).

I. INTRODUCTION

In February 2011, the U.N. Security Council passed a resolution[1] referring the situation in Libya to the International Criminal Court (ICC). On March 3, 2011, after conducting a preliminary investigation, the ICC Prosecutor concluded that there was a reasonable basis to believe that crimes under the ICC's jurisdiction had been committed in Libya and decided to open a full investigation.[2] Pursuant to the U.N. referral, and at the Prosecutor's request, the Pre-Trial Chamber I issued arrest warrants for Colonel Muammar Gaddafi,[3] Saif-Al Islam Gaddafi,[4] and Abdullah Al-

1. S.C. Res. 1970, (Feb. 26, 2011).

2. Prosecutor v. Gaddafi, Case No. ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ¶ 2 (June 27, 2011) [hereinafter Prosecutor v. Gaddafi, Prosecutor's Application], https://www.icc-cpi.int/CourtRecords/CR2011_08499.PDF.

3. Prosecutor v. Gadafi, Case No. ICC-01/11, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, Case No. ICC-01/11-13 (June 27, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_08351.PDF.

4. Prosecutor v. Gaddafi, Case No. *ICC-01/11-14,* Warrant of Arrest for Saif-Al Islam Gaddafi, (June 27, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_08353.PDF.

Senussi[5] on charges of crimes against humanity, including persecution and murder, allegedly committed between February 15, 2011 and at least February 28, 2011, in contravention of Article 7(1)(a) of the Rome Statute.[6] The court terminated proceedings against Colonel Muammar Gaddafi on November 22, 2011, after he was captured and killed by National Transitional Council (NTC) forces on October 20, 2011.[7]

Following an admissibility challenge by the Libyan authorities, who sought to hold the proceedings against Saif Al-Islam Gaddafi in Libya,[8] Pre-Trial Chamber I rejected the challenge and ruled that the case against Saif Al-Islam Gaddafi was admissible before the ICC.[9] The Chamber concluded that, "Libya had fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, that Libya's domestic investigation covered the same case that is before the ICC."[10] The Chamber also underlined the Government's inability to secure Saif Al-Islam Gaddafi's transfer to state custody and the significant impediments to guaranteeing his legal representation given the security situation in Libya.[11] The Appeals Chamber confirmed the Pre-Trial Chamber I

5. Prosecutor v. Gadafi, Case No. *ICC-01/11-01/11-4,* Warrant of arrest for Abdullah Al-Senussi, (June 27, 2011), *https://www.icc-cpi.int/CourtRecords/CR2011_08507.PDF.*

6. U.N. Support Mission Libya & U.N. High Comm'r Human Rights, Report on the Trial of 37 Former Members of the Qadhafi Regime, 19, Case 630/2012, (Feb. 21, 2017) [hereinafter Qadhafi Regime Report].

7. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, (Nov. 22, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_19969.PDF.

8. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute (May 1, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_05322.PDF.

9. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶ 219 (May 31, 2013), *https://www.icc-cpi.int/CourtRecords/CR2013_04031.PDF (stating that there is no evidence to demonstrate Libya's genuine capacity to investigate Gaddafi and no overlap between the conduct being investigated in Libya and the ICC).*

10. *Id.* ¶ 135.

11. *Id.* ¶¶ 174-75, 205-07, 212-15; *see* Qadhafi Regime Report, *supra* note 6, at 11-2 (explaining that Libya's failure to secure legal representation, to capture and surrender Qadhafi, and judicial system deficiencies further support the Pre-Trial Chamber I determination to prosecute).

decision on May 21, 2014.[12]

Libya then filed a second admissibility challenge concerning the proceedings against Abdullah Al-Senussi.[13] Pre-Trial Chamber I issued a diverging decision and ruled that the case against Al-Senussi was inadmissible,[14] according to the principle of complementarity enshrined in the Rome Statute.[15] It found that Mr. Al-Senussi was subject to domestic proceedings in Libya,[16] and that Libya was willing and genuinely able to carry out such proceedings.[17] The Appeals Chamber confirmed the decision on July 24, 2014.[18] The

12. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 4, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013, ¶ 215 (May 21, 2014), *https://www.icc-cpi.int/CourtRecords/CR2014_04273.PDF.*

13. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the ICC Statute, (Apr. 2, 2013) [hereinafter Prosecutor v. Gaddafi, Libya Abdullah Al-Senussi Application], https://www.icc-cpi.int/CourtRecords/CR2013_02635.PDF.

14. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi (Decision on Abdullah Al-Senussi), ¶ 311 (Oct. 11, 2013), https://www.icc-cpi.int/CourtRecords/CR2013_07445.PDF.

15. Rome Statute of the International Criminal Court pmbl., art. 1, July 17, 1998.

16. *See* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on Abdullah Al-Senussi, ¶ 311 (referring to the start of domestic proceedings later held in Libya between March 2014-July 2015, in which the Court of Assize in Tripoli tried and sentenced Saif Al-Islam Gaddafi, Abdullah Al-Senussi, and thirty-seven other pro-Gaddafi regime officials).

17. *Contra* Hilmi M. Zawati, *Prosecuting International Core Crimes Under Libya's Transitional Justice: The Case of Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, *in* JUSTICIABILITY OF HUMAN RIGHTS LAW IN DOMESTIC JURISDICTIONS *217, 252-53* (Alice Diver & Jacinta Miller eds., 2016) (criticising the Pre-Trial Chamber's conclusion that Libya was willing and genuinely able to carry out proceedings in the case of Al-Senussi, despite Libya's clear violations of Al-Senussi's due process rights including: depriving him of the right to appear before a judge without undue delay; the failure to provide him with legal representation; the lack of independence and impartiality of the Libyan judicial system; Libya's lack of control over detention facilities; and the lack of security and witness protection impeding testimonies in the case of Al-Senussi.)

18. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on the Admissibility of the Case Against Abdullah Al-Senussi" (Judgement on Al-Senussi Appeal), ¶ 299 (July 24, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_06755.PDF.

Pre-Trial Chamber officially closed the case on August 7, 2014.[19]

In assessing Libya's willingness to prosecute under the Rome Statute, the court held that for violations of a suspect's due process rights to amount to "unwillingness," they must be "so egregious," that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect, so that such proceedings are deemed to be "inconsistent with an intent to bring the person to justice" for the purposes of Article 17(2).[20] The court did not give any definitive examples of what would constitute an "egregious violation" in this context, but it certainly made clear that the due process violations in Mr. Al-Senussi's case had failed to meet that threshold.[21]

This article argues that the ICC made two critical errors in the trial of Al-Senussi. The first is that the Appeals Chamber set an unreasonably high threshold in assessing whether violations of due process rights render a state "unwilling" to prosecute.[22] The approach adopted by the Appeals Chamber in the *Al-Senussi* case will likely undermine respect for due process rights in domestic trials, and further delegitimize the ICC in the eyes of the public.[23] As the court is currently struggling to emerge from a legitimacy crisis following the withdrawal of several African Union States (e.g., South Africa, Gambia, Burundi),[24] there is a risk that it will be perceived as an institution that condones the infringement of due process rights.

The second error in the *Al-Senussi* case is that the Prosecutor

19. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision Following the Declaration of Inadmissibility of the Case Against Abdullah Al-Senussi Before the Court (Declaration of Inadmissibility Decision), ¶ 6 (Aug. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_06968.PDF.

20. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgement on Al-Senussi Appeal, ¶¶ 3, 190, 230(3).

21. *Id.* ¶ 231 (noting that despite the absence of a clear definition for "egregious," the Pre-Trial Chamber correctly found that alleged violations of due process rights are not "per se" grounds for finding unwillingness or inability).

22. *Id.* (agreeing with the Pre-Trial Chamber's emphasis on scenarios described in 17(2) or (3) of the Rome Statute as relevant indicators of unwillingness or inability when paired with sufficient evidence).

23. *See infra* p. 88.

24. Aaron Maasho, *African Leaders Cautiously Back Strategy to Quit Global Court*, REUTERS AFRICA (Feb. 1, 2017, 11:50 AM), http://af.reuters.com/article/topNews/idAFKBN15G49S.

mistakenly relied on the Appeals Chamber decision and, subsequently, failed to challenge the admissibility judgment on grounds that new evidence shows that the defendant's rights were severely compromised.[25]

In a statement to the author, the Prosecutor stated that,

> The Office is mindful of the Appeals Chamber's ruling that "in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated" and instead, "what is at issue is whether the State is willing genuinely to investigate or prosecute."[26]

The Prosecutor reiterated this position to the author during a meeting and stated that the Appeals Chamber's ruling allows the Prosecutor to rely on a test of "genuineness of the prosecution" and "not the fundamental rights of the suspect or accused."[27] The Prosecutor maintained that respecting the sovereignty of states requires a "flexible" position regarding what constitutes due process at the national level and fair trial standards at the international level.[28]

However, the court's interpretation of Article 17 of the Rome Statute, as well as the Prosecutor's failure to reverse her earlier position on admissibility, is extremely harsh. Both errors are untenable in light of new evidence at hand.[29]

---

25. MARK S. ELLIS, SOVEREIGNTY AND JUSTICE: BALANCING THE PRINCIPLE OF COMPLEMENTARITY BETWEEN INTERNATIONAL AND DOMESTIC WAR CRIMES TRIBUNALS 9 (2014) [hereinafter ELLIS, SOVEREIGNTY AND JUSTICE].

26. *See* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgement on Al-Senussi Appeal, ¶ 190, 219 (noting that the Prosecutor also recalled the words of the Appeals Chamber's judgment to affirm that "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."); INTERNATIONAL CRIMINAL COURT—OFFICE OF THE PROSECUTOR, THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE ¶ 49 (2003).

27. Interview with Prosecutor, in the Hague (June 29, 2016).

28. *Id.*

29. *See infra* Section III.

II. ICC SUPPORT FOR THE PROSECUTION OF AL-SENUSSI AT THE STATE LEVEL

Despite concerns regarding Libya's justice system, the ICC Office of the Prosecutor (OTP), from the outset, supported Libya's insistence to try Saif Al-Islam Gaddafi and Al-Senussi.[30] During his November 2011 visit to Tripoli, Prosecutor Luis Moreno-Ocampo, the ICC's first Prosecutor, acknowledged and supported Libya's NTC demands to undertake domestic trials:[31]

> The standard of the ICC is that it has to be a judicial process that is not organized to shield the suspect . . . and I respect that it's important for the cases to be tried in Libya . . . and I am not competing for the case.[32]

As argued by Mark Kersten, Ocampo seemingly set aside "the orthodox standard of complementarity, whereby a state has to convince the ICC judges that it is actively able and willing to prosecute the same individuals for the same crimes."[33] Instead, as argued by the Office of Public Counsel for the Defence (OPCD), Ocampo implicitly endorsed the position of the NTC, explaining that "[t]hey are proud, they say to me that for them it's a matter of national pride to show that Libyans can do the case, . . . They will show they are able to prosecute Saif."[34]

At a later date, the Prosecutor also reinforced his bias in favor of domestic prosecution by stating that, "Libya has now established its

30. *See* MARK KERSTEN, JUSTICE IN CONFLICT: THE ICC IN LIBYA AND NORTHERN UGANDA 188 (2014) (referring to OTP's position as "unprecedented leniency").

31. *See id.* (reinforcing the idea that Moreno-Ocampo's willingness to allow Libya to try Saif and Senussi is further evidence of the OTP siding with Libya in an unprecedented way).

32. Caroline Hawley, *Ocampo: Saif Al-Islam Case is Huge Responsibility for Libya*, BBC (last visited July 6, 2017), http://www.bbc.com/news/av/world-africa-15866040/ocampo-saif-al-islam-case-is-huge-responsibility-for-libya.

33. Kersten, *supra* note 30, at 188.

34. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Request to Disqualify the Prosecutor from Participating in the Case Against Mr. Saif Al Islam Gaddafi, ¶ 59 (May 3, 2012) [hereinafter Prosecutor v. Gaddafi, Request to Disqualify the Prosecutor], https://www.icc-cpi.int/CourtRecords/CR2012_05388.PDF.

government. They have the right to prosecute Saif and Senussi here. According to our role, the primacy is for national jurisdictions. If they conduct proceedings, the Court will not intervene."[35]

Indeed, Libyan officials publicly stated their belief that the ICC Prosecutor had endorsed their position vis-à-vis the court, and that his collaboration helped achieve their objective.[36]

It seems clear that the OTP "shifted its focus" from seeking custody of Gaddafi and Al-Senussi to framing the court's role in Libya as contributing to "positive complementarity."[37] Positive complementarity not only denotes the court's deference to national criminal jurisdictions, but also compels the ICC to work actively to enhance the capacity of national justice mechanisms to prosecute crimes in a way that fulfills obligations under the Rome Statute.[38] "In contemporary practice 'positive' complementarity is mainly seen as a tool to take complementarity 'back to states.'"[39]

In this context, Ocampo insisted that the "ICC is still providing an important service, because we will ensure justice in Libya, whoever will do it."[40] Moreover, Ocampo appeared on numerous occasions with NTC leaders, reaffirming the perception that his role was to provide support for, rather than compete with, Libya.[41] He stated that

35. *Id.*

36. *Id.* ¶¶ 60-62 (explaining how the impact of the Prosecutor's participation and collaboration in press conferences changed the perception as to whom should try the case).

37. Kersten, *supra* note 30, at 189.

38. *See* Carsten Stahn, *Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical', 'Positive' and 'Negative' Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 1, 24 (Carsten Stahn & Mohamed El Zeidy eds., 2011) (stating that the ICC mandate identifies ways for the ICC to play a limited role in strengthening domestic courts to combat states' "inability" to engage in domestic prosecutions).

39. *Id.* at 21.

40. Till Papenfuss, *Interview with Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court*, IPI GLOBAL OBSERVATORY (Jan. 25, 2012), https://theglobalobservatory.org/2012/01/interview-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court/.

41. *Saif al-Islam Gaddafi can face trial in Libya - ICC*, BBC (Nov. 22, 2011), http://www.bbc.com/news/world-africa-15831241; *see also* ICC Office of the Prosecutor, *Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps The Hague, Netherlands 12 February 2004*, 1 (Feb. 12, 2004) (identifying the Prosecutor's positive approach to complementarity, and affirming that "[r]ather

"the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[42]

Ocampo's position was consistent with the Prosecutorial Strategy of 2009–2012, which adopted a "proactive policy" to encourage "genuine national proceedings where possible, including in situation countries."[43]

Current Chief Prosecutor, Fatou Bensouda, has expressed the same sentiment.[44] Bensouda followed Ocampo's lead by declaring that the prosecution of Gaddafi and Al-Senussi in Libya would be the country's "Nuremberg Movement," implying that Libya should conduct the trials and, consequently, "seal the primacy of the rule of law, due process and human rights for future generations."[45] She later declared that the court would continue to "work with the government in trying to address as many cases as possible" and that "Libya through its active involvement in related proceedings before the Court is setting an example of how states can invoke complementarity to protect their sovereign right to investigate and prosecute their nationals."[46]

In line with its focus on positive complementarity, the ICC has exhibited a tendency to focus more on its role and ability to catalyze

---

than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible.").

42. Luis Moreno-Ocampo, Chief Prosecutor, ICC, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, 2 (June 16, 2003).

43. ICC OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY 2009-2012 at 5 (2010); *see also* ICC OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY 5 (2006) (empahisizing that the OTP adopted a positive approach to complementarity by which the Office "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.").

44. *See* ICC OFFICE OF THE PROSECUTOR, STRATEGIC PLAN 2016-2018 (2015) (continuing the policy to support and domestic proceedings when possible).

45. Fatou Bensouda, Prosecutor of the ICC, Speech in New York, *Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)*, ¶ 11 (May 8, 2013).

46. *See* Fatou Bensouda, Prosecutor of the ICC, Speech in New York, *ICC Prosecutor Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)*, (Nov. 14, 2013).

domestic prosecutions, rather than ensuring adherence to international standards of fairness at the domestic level.[47] The problem is that the ICC's endorsement of positive complementarity never really envisaged domestic trials of an irregular and dysfunctional nature, where the accused might suffer due process violations.[48] The drafters of the Rome Statute were much more concerned about states shielding former leaders from accountability.[49] In reality, however, many states are all too willing to prosecute members of a former regime.[50] This is the "shadow side to complementarity."[51]

Not surprisingly, other organs of the court disagreed with the OTP's approach.[52] The OPCD questioned the Prosecutor's acquiescence to Libya's desire to prosecute Gaddafi and Al-Senussi.[53] The OPCD also took issue with Ocampo's public comments and appearances with NTC members. In May 2012, the

47. *See* Mark Kersten, *Hold Your Horses, ICC Complementarity*, JUSTICE IN CONFLICT (June 21, 2016), https://justiceinconflict.org/2016/06/21/hold-your-horses-icc-complementarity/ (considering the effects of the ICC's turn toward positive complementarityin supporting state action).

48. Nidal Nabil Jurdi, *The Complementary Regime of the International Criminal Court in Practice: Is It Truly Serving the Purpose? Some Lessons from Libya*, 11 LEIDEN J. INT'L L. 199, 210 (2017) (reinforcing the idea that the international community initially perceived positive complementarity to be based on two pillars: respect for the primary jurisdiction of states to domestically prosecute international crimes, and considerations of efficiency and effectiveness).

49. *See id.* (explaining that, for example, the British proposal within the Preparatory Committee of the Rome Statute advocated for allowing the ICC to consider aspects of fairness in the domestic proceedings revealing an emerging consensus on the Committee tolimitthe role of the ICC to only cases where national authorities were carrying out or had carried out 'sham' proceedings' intended to shield criminals from accountability).

50. *See* Frédéric Mégret & Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials*, 11 J. INT'L CRIM. JUST. 571, 572 (2013) (considering the case of Saif Al-Islam Gaddafi and Abdullh Al-Senussi as prime examples of a state being "too willing" to prosecute).

51. Kevin J. Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. F. 255, 255 (2006) (referring to the low likelihood that former members' due process rights will be respected in national proceedings).

52. Prosecutor v. Gaddafi, Request to Disqualify the Prosecutor, *supra* note 34, ¶ 27.

53. *Id.* ¶ 28.

OPCD filed a motion with the ICC's Appeals Chamber to disqualify Ocampo from the Libyan case due to "an objective appearance that the Prosecutor is affiliated with both the political cause and legal positions of the NTC government."[54] Although the motion was unsuccessful, the Appeals Chamber issued a scathing ruling, claiming that,

> [The Prosecutor's] behavior was clearly inappropriate in light of the presumption of innocence. Such behavior not only reflects badly on the Prosecutor but also, given the Prosecutor is an elected official of the Court and that his statements are often imputed to the Court as a whole, may lead observers to question the integrity of the Court as a whole.[55]

The Prosecutor's attitude toward the *Al-Senussi* case, at least publicly, was therefore an extension of the OTP's championship of positive complementarity. By encouraging Libya's domestic proceedings despite dramatic evidence of flaws in the system, the OTP weakened accountability for crimes in Libya and contributed to the ICC's ongoing legitimacy crisis.

III. APPEALS CHAMBER JUDGMENT IN PROCEEDINGS AGAINST ABDULLAH AL-SENUSSI

On July 24, 2014, the Appeals Chamber upheld Pre-Trial Chamber I's earlier decision that the case against Abdullah Al-Senussi was inadmissible.[56] In its reasoning, the Appeals Chamber concentrated on the meaning of "unwillingness" as defined by Article 17(2) of the Rome Statute.[57]

Taking into account the text, context, object, and purpose of Article 17(2), the Appeals Chamber held that a determination of unwillingness derives from proceedings which are "being conducted

54. Prosecutor v. Gaddafi, Request to Disqualify the Prosecutor, *supra* note 34, ¶ 28.

55. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 3, Decision on the Request for Disqualification of the Prosecutor, ¶ 33 (June 12, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_06724.PDF.

56. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr Abdullah Al-Senussi, ¶ 299.

57. *Id.* ¶ 218.

in a manner . . . inconsistent with an intent to bring the person concerned to justice" as set out in Article 17(2)(c) of the Rome Statute and is not one that involves an assessment of whether the due process rights of a suspect have been breached per se.[58]

The Appeals Chamber argued that "unwillingness" should generally be understood as a state's lack of genuine willingness to investigate or prosecute, such that proceedings might lead to a suspect evading justice.[59] This is provided for specifically in Article 17(2)(a), according to which the court shall consider whether the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility.[60]

The Appeals Chamber also argued that although human rights standards may assist the court in its evaluation of the criteria described in Article 17(2)(c) (e.g., "conducted independently and impartially," "an intent to bring the person concerned to justice"), the primary focus is not whether the suspect's rights have been violated, but whether the domestic proceedings are being conducted in a manner that might permit a suspect to evade justice.[61] To be fair, despite the court's view that there is an absence of formal "fair trial" or "due process" requirements in the text of the Rome Statute, it did not completely sever the link between fair trial requirements and admissibility challenges.[62]

It is true that the court characterized a state challenge to ICC admissibility as "primarily a question of forum" focused on "the relationship between [s]tates and the court."[63] However, the Appeals Chamber agreed that the lack of "due process" requirements "does not mean 'that the court must turn a blind eye to clear and conclusive evidence demonstrating that national proceedings completely lack fairness.'"[64] In fact, the court considered a spectrum of unfair

58. *Id.* ¶ 230(2).
59. *Id.* ¶ 218.
60. *Id.*
61. *See* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr Abdullah Al-Senussi, ¶¶ 220-21 (indicating that the provision is not primarily concerned with whether the rights of the suspect are being violated).
62. *Id.*
63. *Id.* ¶ 169.
64. *Id.* ¶ 229.

proceedings that it could not countenance finding inadmissible in the context of Article 17(2)(c):

> At its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations 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.[65]

Thus, the court did envisage an exception; a threshold at which due process violations would be "so egregious" that one can realistically say there is no "genuine form of justice" and which would thus compel a finding of unwillingness to prosecute at the domestic level.[66] In essence, depending on the facts of the individual case, there may be circumstances whereby violations of a suspect's rights are *so* egregious that the proceedings can no longer be regarded as providing any genuine form of justice. In these circumstances, the case would be "inconsistent with an intent to bring the person to justice."[67]

However, the court's understanding of egregious violations is still unclear and contestable. In its decision, the court provided no clear example of the type of violations that would qualify as "egregious" for the purposes of admissibility proceedings.[68] Yet, it still determined that the alleged violations of due process rights in Al-Senussi's case were not sufficiently "egregious" to suggest Libya's unwillingness to prosecute.[69] Considering the due process violations that occurred during the Libyan trials, as outlined below, the

65. *Id.* ¶ 230.

66. *Id.* ¶ 230

67. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr Abdullah Al-Senussi, ¶ 3.

68. *See* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr Abdullah Al-Senussi, ¶ 230 (asserting that finding violation to be egregious will depend on the facts).

69. *Id.* ¶ 191 (arguing that while a lack of access to counsel may be a violation of Al-Senussi's rights, it does not meet the threshold needed to prove Libya is unwilling to prosecute).

threshold used by the court was either too high or the facts of the case were improperly evaluated.[70]

When the court ruled the *Al-Senussi* case inadmissible, it had knowledge of early indications that the fairness of the trial process was questionable, including the lack of counsel for Al-Senussi.[71] The Appeals Chamber did accept that this could potentially undermine the fairness of the proceedings in the future.[72]

As noted below, "the future" envisioned by the Appeals Chamber in its judgment on admissibility has now fully materialized.[73] Yet, the ICC Prosecutor has failed to exercise the power conferred on her by the Rome Statute to renew the court's admissibility decision.[74]

IV. DOMESTIC PROCEEDINGS: NEW EVIDENCE OF EGREGIOUS DUE PROCESS VIOLATIONS

Between March 2014 and July 2015, thirty-seven Gaddafi-era officials, including Saif Al-Islam Gaddafi and Abdullah Al-Senussi, were tried on charges of war crimes and other offences.[75] Both Gaddafi and Al-Senussi (and several other defendants) were sentenced to death at Tripoli's Court of Assize, following what the international community has characterized as an unfair trial.[76]

---

70. *See infra* Part III (detailing due process violations including lack of transparency during the proceedings, lack of access to adequate legal representation, and insufficient security).

71. *See* Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr Abdullah Al-Senussi, ¶ 190 (accepting the fact that there had been a problem finding Mr. Al-Senussi proper legal counsel but rejecting the argument that a lack of counsel renders the entire proceeding prejudiced).

72. *Id.* ¶ 198.

73. *See infra* Part III.

74. *See* Rome Statute of the International Criminal Court, *supra* note 15, art.19(10) ("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 the case had previously been found inadmissible under article 17.").

75. *See generally* Qadhafi Regime Report, *supra* note 6, at 18 (describing the trial process of former Gaddafi officials).

76. *See* Human Rights Watch, *Libya: Flawed Trial of Gaddafi Officials: Defendants Alleged Limited Access to Lawyers, Ill-Treatment*, (July 28, 2015, 5:49 AM) [hereinafter *Libya: Flawed Trial of Gaddafi Officials*], https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials (calling for the Supreme Court of Libya to "fully review the verdict" and "overturn the death sentences"

Subsequent reports and investigations into the fairness of the domestic trial proceedings revealed that defendants' due process rights were severely compromised and that the trials failed to comply with international human rights law.[77] Even though independent observation had been limited from the outset, relevant reports highlighted that the justice system in Libya was generally "dysfunctional" and "ineffective," and the regime trials were marked by serious violations of due process.[78]

Lack of transparency was one of the major flaws in the trial process. International fair trial standards require hearings to be public, to ensure transparency of proceedings and serve as a safeguard for defendants.[79] However, an in-depth review of trial procedures by the International Bar Association (IBA), found several obstacles that created a de facto barrier to public access.[80] "Security guards in the court complex had wide, if not unchecked, discretion to deny entry" into the specially designated courtroom in the Al-Hadba Corrections Facility in Tripoli.[81] Lawyers informed the United Nations Support Mission in Libya (UNSMIL) that the presence of prison guards in the courtroom created an intimidating atmosphere, which deterred defendants from raising concerns regarding their

based on allegations of unfair trial practices).

77. International Bar Association, *New Report Finds Libyan Regime Trial Compromised*, (Nov. 30, 2015), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=759f1431-4e10-450d-998e-21349fd8bf26.

78. *See* Amnesty International, Libya 2016/2017, (last visited July 19, 2017), https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya (reporting on the general collapse of the justice system marked with inefficiency and high numbers of pre-trial detainees); *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76 (detailing the human rights violations obscuring the trial process).

79. *See* Human Rights Committee, *General Comment No. 32*, ¶ 28, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) ("[A]ll trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of the society at large."); *Libya: Flawed Trial of Gaddafi Officials*, supra note 76.

80. MARK S. ELLIS, TRIAL OF THE LIBYAN REGIME: AN INVESTIGATION INTO INTERNATIONAL FAIR TRIAL STANDARDS 17 (2015) [hereinafter TRIAL OF THE LIBYAN REGIME].

81. *Id.* at 17.

treatment and other abuses in detention,[82] in addition to dissuading some lawyers from visiting their clients more frequently.[83] The fact that trials were being held in a courtroom created inside a compound controlled by an armed group also discouraged defense witnesses from coming forth and giving testimony in favor of senior former regime officials.[84]

Moreover, both domestic and international NGOs were often either expressly barred from entering, or were later rejected access by security personnel after previous visits.[85] For instance, Human Rights Watch and Amnesty International reportedly attended only one trial session and were not allowed to observe additional sessions by prison authorities.[86] Two representatives from the NGO No Peace Without Justice were asked to leave the court while attending a hearing in March 2015, then escorted out of the courtroom and held in a nearby building where they were questioned for several hours before being released later that day.[87]

Observers from UNSMIL were the only members of the public allowed in the courtroom for the first two sessions.[88] In May 2014, an international U.N. staff member was briefly detained by the authorities at the Al-Hadba Corrections Facility on "allegations of sorcery."[89] In response, UNSMIL briefly suspended its trial

82. Qadhafi Regime Report, *supra* note 6, at 21, 40.

83. *Id.* at 40.

84. *Id.* at 22 (finding that members of the Libyan Islamic Fighting Group, which opposed the Gaddafi regime prior to the 2011 uprising as well as during the war, are currently mostly members of an armed group called 'National Guard,' which physically controls the Al-Hadba compound).

85. *See Trial of The Libyan Regime*, *supra* note 80, at 19; *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

86. Amnesty International, *ICC Decision to Allow Abdallah Al-Senussi to Stand Trial in Libya 'Deeply Alarming' Amidst Security Vacuum*, (July 24, 2014), https://www.amnesty.org/en/documents/ior53/008/2014/en/; *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

87. Qadhafi Regime Report, *supra* note 6, at 35.

88. *Id.* at 5 ("UNSMIL monitored Case 630/2012 from the pre-trial phase until the first instance verdict was delivered in July 2015. UNSMIL staff attended in person the first six hearings").

89. Amnesty International, *ICC Decision to Allow Abdallah Al-Senussi to Stand Trial*, *supra* note 86; *see also* Qadhafi Regime Report, *supra* note 6, at 35.

observations. [90] On another occasion, an UNSMIL staff member was arbitrarily asked to leave the courtroom.[91] In July 2014, UNSMIL temporarily withdrew from Libya, citing security concerns.[92] Having relocated in Tunis, the UN Mission continued to monitor the trial remotely via television broadcasts, although programming was sometimes interrupted and the hearings were often not transmitted in their entirety.[93]

As reported by Human Rights Watch, foreign journalists covering the trial reported that they were sometimes refused access to Al-Hadba,[94] and that the process for obtaining permission to enter the trial facility was opaque and subject to frequent changes.[95] Some foreign and Libyan female journalists were denied access altogether,[96] or were asked to cover their heads as a condition of entry into the facility.[97] The Libyan authorities only allowed news networks considered sympathetic to the government in Tripoli, including Al Jazeera and the local al-Nabaa television station, to broadcast trial sessions live.[98]

Despite the shroud of secrecy surrounding the trial proceedings, concerns of due process violations were expressed by a number of entities, including: The Office of the UN High Commissioner for Human Rights,[99] UNSMIL,[100] Human Rights Watch,[101] Amnesty

90. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.
91. Qadhafi Regime Report, *supra* note 6, at 35.
92. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.
93. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76; *see Trial of The Libyan Regime*, *supra* note 80, at 18 (explaining that Libyan law deems a trial "open" if it is broadcast but noting that most broadcasts are limited or interrupted).
94. *Libya: Flawed Trial of Gadhafi Officials*, *supra* note 76.
95. *Id.*
96. *Id.*
97. Qadhafi Regime Report, *supra* note 6, at 35.
98. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.
99. *See* UN News Centre, *UN Human Rights Officials Seriously Concerned by Verdicts in Trial of Former Members of the Gaddafi Regime*, (July 28, 2015), http://www.un.org/apps/news/story.asp?NewsID=51514#.WWFqIsaZOqA (expressing concern that some defendants were missing from some sessions and that there was no effort to establish individual criminal responsibility through evidence).
100. *See* United Nations Support Mission in Libya, *Concerns About Verdict in Trial of Former Qadhafi-Era Officials,* (July 28, 2015), https://unsmil.unmissions.org/concerns-about-verdict-trial-former-qadhafi-era-officials

International,[102] the IBA,[103] the International Commission of Jurists,[104] No Peace Without Justice,[105] and Lawyers for Justice in Libya.[106]

A. LACK OF EFFECTIVE AND COMPETENT DOMESTIC LEGAL REPRESENTATION

Even with limited independent observation of the trials, it was clear that Al-Senussi did not receive any meaningful legal representation.[107] Based on a number of relevant reports, limited

(expressing concern regarding defendants being denied access to lawyers for prolonged periods of time).

101. *See Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76 (calling for a Libyan Supreme Court review of the proceedings to reveal possible unfair trial practices).

102. *See* Amnesty International, *Libya: Flawed Trial of Al-Gaddafi Officials Leads to Appalling Death Sentences*, (July 28, 2015, 12:24 PM), https://www.amnesty.org/en/latest/news/2015/07/libya-flawed-trial-of-al-gaddafi-officials/ (expressing concern over the defense counsel's inability to cross-examine witnesses and limited ability to call witnesses).

103. *See* International Bar Association, *Libya's Trial of Former Regime Members Prompt Serious Concern*, (July 28, 2015), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=3eedd48e-d005-411e-b237-1794e56e22cf (expressing concern about the lack of transparency that occurred during the proceedings).

104. *See* International Commission of Jurists, *Libya: Unfair Trial of Saif Al-Islam Gadhafi and Others a Missed Opportunity to Establish Truth, Violates Right to Life*, (July 28, 2015), https://www.icj.org/libya-unfair-trial-of-saif-al-islam-gadhafi-and-others-a-missed-opportunity-to-establish-truth-violates-right-to-life/ (expressing concern that the fair trial guarantees required by Article 14 of the International Covenant on Civil and Political Rights were not adequately respected).

105. *See* No Peace Without Justice, *Libya's Missed Opportunity: Flawed Penalties Follow Flawed Trials*, (July 28, 2015), http://www.npwj.org/ICC/Libya's-missed-opportunity-flawed-penalties-follow-flawed-trials.html (indicating that due process was violated by not allowing defendants access to lawyers).

106. Lawyers for Justice In Libya, *LFJL is Concerned that the Absence of Fair Trial Standards During the Gaddafi Official Trials Will Jeopardize the Right of Victims to Justice*, (July 29, 2015), http://www.libyanjustice.org/news/news/post/201-lawyers-for-justice-in-libya-lfjl-is-concerned-that-the-absence-of-fair-trial-standards-during-gaddafi-official-trials-will-jeopardise-the-right-of-victims-to-justice (expressing concern about the transparency of the proceedings and their inaccessibility to independent observers).

107. *See* Qadhafi Regime Report, *supra* note 6, at 36-37 (detailing accounts of defendants' limited access to counsel, attempts to intimidate counsel, and counsel

access to counsel, intermittent legal representation, lack of access to defense files, and lack of sufficient time to prepare a defense and present witnesses significantly undermined the fairness of Al-Senussi's proceedings.[108]

Despite the fact that Al-Senussi was charged with serious crimes that stipulated the death penalty, he had no legal representation during his interrogation and pre-trial hearing.[109] Full respect for fair trial guarantees is even more important when the imposition of the capital penalty is at stake.[110] In this regard, the United Nations Human Rights Committee stated that:

> [i]n cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provision of Article 14 of the Covenant [ICCPR] have not been respected, constitutes a violation of the right to life (Article 6 of the Covenant).[111]

The Committee further specified that, "in cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings."[112] Yet, under Libya's own Code of Criminal Procedure (Article 54 of the Libyan Prisons Law No. 47), the state must allow a detainee access to a

---

having limited access to witnesses and evidence).

108. *Id.*; *see* Human Rights Watch, *Libya: Ensure Abdallah Sanussi Access to Lawyer: Gaddafi's Intelligence Chief Discusses Jail Conditions, Concern*, (Apr. 17, 2013, 5:41 AM), https://www.hrw.org/news/2013/04/17/Libya-ensure-abdallah-sanussi-access-lawyer (noting that Al-Senussi requested a lawyer almost immediately after returning to Libya).

109. Human Rights Watch, *Libya: Gaddafi Son, Ex-Officials, Held Without Due Process*, (Feb. 13, 2014, 12:00 AM), https://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process.

110. INTERNATIONAL BAR ASSOCIATION, THE DEATH PENALTY UNDER INTERNATIONAL LAW: A BACKGROUND PAPER TO THE IBAHRI RESOLUTION ON THE ABOLITION OF THE DEATH PENALTY 4 (2008).

111. Human Rights Committee, *supra* note 79, ¶ 59.

112. *Id.* ¶ 38; *see* Aliev v. Ukraine, 44 Eur. Ct. H.R. ¶ 7.3 (2003); Human Rights Committee, Aliboeva v. Tajikistan, ¶ 6.4, U.N. Doc. CCPR/C/85/D/985/2001 (2005); Human Rights Committee, Saidova v. Tajikistan, ¶ 6.8, U.N. Doc. CCPR/C/81/D/964/2001 (July 8, 2004); Human Rights Committee, LaVende v. Trinidad and Tobago, ¶ 58, U.N. Doc. CCPR/C/61/D/554/1993 (Nov. 17, 1997).

lawyer during an investigation if the detainee requests one.[113] However, Al-Senussi and other former Gaddafi officials' right to legal assistance before Libyan courts was not adequately protected in law or in practice, allowing pre-trial interrogations to proceed without the presence of a defense lawyer.[114]

During a prison visit by Human Rights Watch at the Tripoli Al-Hadba Corrections Facility on April 15, 2013, Al-Senussi revealed that he had no access to a lawyer after being extradited from Mauritania in September 2012.[115] Al-Senussi himself reported that he had been taken before a judge about once a month to review his detention, and each time the judge extended his detention.[116] At each appearance, Al-Senussi asked the judge for a lawyer.[117] Al-Senussi consistently alleged that he did not have a lawyer for his pre-trial hearings.[118] He told Human Rights Watch that during his interrogation, officials would not allow him to have a lawyer present, would not reveal his interrogators' identities, and denied him both the right to remain silent and the opportunity to review the evidence against him; all of this in violation of Article 106 of the Libyan Code of Criminal Procedure.[119]

In its admissibility decision of October 11, 2013, the ICC Pre-Trial Chamber acknowledged that up until that moment, Al-Senussi was yet to appoint—or have appointed—a lawyer in the domestic proceedings, despite the fact that he was entitled to legal representation pursuant to Article 106 of the Libyan Code of Criminal Procedure.[120] This was also patently in contrast with the Basic Principles on the Role of Lawyers pursuant to which

113. Libya Code Crim. Proc., art. 54.

114. Qadhafi Regime Report, *supra* note 6, at 37.

115. Human Rights Watch, *Libya: Ensure Abdallah Sanussi Access to Lawyer*, *supra* note 108.

116. *Id.*

117. *Id.*

118. Human Rights Watch, *Libya: Gaddafi Son, Ex-Officials, Held Without Due Process*, *supra* note 109.

119. *Id.*

120. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on Abdullah Al-Senussi, ¶¶ 232, 304 (admitting that the sensitivity of the case has created a delay in appointing a lawyer for Al-Senussi but assuring that a lawyer will be appointed by Accusation Chamber in the "very near future").

"Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention."[121]

Remarkably, Al-Senussi was unaware of the lawyer representing him in his admissibility case to the ICC.[122] Although the ICC judge had asked Libya to arrange privileged visits between Al-Senussi and his lawyers, no meeting ever took place.[123] In its submission to the ICC on April 2, 2013, Libya attributed the delay to its recent replacement of the general prosecutor and said it would address the issue of legal access for Al-Senussi "as a matter of priority."[124] However, Al-Senussi's lawyers argued before the ICC that Libya had ignored the ICC judge's order requiring a visit by the lawyers engaged to represent him.[125]

The Pre-Trial Chamber noted that,

> the problem of legal representation, while not compelling at the present time, holds the potential to become a fatal obstacle to the progress of the case. Indeed . . . according to the Libyan national justice system, trial proceedings cannot be conducted in the absence of a lawyer for the suspect.[126]

Oddly enough, although the Chamber openly acknowledged the failure of the Libyan Government to appoint an attorney to represent Al-Senussi, it did not consider that fact to be fatal to Libya's admissibility challenge.[127]

---

121. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, princ. 7 (1990), http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx.

122. Human Rights Watch, *Libya: Ensure Abdallah Sanussi Access to Lawyer*, *supra* note 108.

123. *Id.*

124. Prosecutor v. Gaddafi, Libya Abdullah Al-Senussi Application, *supra* note 13, ¶ 53.

125. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

126. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision on Abdullah Al-Senussi ¶ 307.

127. Kevin Jon Heller, *PTC I's Inconsistent Approach to Complementarity and the Right to Counsel*, OPINIO JURIS (Oct. 12, 2013, 10:43 PM), http://opiniojuris.org/2013/10/12/ptc-inconsistent-approach-right-counsel/ (noting that inconsistency affecting the Pre-Trial Chamber admissibility decisions in the

While the ICC envisaged that Al-Senussi would receive legal representation at trial, trial observers informed the IBA that Al-Senussi's representation was inconsistent.[128] It appears that "all the defendants in the case were eventually represented by defense counsel a few sessions into the trial — either retained by their families or appointed by the court."[129] The majority of the defendants complained of insufficient access to defense counsels and difficulties of confidentially consulting and communicating with their lawyers.[130] Moreover, it was impossible for several high-profile defendants to retain the same defense counsels throughout the trial, possibly due to threats and intimidation faced by those lawyers.[131] It was also reported by the IBA that Al-Senussi's original lawyer, "a well-known Libyan defense attorney, recused himself for medical reasons following a leg injury."[132]

One Tunisian lawyer representing Al-Senussi early on, Leila Ben Debba, indicated that she was "unable to obtain the accreditation from the Libyan Bar Association needed to officially meet with her clients and represent them in court. The lack of accreditation also prevented her from accessing the case materials."[133] This type of interference frequently occurs in domestic war crimes proceedings.[134] Ben Debba said she only managed to attend "a few trial sessions unofficially through personal connections."[135] She was never able to meet with Al-Senussi in private and never discussed the case with

---

Gaddafi and Al-Senussi cases is undeniable.

128. TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 34.

129. *Id.* at 33; *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

130. Qadhafi Regime Report, *supra* note 6, at 23-24, 40 (noting that the Libyan Code of Criminal Procedure allows the Public Prosecution or investigating judge to prohibit communication between the accused and other inmates or visitors, "without prejudice to the right of the accused to always contact his attorney without the presence of anyone.")

131. Id., at 3, 25 (stating that a number of defendants were not represented during hearings before the Accusation Chamber in Tripoli and that the indictment hearings before the Chamber appear to have been the first time many defendants had access to a lawyer in September and October 2013, some of whom remained without any legal representation for several hearings of the trial itself).

132. TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 34.

133. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

134. *Id.*

135. *Id.*

him.[136] When conflict broke out in Tripoli in July 2014, Ben Debba stopped traveling to Libya.[137]

Al-Senussi was eventually appointed a public defender but as reported by the IBA, he reportedly claimed that no Libyan lawyer was willing to take on his defense.[138] Allegedly, he wanted to be turned over to the ICC, or to be assigned international counsel.[139] According to reports by trial observers, Al-Senussi was appointed a counsel by the court, as his counsel of choice was not available.[140] There is no information concerning the preferences of the other defendants regarding counsel or how much time, if any, they were given to secure counsel of choice before being appointed a public defender.[141]

Moreover, there were additional issues further undermining Al-Senussi's already limited legal representation, including court authorities preventing him from speaking freely during the proceedings, and Al-Senussi inability to call in or question witnesses.[142] He also claimed that armed groups had intimidated his lawyers.[143] Al-Senussi's former lawyer Ahmed Nashad also claimed that a guard was present in the room whenever he met with his client.[144] However, he also said that "the trial was not politicized and was conducted in a normal and professional manner," and that "the Court was very accommodating to our needs."[145]

---

136. *Id.*

137. *Id.*

138. TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 34.

139. *Id.*; *see* Qadhafi Regime Report, *supra* note 6, at 38 (detailing how the security situation in Libya and the political sensitivity of the case may have limited the number of experienced lawyers willing to represent former Gaddafi-era officials, especially high-profile defendants like Al-Senussi, who subsequently expressed an interest in being tried by foreign lawyers).

140. TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 34.

141. *Id.*

142. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76; Human Rights Watch, *Libya: Gaddafi Son, Ex-Officials, Held Without Due Process*, *supra* note 109.

143. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

144. *Id.*

145. Emadeddin Zahri Muntasser, *Libyans Have Earned the Right to Justice*, HUFFINGTON POST (last visited July 20, 2017), http://www.huffingtonpost.com/emadeddin-zahri-muntasser-/libyans-justice-gaddafi_b_8005992.html.

There was a common complaint among defense lawyers participating in the trial that they lacked time to review the case materials and to identify and bring to court witnesses located in different parts of the country.[146] One of the defense attorneys affirmed that lawyers present for other defendants at trial were not able to review the more than 4,000 pages of testimony and 70,000 pages of evidence and statements submitted by the prosecution, although they had requested it.[147] Lawyers who did receive a full accusation file complained about the lack of adequate time to investigate or respond to all the prosecution's evidence.[148] During the hearings, no prosecution witnesses testified in court, whereas the defendants' right to call and examine witnesses on their behalf was hindered by the court's decision to allow only two witnesses per defendant.[149] Ahmed Nashad indicated he had not been able to secure the physical presence of any witnesses on behalf of Al-Senussi due to fear of reprisals and a lack of witness protection programs.[150] He was forced to submit several written statements from people who refused to attend the trial due to security concerns.[151]

These issues, coupled with a lack of full and timely access to the complete case file against the accused and defense concerns over lack of time to prepare and present witnesses, diminished the possibility of any meaningful legal representation for Al-Senussi.[152] In fact, on the day of the verdict, July 28, 2015, the Ministry of Justice in the government of Prime Minister Abdullah al-Thinni issued a statement calling the verdict "null and void, arguing that the judges were under duress and the defendants' conditions of detention

146. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

147. Human Rights Watch, *Libya: Gaddafi Son, Ex-Officials, Held Without Due Process*, *supra* note 109.

148. Qadhafi Regime Report, *supra* note 6, at 41.

149. *Id.* at 44.

150. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

151. *Id.*; *see also* Qadhafi Regime Report, *supra* note 6, at 45 (discussing the lawyers' concerns regarding difficulties in bringing witnesses to court, including those residing abroad or in other parts of Libya with Al-Senussi's lawyer particularly complaining that he was unable to have a witness testimony certified at the Libyan consulate in Egypt, and that the Court did not take any measures to facilitate the testimony or to ensure that the Libyan consulate in Cairo would certify it).

152. Amnesty International, *Libya: Flawed Trail of Al-Gaddafi*, *supra* note 102.

and insufficient access to lawyers" foreclosed the possibility of a fair verdict.[153] This followed a previous statement by the Minister of Justice affirming that it was impossible to issue fair and independent verdicts given the tense security situation prevailing in western Libya, which he described as under the control of armed groups.[154]

B. LACK OF SECURITY SURROUNDING THE LIBYAN JUDICIAL SYSTEM

1. Violence Surrounding Proceedings

During Al-Senussi's pre-trial hearing by the ICC, the Defense's now prescient assertion that "the pressure on the Libyan judiciary is such that the only possible outcome of national proceedings in Libya will be Mr. Al-Senussi's conviction and execution," was then deemed to be speculative and unsubstantiated.[155] Despite the fact that reports from international news media and NGOs continued to indicate that such assertions were well founded, the Appeals Chamber again refused to reconsider the Pre-Trial Chamber's factual finding on the security situation in Libya.[156] Indeed, reports from Libya amply document the government's lack of effective control over detention facilities and its inability to protect judicial staff.[157] Armed militias posed insurmountable obstacles to a fully functioning Libyan judiciary, including intimidation of witnesses and threats and acts of violence against judicial actors.[158]

As early as the Pre-Trial Chamber ruling in October 2013, Judge Van den Wyngaert worried whether Libya's security problem compromised Libya's ability to prosecute Al-Senussi through its national courts. She stated:

> I cannot help but note the widely reported abduction and release of

153. Qadhafi Regime Report, *supra* note 6, at 50.
154. *Id.*
155. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgement on Al-Senussi Appeal, ¶ 244(b).
156. *Id.* ¶¶ 276, 280-81.
157. Qadhafi Regime Report, *supra* note 6, at 9.
158. *Id.*; INTERNATIONAL COMMISSION OF JURISTS, CHALLENGES FOR THE LIBYAN JUDICIARY: ENSURING INDEPENDENCE, ACCOUNTABILITY AND GENDER EQUALITY 20 (2016).

> Libyan Prime Minister on 10 October 2013. It is unclear, at this point in time, what effect these events might have on the already precarious security situation in Libya. Further deterioration of the security situation could extend to Mr. Al-Senussi's legal proceedings, and, accordingly, affect Libya's ability to carry out those proceedings . . . Prior to ruling on the present challenge, I would have preferred to seek submissions from the parties and participants as to whether Libya's security situation remains sufficiently stable to carry out criminal proceedings against Mr. Al-Senussi.[159]

However, in a clear omission, the court did not pause to consider the significance of the abduction of the Libyan Prime Minister, which occurred the day before the court's decision.[160]

Furthermore, the Defense brought several NGO reports and media articles to the Pre-Trial Chamber's attention showing that government authorities, local prosecutors, and judges faced security threats.[161] In particular, Taha Bara, the Deputy Prosecutor assigned to Al-Senussi's case, was allegedly abducted and abused by militia groups in May 2013.[162] Once again, the court did not attach due importance to this event, and simplistically found that there was no proof of any link between the abduction and the proceedings against Al-Senussi.[163]

Following the pre-trial ruling, the security situation in Libya deteriorated dramatically.[164] As militia infighting spread across Libyan territory, there was a major escalation of violence and near total collapse of the rule of law in parts of the country.[165] Libya gradually became entangled in a violent power struggle largely between two competing governments—the General National

159. Prosecutor v. Gaddafi, ICC-01/11-01/11-466-Anx, Declaration of Judge Christine Van den Wyngaert, ¶ 2 (Nov. 10, 2013), https://www.icc-cpi.int/RelatedRecords/CR2013_07447.PDF.

160. ELLIS, SOVEREIGNTY AND JUSTICE, *supra* note 25, at 218.

161. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgement on Al-Senussi Appeal, ¶ 276 (sharing one viewpoint with the Office of the Prosecutor on this subject).

162. *Id.* ¶ 273.

163. *Id.* ¶¶ 273-75.

164. Amnesty International, *ICC Decision to Allow Abdallah Al-Senussi to Stand Trial*, *supra* note 86.

165. *Id.*

Congress allied with the pro-Islamist "Libya Dawn" militias, and the elected, internationally recognized, House of Representatives allied with the forces of Gaddafi-era defector, General Haftar.[166] By July 2014, Libya's Foreign Minister, Mohamed Abdelaziz, openly admitted that the central government was too weak to control the country's militias.[167]

By 2015, Libya was engulfed in civil war.[168] Libya Dawn militias seized Tripoli and the internationally recognized government retreated to the Eastern towns of Beida and Tobruk.[169] Haftar's government had no control over the trial process and the Justice Minister openly condemned the continuation of proceedings in Tripoli.[170]

Despite these extraordinary events and the fact that Libya Dawn militias controlled Tripoli, the ICC Prosecutor, Fatou Bensouda, insisted there was no evidence that the case against Al-Senussi had been affected.[171] In a letter to Al-Senussi's lawyers, she stated that, "[d]espite the fact that the groups allegedly associated with Libya Dawn are in physical control of Tripoli and therefore the judicial and correctional facility system, there does not appear to have been any significant disruption to the trial proceedings."[172]

The ICC Prosecutor's assertions were unduly optimistic and ignored rule of law implications, considering the situation on the ground as documented by NGOs. The UNSMIL and the Office of the

166. Rebecca Murray, *Libya: A Tale of Two Governments*, AL JAZEERA (Apr. 4, 2015, 10:03 AM), http://www.aljazeera.com/news/2015/04/libya-tale-governments-150404075631141.html.

167. *See* Amnesty International, *ICC Decision to Allow Abdallah Al-Senussi to Stand Trial*, *supra* note 86 (appealing to the United Nations Security Council for help in protecting the oil installations and warning of the possibility of Libya turning into a failed state).

168. Chris Stephen, *Gaddafi's Son Saif Al-Islam Sentenced to Death By Court in Libya*, GUARDIAN (July 28, 2015, 12:57 PM), https://www.theguardian.com/world/2015/jul/28/saif-al-islam-sentenced-death-by-court-in-libya-gaddafi-son.

169. *Id.*

170. *Id.*; Chris Stephen, *ICC Prosecutor Says Libya is Providing a Fair Trial for Senussi Despite Chaos*, INT'L JUST. TRIB. (Feb. 25, 2015), https://www.justicetribune.com/articles/icc-prosecutor-says-libya-providing-fair-trial-senussi-despite-chaos.

171. Stephen, *supra* note 168.

172. *Id.*

United Nations High Commissioner for Human Rights (OHCHR) documented ongoing and severe violent attacks against the judiciary during the transition period, and specifically noted that the security situation compromised the judiciary's ability to function.[173] Human Rights Watch reported that "militias and criminals have harassed, intimidated, threatened and in some cases assassinated judges, prosecutors, witnesses, lawyers and judicial staff. The government can provide little or no protection for them."[174] The Judicial Police, the main body responsible for the protection of judges and prosecutors and in charge of running detention facilities, "is weak, lacks training and is ill-equipped."[175] Human rights groups working in Libya documented numerous attacks on judges and lawyers, including the assassination of judges in Tripoli.[176]

According to Human Rights Watch, in November 2015 - in one region alone - 4,000 out of 6,000 prisoners were held in arbitrary detention without formal charges.[177] It also noted that, "[d]etainees, family members, local organizations and the UN report widespread ill-treatment of detainees in facilities across Libya, which has resulted in deaths in custody."[178]

In this context, concerns for the safety of the Tripoli detainees, including Al-Senussi, and about the undermining of the Libyan judiciary were well founded. In September 2015, a car bomb, targeting Al-Senussi and Gaddafi, exploded near the Al-Hadba prison in Tripoli.[179] In July 2016, twelve members of the former regime being detained in Al-Ruwaimi prison were murdered the day

173. INTERNATIONAL COMMISSION OF JURISTS, *supra* note 158, at 20; Qadhafi Regime Report, *supra* note 6, at 9.

174. Hanan Salah, *Libya's Justice Pandemonium*, HUM. RTS. WATCH (Apr. 14, 2014, 10:17 AM), https://www.hrw.org/print/253389.

175. *Id.*

176. *Id.*

177. INTERNATIONAL COMMISSION OF JURISTS, *supra* note 158, at 20; *see* Salah, *supra* note 174 (reporting on a pattern of mass, arbitrary detention and ill-treatement of those detained); *see generally* Human Rights Watch, *The Endless Wait: Long-Term Arbitrary Detentions and Torture in Western Libya*, (Dec. 2, 2015), https://www.hrw.org/report/2015/12/02/endless-wait/long-term-arbitrary-detentions-and-torture-western-libya.

178. Salah, *supra* note 174.

179. *Bomb Hits Near Libya Prison Holding Former Gaddafi Officials*, ARAB WKLY. (Sept. 9, 2015, 3:26 PM), http://www.thearabweekly.com/?id=1896.

after they were due for release.[180] After the killings, fears for the safety of remaining Tripoli detainees led British lawyers for Al-Senussi, Ben Emmerson and Rodney Dixon, to petition the ICC to review its decision: "We are deeply concerned by reports of the killing of detainees in Tripoli . . . [i]t is essential that the ICC chief prosecutor call for a full review."[181]

2. Challenges to Independence of the Judiciary

Despite efforts to secure credible background information on judges in the *Al-Senussi* case, identified as Naji al-Amin, al-Sadeeq Badi, and Badoura, such information was not publicly available.[182] A source reported that there was a close relationship between judges and prosecutors, and the majority of judges were themselves former prosecutors.[183] Additionally, the IBA received credible information that the Prosecutor and judges used a common entrance to the court, and the Prosecutor also used this entrance when the judges were deliberating.[184] Even though this is not unique to Libya, it remains cause for concern.[185] In its 2013 Rule of Law Assessment Report, the International Legal Assistance Consortium (ILAC) observed that there was a lack of public trust in the judiciary in Libya.[186] When the assessment team, including the author, spoke to judges in Western Libya, they found that the "courts had not yet begun to process [a] significant number of cases against conflict-related detainees."[187] Furthermore, they found that, while the security situation facing the judiciary in the East involved a broad pattern of attacks, threats to the judiciary in the Western part of Libya appeared to result from courts

180. *12 Former Inmates Killed in Tripoli One Day After Release*, LIBYA OBSERVER (June 12, 2016, 1:51 PM), https://www.libyaobserver.ly/news/12-former-inmates-killed-tripoli-one-day-after-release.

181. *Id.*; *see also* Stephen, *supra* note 168.

182. *See* TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 24-25 (noting that the public had to rely on information from trial observers regarding the judges).

183. *See* Interview by Mark S. Ellis, Executive Director of the International Bar Association, (Nov. 2015).

184. TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 25.

185. *Id.*

186. INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM, ILAC RULE OF LAW ASSESSMENT REPORT: LIBYA 2013 36 (2013).

187. *Id.*

exercising their independence to acquit suspects popularly believed to have committed crimes against civilians."[188]

3. Allegations of Ill-Treatment in Detention Facilities

As the 2013 ILAC Rule of Law Assessment Report stated, "[t]he on-going detention with charge or trial of roughly 8,000 persons alleged to have committed severe crimes on behalf of the Gaddafi regime is undoubtedly the most serious human rights and rule of law challenge facing the new Libya."[189] Around 3,000 detainees were in legal detention centers run by local brigades.[190] Furthermore, the authorities frequently "had incomplete control over even official prisons, leaving many of those detained at risk of abuse and torture."[191]

Allegations of torture in detention facilities were widespread in Libya at the time of the trials.[192] In March 2015, based on these allegations, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment held that, in the absence of information to the contrary, Libya had violated Saif al-Islam Gaddafi's rights against torture and ill treatment.[193] When the Special Rapporteur outlined the allegations, Libya failed to reply.[194]

UNSMIL received allegations that some defendants were beaten

188. *Id.*

189. *Id.* at 34.

190. *See id.* (finding that state authorities hold 5,000 out of roughly 8,000 detainees, leaving the rest in extra-legal detention centers).

191. *Id.*

192. *See Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76 (explaining that one unidentified person was beated and injured inside of his cell, but, despite meeting with a defense lawyer, he did not know whether an investigation was conducted).

193. *Id.*

194. *Id.*; *see* Juan E. Méndez (Special Rapporteur on Torture), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez*, U.N. Doc. A/HRC/28/68/Add.1, ¶ 298-99 (Mar. 5, 2015) (expressing regret that Libya did not reply to the communications and concluding that there is substance to the ellegations of torture and ill-treatment); TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 49-50 (expressing concern over possibility of ill-treatment rising to the level of torture while in detention for this case).

or otherwise mistreated, especially upon arrest and during their initial period in detention.[195] Some defense lawyers raised claims before the Court of Assize asserting that their clients had been tortured, beaten, threatened, and blackmailed, as well as forced to confess while in the custody of armed groups, and threatened if they changed their statements in front of the prosecutor.[196] Still, the court dismissed the defense's claims and took no action to investigate.[197]

During the hearing on April 13, 2015, Al-Senussi's lawyer claimed that his client was beaten and interrogated by individuals not belonging to the judicial authority.[198] The court did not address this claim in its verdict.[199] Al-Senussi complained several times to the court about being held in solitary confinement for prolonged periods, and being subject to discriminatory treatment.[200] In fact, a guard at the Al-Hadba compound acknowledged to UNSMIL that families of victims of the 1996 Abu Salim massacre and former detainees at the prison targeted Al-Senussi with abuse.[201]

Similarly, the IBA reported that trial observers claimed on at least one occasion that Al-Senussi complained to judges about his detention conditions.[202] According to the IBA, trial observation notes document Al-Senussi telling the court that he had requested to be transferred to a different facility.[203]Al-Senussi also informed the court that he was under great pressure, and that he suffered from a mental disorder.[204] He complained to the court that the prison authorities had not given him a new set of clothes, forcing him to

195. *See* Qadhafi Regime Report, *supra* note 6, at 28 (noting that most defendants did not discuss their treatment during interviews, however four defendants indicated that they were beaten).

196. *Id.*

197. *See id.* (finding the court based its verdict on a lack of evidence to support the claim).

198. *Id.* at 29.

199. *See id.* (stating that during the investigation with the public prosecution on September 17, 2012, Al-Senussi affirmed that he was beaten on his eye, head, and legs and that he was interrogated by a non-judicial committee).

200. *Id.*

201. Qadhafi Regime Report, *supra* note 6, at 28.

202. *See* TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 50.

203. *Id.*

204. *Id.* (noting that it was unclear what type of mental disorder he was suffering from).

wear the same clothes every day.[205]

The Human Rights Committee noted that prolonged solitary confinement may amount to acts prohibited by Article 7 of the International Covenant on Civil and Political Rights (ICCPR).[206] The Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment recognized that the prolonged isolation of a detainee may constitute cruel, inhuman, or degrading treatment or punishment, and in some cases, may amount to torture because of its harmful physical and mental effects.[207] The harmful effects of prolonged solitary confinement have also been highlighted by the Committee against Torture (CAT), which recommended the abolition of such measures, particularly during pre-trial detention.[208] Yet, according to Human Rights Watch, "during a trial session . . . Senussi's lawyers said that he was being held in solitary confinement."[209] At another session, Al-Senussi protested that "he had been held in solitary confinement for two and a half years."[210]

---

205. *Id.*

206. Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, ¶ 6 (March 10, 1992) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *see also* International Covenant on Civil and Political Rights art. 7, Dec.16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

207. Special Rapporteur on Torture, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 21-22, U.N. Doc. A/66/268 (Aug. 5, 2011), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/pdf/N1144570.pdf?OpenElement; Special Rapporteur on Torture, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 83, U.N. Doc. A/63/175, ¶¶ 77, 83 (July 28, 2008), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/pdf/N0844075.pdf?OpenElement.

208. *See, e.g.*, Rep. of Committee against Torture, ¶¶ 186, 188, 220, 226, U.N. Doc. A/52/44 (1997), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N97/235/57/img/N9723557.pdf?OpenElement (affirming that solitary confinement "may only be used as an exceptional disciplinary sanction of last resort and for a restricted period," and added that "[b]oth its use and the manner in which it is implemented must be subject to stringent control"); Rep. of Committee against Torture, ¶ 61, U.N. Doc. A/69/44 (2014), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/125/96/pdf/G1412596.pdf?OpenElement.

209. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76.

210. *Id.*

In their Report of February 21, 2017, UNSMIL and OHCHR expressed concern that solitary confinement appears to have been used widely at the Al-Hadba prison, where several detainees were allegedly kept in isolation for periods of up to eight months.[211] Concerns were also raised by UNSMIL and OHCHR with regard to allegations of torture at the Al-Hadba compound, especially in view of the pattern of torture and other human rights abuses committed by armed groups since 2011 in a climate of total impunity for the perpetrators.[212]

V. COMPLEMENTARITY DOCTRINE AND DUE PROCESS RIGHTS: AN ILL-DEFINED RELATIONSHIPIN THE AL-SENUSSI ADMISSIBILITY DECISION

The principle of complementarity, enshrined in Article 17 of the Rome Statute, governs the exercise of the court's jurisdiction.[213] The Rome Statute recognizes that states have primary responsibility for investigations and prosecutions of international crimes committed in their jurisdictions.[214] This means that the ICC may only exercise jurisdiction where states purport to act, but in reality are unwilling or unable to genuinely carry out proceedings.[215] The principle of complementarity is based on respect for the sovereignty of states, as well as on considerations of efficiency and effectiveness, as it is believed that states will generally have the best access to evidence and witnesses, as well as the resources to carry out proceedings.[216] Moreover, there are limitations on the number of prosecutions the

211. Qadhafi Regime Report, *supra* note 6, at 29 (stating that this left detainees vulnerable to intimidation and that many detainees were held in solitary confinement on more than one occasion).

212. *See id.* at 30 (noting that many defendants remained under the control of armed groups, which heightened the concerns regarding allegations of tortured defendants).

213. Rome Statute of the International Criminal Court, *supra* note 15, art. 17.

214. *See id.* at pmbl. ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for interntional crimes."); *see also* INTENATIONAL CRIMINAL COURT-OFFICE OF THE PROSECUTOR, *supra* note 26, ¶ 1.

215. *See* INTERNATIONAL CRIMINAL COURT-OFFICE OF THE PROSECUTOR, *supra* note 26, ¶ 1.

216. *Id.*

ICC can practically conduct.[217]

A. COMPLEMENTARITY AND UNWILLINGNESS

In principle, under the ICC doctrine of complementarity, when a case is subject to national investigations or prosecution, that case is deemed inadmissible before the ICC unless "the State is *unwilling* or *unable* genuinely to carry out the investigation or prosecution" (emphasis added).[218] For the purpose of determining unwillingness, Article 17(2) lists three factors that must be considered in the court's assessment, with regard to the due process principles recognized by international law.

First, where the proceedings were or are being undertaken, or the national decision not to prosecute was made in order to shield a person from criminal responsibility, the court can find that the State in question is unwilling to investigate or prosecute for purposes of Article 17 of the Rome Statute.[219] Secondly, where there has been an unjustified delay in proceedings, which in the circumstances is inconsistent with an intent to bring the person concerned to justice,[220] the court can interpret such actions as "unwillingness." Finally, where proceedings were or are not being conducted independently or impartially, and were or are being conducted in a manner inconsistent, in the circumstances, with an intent to bring the person concerned to justice,[221] such action can be interpreted as an "unwillingness" to prosecute in admissibility proceedings.

This article will focus on the third factor enumerated in Article 17(2)(c), relating to impartiality and independence. This factor has been the subject of controversy among legal academics and experts.[222]

---

217. *Id.*
218. Rome Statute of the International Criminal Court, *supra* note 15, art. 17(1)(a).
219. *Id.* art. 17(2)(a).
220. *Id.* art. 17(2)(b).
221. *Id.* art. 17(2)(c).
222. *See, e.g.*, ELLIS, SOVEREIGNTY AND JUSTICE, *supra* note 25, at 126-30 (considering the legal debate over standards of impartiality and independence for domestic proceedings).

1. Unwillingness and the "Due Process Thesis"

A brief look at the history of the complementarity principle highlights the challenges associated with Article 17 of the Statute, particularly in its attempt to draw the right balance between upholding the fight against impunity and preserving state sovereignty.[223] Article 17(2)(c) of the Statute states that the proceedings will be admissible where "they 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*" (emphasis added).[224]

It is possible to examine independence and impartiality through the lens of national prosecutions. In relation to interpreting the term "justice," the ICC clearly favors the view that "justice" means punishment for wrongdoing.[225] However, an analysis of the preparatory work (drafting history) demonstrates that the terms "independence," "impartiality" and "justice" in the context of Article 17(2)(c) should be interpreted more expansively.[226]

There is a vast amount of expert academic opinion, as well as relevant international jurisprudence, which supports aggressive adherence to the "due process" approach.[227] However, even though

223. *See id.* at 20-25 (discussing the advent of the complemntarity framework to help balance state sovereignty and fighting impunity).

224. Rome Statute of the International Criminal Court, *supra* note 15, art. 17(2)(c).

225. *See* WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 456-57 (2d ed. 2016).

226. Vienna Convention on the Law of Treaties, art. 31(1), Jan. 27, 1969, 1115 U.N.T.S. 340, [hereinafter Vienna Convention] (revealing that the text of Article 17 fails to offer a clear interpretation in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and meaning, accordingly, recourse may be held to supplementary means of interpretation, such as the preparatory work of the treaty).

227. *See* Schabas, *supra* note 225, at 468 (arguing also that the case law of human rights treaty bodies may be helpful in addressing issues related to Article 17(2)(c)); *see e.g.*, Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 19, 2011) (showing that the Tribunal interpreted the term "justice" to mean respect for the rights of the accused and the rights of victims); Dawn Yamane Hewett, *Sudan's Courts and Complementarity in the Face*

the court has accepted that due process violations are relevant when assessing "unwillingness,"[228] its determination in the *Al-Senussi* case demonstrates that it has adopted an overly restrictive approach to assessing the relevance of due process violations within the context of Article 17(2)(c). Despite the fact that it is within the court's powers to determine the degree of relevance of due process violations, its discretion is not unfettered.[229] The court should exercise such discretion in line with statutory requirements,[230] the intentions of the original drafters of the Rome Statute,[231] and the practice of other tribunals and relevant expert and academic opinions.

B. WORK OF THE PREPARATORY COMMITTEE AND THE "SHIELDING" VARIANT OF UNWILLINGNESS

The drafting history of the Rome Statute offers an important means of establishing special meanings, confirming interpretations, and providing clarification of obscure terms.[232] Upon careful review

---

of Darfur, 31 YALE J. INT'L LAW 276, 278 (2006); Federica Gioia, *State Sovereignty, Jurisdiction and 'Modern' International Law: The Principle of Complementarity in the International Criminal Cour*t, 19 LEIDEN J. INT'L L. 1095, 1111-12 (2006) (arguing that the phrase "bring the accused to justice" requires assessing both the guilt and punishment stage, as well as the impartial process of bringing the accused to justice).

228. *See* Prosecutor v. Gaddafi, Judgment on Al-Senussi Appeal, *supra* note 18, ¶ 220.

229. *See* John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS 41, 48-51 (Lee ed., 1999) (considering the complexity of procedural fairness as a a part of the impartial proceeding standard).

230. Rome Statute of the International Criminal Court, *supra* note 15, art. 21(3) ("The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.").

231. Vienna Convention, *supra* note 226, art. 31(1), 1115 U.N.T.S. ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); *see, e.g.*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, ¶ 92 (Mar. 31, 2010) (showing where the Court found that, "had the drafters intended to exclude non-State actors from the term 'organization,' they would not have included this term in article 7(2)(a) of the Statute").

232. *See* INTERNATIONAL CRIMINAL COURT-OFFICE OF THE PROSECUTOR, *supra* note 26, ¶ 26 (noting that reconstructing the history is challenging given the

of its history, one can argue that the majority of original drafters never intended the court to render cases admissible on the sole basis of due process violations.[233] Discussions within the Preparatory Committee on the Establishment of an International Criminal Court further demonstrate that most delegations opposed a proposal by France to grant the Court a more expansive role in exercising jurisdiction where there is "denial of justice."[234] An Italian proposal,[235] which suggested that the court be tasked with the duty of assessing whether the fundamental rights of the accused are respected or not, did not make it into the final version of Article 35 (subsequently Article 17).[236]

The first debate on the question of complementarity opened during the Preparatory Committee's session held in March and April 1996.[237] However, it was not until the Preparatory Committee's meeting in August 1997 that the concept of "unwillingness" was discussed in more detail.[238] Initially, there was general consensus that

---

complexity of the statute).

233. *See* Report of the Ad Hoc Comm. on the Establishment of an International Criminal Court, U.N. Doc. A/50/22, ¶¶ 41, 43, 45, 162, 177, 180 (Sept. 6, 1995), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/269/67/pdf/N9526967.pdf?OpenElement (noting agreement that the words "available" and "ineffective" were unclear).

234. *See* U.N. Secretary-General, *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court*, ¶ 11, U.N. Doc. A/AC.244/1/Add.2 (Mar. 31, 1995), [hereinafter *Comments*] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/093/87/pdf/N9509387.pdf?OpenElement.

235. *See* Preparatory Committee on the Establishment of an Int'l Crim. Ct., Recommendation by the Preparatory Committee to the General Assembly in Connection with the Invitation by the Government of Italy to Host the Diplomatic Conference, U.N. Doc. A/AC.249/1997/WG.3/IP.4 (Aug. 5, 1997).

236. *See* Holmes, *supra* note 229, at 50 (mentioning that the drafting history of Article 17(2) of the Rome Statute shows that many delegations agreed that procedural fairness should not be a ground for defining complementarity, thus rejecting the proposal by Italy to make the absence of national due process a ground for admissibility. John Holmes was the coordinator of consultations on complementarity during both the Preparatory Committee and the Rome Conference).

237. *Id.* at 45.

238. *See id.* at 45-47 (noting that other substantive issues included reference to jurisdiction, and whether the Court could act if the State was unwilling and unable to do so).

the main purpose of the notion of unwillingness was to avoid sham proceedings aimed at shielding perpetrators.[239] Nevertheless, two additional types of unwillingness emerged and subsequently made their way into the final draft of the Statute.[240] This demonstrates that the concept of unwillingness was not to be assessed solely in the context of efforts to shield the accused from justice. In fact, the latter form of unwillingness, which refers to the lack of independence and impartiality of the proceedings (including due process guarantees for defendants), was considered necessary in order to capture procedural issues that do not amount to the shielding variant of unwillingness.[241] Although some have questioned the drafters' decision to adopt three different categories of unwillingness, given the significant overlap between them,[242] the drafters clearly intended that there would be three separate categories of unwillingness.[243]

The drafter's intent is inconsistent with the Appeals Chamber's argument that the concept should generally be understood as referring to proceedings which will lead to a suspect evading justice (i.e., sham proceedings).[244] The Court's reasoning in this respect seems to suggest that unwillingness based on the absence of impartiality and independence should be understood in the context of sham proceedings. This would suggest that Article 17(2)(c) does not differ much from Article 17(2)(a). However, it is difficult to argue that this could have been the drafters' intention because it would amount to a duplication that serves no actual purpose.

Furthermore, to address concerns of some delegations that Article

239. *See id.* at 50 (showing that as a result this definition was easily included).

240. *See* Holmes, *supra* note 229, at 50-51 (noting the Statute's need to provide guidance relating to the nature of the delay, thus creating the phrase "undue delay" to mean "[t]he delay must, in the circumstances, be "inconsistent with an intent to bring the person concerned to justice." The second type of unwillingness "was the question of the independence and impartiality of the proceedings.").

241. *See id.* at 50-51 (considering that a State may want to prosecute an individual but is unwilling because of the potential for manipulation of the domestic proceeding).

242. *See* JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 1, 159 (Oxford University Press 2008).

243. *See* Holmes, *supra* note 229, at 50-51 (emphasizing the individual importance of all three categories of unwillingness).

244. *Prosecutor v. Gaddafi*, Judgment on Al-Senussi Appeal, *supra* note 18, ¶ 2.

17(2)[245] of the Draft Statute gave the Court too much discretion to determine "unwillingness," it was agreed during negotiations in Rome that wording would be inserted in the paragraph to deal with independence and impartiality.[246] The added wording stated: "having regard to the principles of due process recognized by international law."[247]

Even though the relevant passage was later removed from the text of what is today Article 17(2)(c), and placed in the chapeau of Article 17(2),[248] its original inclusion under the section dealing with independence and impartiality was far from random. It demonstrates that the drafters clearly envisioned that Article 17(2)(c) would be interpreted in line with internationally recognized human rights standards and due process guarantees. It further suggests that the terms "independence" and "impartiality" were not to be interpreted as independence and impartiality of the Court alone, because clearly, due process guarantees contained in international human rights instruments are much wider.[249] Most importantly, it indicates that the threshold for finding that due process violations amount to unwillingness under Article 17(2)(c) should be set in accordance with recognized international law principles.

VI. JUS COGENS STATUS OF FAIR TRIAL RIGHTS

If the international justice system is to rely on domestic courts to bring to justice those who have perpetrated the most heinous crimes, then these courts must equally ensure that those trials are non-political and that they meet international fair trial standards.

Addressing the referral of cases to competent domestic jurisdictions for trial, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Theodor Meron, affirmed in his 2004 statement to the UN Security Council, that

245. Rome Statute of the International Criminal Court, *supra* note 15, art. 17(2).
246. *See* Holmes, *supra* note 229, at 48.
247. *Id.* at 53.
248. *See id.* at 54 (according to the coordinator John Holmes, the inclusion of the notion of due process into the chapeau of the paragraph on unwillingness would have had the effect of adding an element of objectivity to all the three criteria listed in the sub-paragraphs of Article 17(2)).
249. *See id.* at 50-51.

"[n]ational courts can only play this role . . . if trials are not used for political purposes and if they meet international standards of due process and fair trial."[250]

The right to a fair trial has been codified in a number of human rights instruments and today is recognized as not only customary international law but also as a *jus cogens* norm, binding on all states through their acknowledgment of its imperative force.[251]

The inclusion of the right to a fair trial into modern human rights instruments can be traced back to the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948. Article 10 of the Declaration provides for the right to a fair trial in both criminal and civil proceedings, stating that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." [252]

Fair trial guarantees are also contained in several regional human rights instruments. The 1948 American Declaration of the Rights and Duties of Man affirms, under Article 18, the right of every individual to "resort to the courts to ensure respect for his legal rights."[253]

---

250. Press Release, International Criminal Tribunal for the former Yugoslavia, Address of Judge Theodor Meron, President of the ICTY, to the U.N. Security Council, U.N. Press Release TM/P.I.S./916-e (Nov. 23, 2004), www.icty.org/en/press/address-judge-theodor-meron-president-icty-un-security-council.

251. *See* Vienna Convention, *supra* note 226, art. 53, 1115 U.N.T.S. at 53; *see also* Prosecutor v. Norman, Case No. SCSL-2003-09-PT, Decision on the Application for a Stay of Proceedings and Denial of Right to Appeal, ¶ 19 (Nov. 4, 2003); *see also* Kamrul Hossain, *The Concept of* Jus Cogens *and the Obligation Under The U.N. Charter*, 3 SANTA CLARA J. INT'L L. 72, 73 (2005), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1011&context=scujil (suggesting the concept of *jus cogens* to refer to those norms of general international law that are deemed as hierarchically superior in comparison to other ordinary norms of international law, and which can be modified only by a subsequent norm of general international law having the same character. *Jus cogens*, in fact, consists of a set of rules which are peremptory in nature and from which no derogation is permitted under any circumstances.).

252. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

253. American Declaration of the Rights and Duties of Man art. XVIII, 1948, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003), http://www.oas.org/en/iachr/

Article 8 of the 1969 American Convention on Human Rights recognizes a general "right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law" in criminal proceedings as well as in proceedings involving civil, labor, fiscal, and other matters.[254] The same article codifies, in its second paragraph, a range of "minimum guarantees" specifically intended for those accused of a criminal offence.[255] Interestingly, the language used resembles that of Article 6 of the European Convention on Human Rights (ECHR).

The ECHR, adopted in 1950, entitles "everyone" to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[256] Additionally, it adds a full set of "minimum rights" explicitly intended for everyone charged with a criminal offense. These basic guarantees include, inter alia, the right of an accused to have time and facilities adequate for the preparation of a defense, the right to defend himself in person or through legal assistance of his own choosing, the right to obtain witnesses to testify on his behalf and to challenge witnesses testifying against him.[257]

The African Charter on Human and Peoples' Rights, adopted in 1981, and the League of Arab States' Charter on Human Rights, as amended in 2004, codify the right to a fair trial.[258] Whereas Article 7 of the African Charter contains some of the rights encompassed in other human rights instruments, including the right to be defended by a counsel of choice and to be tried in a reasonable time by an impartial court or tribunal, it does not explicitly refer to other

mandate/Basics/declaration.asp.

254. Organization of American States, American Convention on Human Rights art. 8, ¶ 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 114 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

255. *Id.* art. 8(2)-(5).

256. *See* European Convention on Human Rights art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

257. *See id.* art. 6(3).

258. *See* African (Banjul) Charter on Human and Peoples' Rights art. 7, U.N.T.S. 26363 (entered into force Oct. 21, 1986) [hereinafter Banjul Charter]; *see also* Arab Charter on Human Rights art. 13, Mar. 22, 1945 [hereinafter Arab Charter].

constitutive elements of the right to a fair trial.[259] Nevertheless, the provision must be interpreted in a broad manner to include various other fair trial guarantees as illustrated in several human rights instruments, including the Universal Declaration of Human Rights.[260]

Conversely, the Arab Charter provides a full list of fair trial rights.[261] Along the lines of Article 6 of the ECHR, the Arab Charter affords a range of "minimum guarantees" to the accused charged with a criminal offence, including the rights, among others, to adequate time and facilities for the preparation of his defense, to defend himself in person or through a counsel of his own choosing, to examine the prosecution witnesses, and to summon witnesses on his behalf.[262]

The International Covenant on Civil and Political Rights, adopted by the UN General Assembly in 1966, provides under Article 14 a comprehensive array of "minimum" due process and fair trial rights afforded to everyone accused of a criminal offence.[263] With a total of 169 States Parties (including Libya), the ICCPR is undoubtedly the principal global treaty addressing political and civil rights, to the point that some of its obligations today reflect customary international law.[264] Included in this set of obligations reflecting customary international law is Article 14 of the ICCPR, which, in the opinion of many scholars and international lawyers, has even

259. *See* Banjul Charter, *supra* note 258, art. 7; *see also* Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 BERKELEY J. INT'L L. PUBLICIST 1, 4-5 (Oct. 2009), http://bjil.typepad.com/Robinson_macro.pdf (suggesting "that the provisions are to be interpreted broadly to include various components as spelled out in a number of international instruments, including the Universal Declaration of Human Rights").

260. *See* Robinson, *supra* note 259, at 5.

261. *See* Arab Charter, *supra* note 258, art. 13.

262. *Id.* art. 16.

263. ICCPR, *supra* note 206, art. 14.

264. *See* Montani Davide, The Right to Secede: A Comparative Analysis 1, 23 (2014-2015) (unpublished thesis, Libera Università Internazionale Degli Sudi Sociali) http://tesi.eprints.luiss.it/15931/1/montani-davide-tesi-2015.pdf. (noting that customary international law consists of two elements: an objective element,"*diuturnitas,*" the constant repetition of certain behaviors by the majority of the States; and a subject element, "*opinion iuris sive necessitates,*" the belief by those States that such behaviors are legally binding).

achieved the status of a "*jus cogens* norm."[265]

In addition, there is a group of ICCPR principles, articulated in Article 4(2), from which no derogation is permitted.[266] The UN Human Rights Committee has stressed the non-exhaustion of the list of non-derogable provisions provided in Article 4(2), and affirmed that even in a state of emergency, states cannot depart from fundamental fair trial principles:

> The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., arts. 6 and 7).
>
> Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . by deviating from fundamental principles of fair trial, including the presumption of innocence.[267]

Moreover, although Article 14 of the ICCPR is not included in the

---

265. *See* THE LAW REPORTS OF THE SPECIAL COURT FOR SIERRA LEONE, VOL. II, PROSECUTOR V. NORMAN, FOFANA AND KONDEWA (THE CDF CASE) (Charles C. Jalloh & Simon M. Meisenberg eds., 2013); *see also* CYRIL LAUCCI, DIGEST OF JURISPRUDENCE OF THE SPECIAL COURT OF SIERRA LEONE 2003-2005 156-57 (Martinus Nijhoff Publishers 2007) (arguing "that the right to a fair hearing would – at least in the context of criminal proceedings – by now constitute an element of *jus cogens*); U.N. SEC. COUNCIL, REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 22 (Erika de Wet & André Nollkaemper eds., 2003) (noting that "there are reservations, by countries as important as Italy, Germany, Belgium and Norway to the extension of this Rule to convictions rendered by higher courts").

266. Summary Records of the Commission on Human Rights, Fifth Session, R. 195, U.N. Doc. E/CN.4/SR. 195, ¶¶ 38, 57 (May 29, 1950); *see* ICCPR, *supra* note 206, arts. 6-8, 11, 15-16, 18 (providing the right to life; protection against torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery; prohibition of imprisonment merely because of failure to fulfill a contractual obligation, and freedom of movement and residence; prohibition of retrospective punishment without a law; the right of recognition as a person before the law; and freedom of thought, conscience and religion).

267. Office of the High Commissioner for Human Rights, *CCPR General Comment No. 29, Article 4: Derogations during a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 11 (adopted Aug. 31, 2001) [hereinafter *CCPR General Comment*].

list of non-derogable rights of Article 4(2),[268] states derogating from normal procedures required under Article 14, in circumstances of a public emergency, must ensure such derogations do not exceed those strictly required by the exigencies of the actual situation.[269] Most importantly, the UN Human Rights Committee has confirmed yet again that "[t]he requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, Paragraph 1, is an absolute right that is not subject to any exception."[270]

It is accepted that states enjoy a certain margin of appreciation with regard to judicial procedures during a situation of emergency.[271] However, there is no legally sound reasoning that allows states, in times of emergency, to depart from minimum judicial safeguards, namely the minimum fair trial standards that apply even in the most difficult circumstances.[272]

The customary nature of the minimum fair trial standards can also be inferred from the inclusion of an extensive list of fair trial principles in the 1977 Additional Protocols I and II to the Geneva Conventions.[273] For example, Article 75(4) of Additional Protocol I (which applies to "international armed conflict"[274]) provides the right

268. ICCPR, *supra* note 206, art 4.

269. *CCPR General Comment No. 29*, *supra* note 267, ¶ 6.

270. Human Rights Committee, *supra* note 79, ¶ 19.

271. *See* Richard Smith, *The Margin of Appreciation and Human Rights Protection in the 'War on Terror': Have the Rules Changed before the European Court of Human Rights?*, 8 ESSEX HUM. RTS. REV. 124, 4 (2011) (considering that domestic authorities are in a better place to assess whether an emergency exists).

272. Evelyne Schmid, *The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights*, 1 GÖTTINGEN J. INT'L L. 29, 36 (2009) ("derogations can only be made in officially proclaimed emergencies which threaten the life of the nation; the measures must be strictly required by the exingencies of the situation; they must be non-discriminatory and must not be inconsistent with the State's other obligations under international law").

273. Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, U.N.T.S. 17512 (entered into force Mar. 1, 1994); Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II) art. 6, U.N.T.S. 17513 (entered into force Mar. 1, 1994).

274. INTERNATIONAL COMMITTEE OF THE RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL LAW 1-2 (2008) (asserting that

to have a sentence passed or a penalty executed only pursuant to a conviction pronounced by an impartial and regularly constituted court which respects the generally recognized principles of regular judicial procedure, including, inter alia, the presumption of innocence, the right of the accused to be tried in his presence, the right to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[275]

In addition, the entire Part II ("Human Treatment") of Additional Protocol II is aimed at guaranteeing respect for the basic rights of the individuals in "non-international armed conflicts."[276] Judicial guarantees play a particularly significant role, since every person is entitled to a fair and regular trial, independent of the circumstances.[277]

Article 6 of Additional Protocol II also affirms "some principles of universal application," including, "affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[278] Article 6(2), sub-paragraphs a)–f) enumerate an illustrative list of universally recognized due process standards from which no derogation may be accepted. They include "in particular" the right to defense, the principle of individual criminal responsibility, the principle of non-retroactivity, the presumption of innocence, the right of the accused to be tried in his presence, and the right not to be compelled to testify against himself or to confess

---

International Armed Conflicts (IAC) are conflicts between two or more High Contracting Parties to the Geneva Conventions, i.e., states, that have led to the intervention of armed forces. They fall under the Geneva Conventions through Common Article 2.).

275. Additional Protocol (I) to the Geneva Convention, *supra* note 273, art. 75(4).

276. Additional Protocol (II) to the Geneva Convention, *supra* note 273, pmbl. (explaining that Non-International Armed Conflicts (NIAC) are all other types of conflicts which differ from International Armed Conflicts. They are defined in Common Article 3 as, "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.").

277. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1396-97 (Sandoz et al. eds., 1987), www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf.

278. *Id.*

guilt.[279]

Article 6 confirms the principle that anyone accused of having committed an offence related to the conflict, whether civilian or combatant, is still entitled to a fair trial.[280] This right is effective only if the court issuing the judgment is capable of offering essential guarantees of independence and impartiality.[281]

VII. CONCEPT OF "EGREGIOUS VIOLATION" IN INTERNATIONAL LAW

The Appeals Chamber's reliance on the concept of "egregious violations" of due process requires a determination of exactly what kind of violations would rise to this level. There is some guidance in international law principles and the practice of international tribunals for this assessment.[282]

The terms "flagrant denial of due process rights," "serious violation" and other qualifiers have been used in international law to refer to violations of human rights and due process rights that are particularly heinous and severe.[283] Over time, egregious and systematic violations of human rights have come to be associated and identified with violations of rights the international community considers fundamental.[284] UN human rights bodies have developed the concept of "gross violations," to enable them to identify and respond to the "most serious" violations, which consist of a "systematic policy of violations" that reach "a high degree of

279. Additional Protocol (II) to the Geneva Convention, *supra* note 273, art. 6(2).

280. *Id.*

281. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 277, at 1398.

282. *See* Rome Statute of the International Criminal Court, *supra* note 15, art. 21(1)(b) (stating that the Court should have regard, "where appropriate, [to] applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.").

283. *See, e.g.*, Joint Committee on Human Rights, Human Rights Implications of UK Extradition Policy – Written Evidence 73 (published June 21, 2011), http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_EXT_Written_Evidence_11.pdf.

284. *Takhmina Karimova, What amounts to 'a serious violation of international human rights law'*, GENEVA ACAD. BRIEFING No. 6, Aug. 2014, at 9.

seriousness" over a period of time.[285]

In the context of criminal trials, international law provides a definition of a "flagrant denial of due process rights" through the jurisdiction of the European Court of Human Rights (ECtHR). The ECtHR has indicated that certain forms of unfairness in criminal trials could amount to a "flagrant denial of justice."[286] These include conviction in absentia with no possibility to obtain a fresh determination of the merits,[287] a trial that is summary in nature and conducted with a total disregard for the rights of the defence,[288] detention without access to an independent and impartial tribunal to have the legality of the detention reviewed,[289] deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country,[290] and where a conviction is based on evidence obtained by torture of third persons.[291]

Furthermore, in *Othman (Abu Qatada) v. The United Kingdom*, the Court stated that "flagrant denial of justice" is a stringent test of unfairness.[292] According to the Court, a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 of the ECHR.[293] What is required is a breach of the principles of fair trial

285. *See id.* at 10.

286. *See* Ahorugeze v. Sweden, App. No. 27075/09, Eur. Ct. H.R. ¶ 19 (2011).

287. *See* Sejdovic v. Italy, App. No. 56581/00, Eur. Ct. H.R. ¶ 84 (2006) ("The duty to guarantee the right of a criminal defendant to be present in the courtroom . . . ranks as one of the essential requirements of Article 6."); *see also* Stoichkov v. Bulgaria, App. No. 9808/02, Eur. Ct. H.R. 1, 11, ¶ 56 (2005); Einhorn v. France, App. No. 71555/01, Eur. Ct. H.R. ¶ 31 (2001).

288. *See* Bader & Kanbor v. Sweden, App. No. 13284/04, 2005-XI Eur. Ct. H.R. ¶ 47 (2006) (find the procceding as a "flagrant denial of justice").

289. *See* Al-Moayad v. Germany, No. 35865/03, Eur. Ct. H.R. ¶ 101 (2007).

290. *Id.*

291. *See* Othman v. United Kingdom, App. No. 8139/09, Eur. Ct. H.R. ¶ 263 (2012).

292. *See generally id.* (finding that a Jordanian national who was recognized as a refugee in the United Kingdom was to be deported in the interests of Jordan's national security. The United Kingdom gained assurances from Jordan that he would not be subjected to ill-treatment and would receive a fair trial, but the applicant argued that Jordan would not abide by the agreed-upon terms if he was deported back to his home country. The claims were ultimately dismissed.).

293. *See id.* (elucidating "that the central issue in the present case is the real risk that evidence obtained by torture of third persons will be admitted at the

guaranteed by Article 6, which is so fundamental as to amount to "nullification, or destruction of the very essence, of the right guaranteed by that Article."[294]

A. VIOLATIONS OF DUE PROCESS RIGHTS DO NOT NEED TO BE "EGREGIOUS" TO RENDER A TRIAL UNFAIR

Violations that do not meet the high threshold can still have irremediable consequences for an accused, especially where a number of different rights are violated in the course of the proceedings, even where each violation, on its own, would not be sufficient to render a trial unfair.

For example, the ICTY and the International Criminal Tribunal for Rwanda (ICTR), under Rule 11bis of the Rules of Procedure and Evidence, consider a number of factors when deciding whether trials in domestic courts are sufficiently fair to allow referral to state authorities.[295] According to Rule 11bis of the ICTY Rules of Procedure and Evidence, the Court may not transfer cases to national courts where the accused would not be accorded fair trial rights.[296]

The Referral Bench in *Prosecutor v. Stanković* laid out a complete list of requirements for a fair criminal trial, which draws heavily on the fair trial guarantees found in the ICCPR.[297] In the *Tadić* case, the Appeals Chamber affirmed that "Article 14 of the International Covenant reflects an imperative norm of international law to which

applicant's retrial").

294. *Id.* ¶ 260.

295. *See* International Criminal Tribunal for the Former Yugoslavia [ICTY], Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 46, 8-9 (Oct. 20, 2011); *see also* International Criminal Tribunal for Rwanda [ICTR], Rules of Procedure and Evidence, 9 (1995).

296. *See* Press Release, International Criminal Tribunal for the former Yugoslavia, *supra* note 250, at 2-3.

297. *See* Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *BIS*, ¶ 55 (2005) (finding that the text of Article 14 of the ICCPR does not make any reference to "flagrant" or "egregious" violations, nor does it distinguish between "egregious" and "ordinary" breaches of fair trial guarantees. The prosecutor in this case found the accused guilty of arresting, interrogating and raping a group of Bosnian Muslim women and detaining them to continue sexually abusing the group of women. He was also found guilty of raping four young women and girls.).

the Tribunal must adhere."[298] The Appeals Chamber in the *Aleksovski* proceedings, commenting on the right of appeal as a component of the fair trial requirement set out in Articles 14 of the ICCPR and 21(4) of the ICTY Statute, argued that "the right to a fair trial is, of course, a requirement of customary international law."[299] In *Furundžija*, the Appeals Chamber stated that the fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the right of an accused to a fair trial.[300]

In the *Norman*, *Kallon*, and *Gbao* cases, the Special Court of Sierra Leone (SCSL) ruled on the so-called "fast-track" process for deciding preliminary motions relating to jurisdiction, holding that pursuant to Rule 72 of the SCSL Rules of Procedure and Evidence the Trial Chamber shall refer these applications to the Appeals Chamber for expeditious determination, instead of deciding them in the first instance.[301] The Appeals Chamber acknowledged that the right to an expeditious trial is now firmly entrenched in international law, through the provisions of Article 14(3)(c) of the ICCPR and the decisions of the ECHR.[302] In the Court's reasoning, the right to an expeditious trial must not be interpreted as just a right of a defendant, but more generally as a vital guarantee for victims of international

298. Prosecutor v. Tadić, Case No IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 1, 3 (Feb. 27, 2001) (finding Tadić guilty for committing war crimes at a Serb-run concentration camp. Tadić challenged the court on the ground that it exceeded the U.N. Security Council's authority but his claim was ultimately dismissed by the Trial Court).

299. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶ 104 (Mar. 24, 2000).

300. Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeal Judgment, ¶ 177 (July 21, 2000) (determining that Anto Furundžija, the commander of a special unit of the Croatian Defense Council known as the "Jokers," was guilty as a co-perpetrator of the war crime of torture and for aiding and abetting the war crime of rape, and sentenced to ten years imprisonment).

301. Prosecutor v. Norman, Kallon, and Gbao, Case No. SCSL-2003-08-PT, SCSL-2003-07-PT, SCSL-2003-09-PT, Decision on the Applications for a Stay of Proceedings and Proceedings and Denial of Right to Appeal, ¶ 13(F) (Nov. 4, 2003) (assessing the concerns raised by multiple defendants regarding the lawfulness of the Special Court for Sierra Leone among other issues, in which the Appeals Chamber decided that Rule 72 was necessary to further the right of justice, not to stay the applications, and to move forward with proceedings).

302. *Id.* ¶ 7.

crimes.[303]

In refusing the arguments that the accused has the right to a two-tier determination of the pre-trial preliminary motions, the Appeals Chamber found that no contravention of the right provided in Article 14(5) of the ICCPR to have a conviction or sentence reviewed by a higher tribunal could be deduced from the "fast-track" process of referral of preliminary motions.[304] In doing so, the Court recognized the *jus cogens* nature of Article 14(5) and stated that "the very agreement by the UN to the terms of Article 20 of the Special Court Statute affords some evidence that it [Article 14(5)] has indeed reached the status termed by international lawyers '*jus cogens*.'"[305]

In *Prosecutor v. Kanyarukiga,* the Trial Chamber denied a referral where there were concerns about witness testimony and equality of arms.[306] The Appeals Chamber in *Kanyarukiga* did not base its decision on an analysis of whether the violations were particularly "egregious" or severe, but rather agreed with the Trial Chamber that the combination of factors and violations "show[ed] that the working conditions for the Defence might be difficult, which might have a bearing on the fairness of the trial."[307]

Apart from the limited reference to "flagrant" violations of due process rights in the *Abu Qatada* case, other regional and international human rights tribunals do not usually distinguish between "egregious" and "ordinary" violations of due process rights. For example, the Inter-American Court of Human Rights (IACtHR) has held that there can be no "due process of law" if a defendant is unable to assert his rights "effectively."[308] In the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago,* it was

303. *Id.* ¶ 8.
304. *Id.* ¶ 18.
305. *Id.* ¶¶ 18-19.
306. Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis*, ¶ 19 (Oct. 30, 2008) (convicting Gaspard Kanyarukiga of genocide and extermination for the events that took place during April 1994 in Nyange that resulted in the death of thousands of Tutsi).
307. *Id.* ¶¶ 18-19.
308. *See* Hilaire v. Trinidad and Tobago, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 146 (June 21, 2002).

noted that in order to ensure a veritable guarantee of the right to a fair trial, the proceedings must adhere to all the requirements that "are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof," or rather, "the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination."[309]

The jurisprudence of the IACtHR advocates for a holistic approach to determining whether there have been violations of due process rights that would render the proceedings unfair.[310] The approach is based on a defendant's ability to assert his or her rights "effectively."[311] In the absence of such "effectiveness," there is simply no due process of law.

The Human Rights Committee applies a lower threshold test than that set by the Appeals Chamber in the *Al-Senussi* case, especially in situations where the accused is facing the risk of a death sentence.[312] The Committee's findings on issues relating to fair trial guarantees (especially in capital cases) demonstrate that where human life is at stake, the application of the highest standards is non-negotiable.

For example, in *Chan v. Guyana,* the Committee found that a two-day adjournment constituted an inadequate amount of time for a

309. *Id.* ¶ 147; *see also* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 118 (Oct. 1, 1999) [hereinafter The Right to Information on Consular Assistance]; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 28 (Oct. 6, 1987) [hereinafter Judicial Guarantees in States of Emergency]; Habeas Corpus in Judicial Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 25 (Jan. 30, 1987) [hereinafter Habeas Corpus in Judicial Emergency Situations].

310. *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94, *supra* note 308, ¶ 4.

311. *See Effective*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/effective (last visited July 10, 2017) (defining "effective" as "successful in producing a desired or intended outcome," which when used in the context of IACtHR jurisprudence can be used to infer that a defendant's anticipated outcome in asserting due process rights is that those rights are fully respected with optimal compliance to international human rights standards).

312. The Right to Information on Consular Assistance, *supra* note 309, ¶ 27.

defendant facing the death penalty to prepare a defense.[313] In addition, in *Larrañaga v. The Philippines*, the Committee established that imposition of the death penalty on an accused after the conclusion of proceedings that failed to meet the requirements of Article 14 amounts to inhuman treatment in violation of Article 7 of the ICCPR.[314] Violations of due process rights – especially when occurring in the context of capital trials – do not necessarily have to be "egregious" or "flagrant" to render the trial proceedings unfair.[315]

1. The ICC and Due Process Guarantees

The ICC guarantees defendants all the procedural protections found in the ICCPR.[316] To date, the ICC's due process guarantees offer the most advanced level of protection for defendants in international criminal proceedings[317] and have been praised by experts and academics as representing an important achievement in the "due process evolution of international criminal procedure."[318] Accordingly, it seems odd that the Court—while accepting the "due

313. Chan v. Guyana, Communication No. 913/2000, U.N. Doc. CCPR/C/85/D/913/2000, ¶ 2.5 (Oct. 31, 2005).

314. Larrañaga v. The Philippines, Communication No. 1421/2005, U.N. Doc. CCPR/C/87/D/1421/2005, Annex: Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 7.11 (Sept. 14, 2006) (focusing on the legality of the death penalty for one of multiple defendants convicted of kidnapping, rape, and homicide when there was evidence of a violation of due process rights).

315. *YVONNE MCDERMOTT, FAIRNESS IN INTERNATIONAL CRIMINAL TRIALS* 161 (2016).

316. *See* Rome Statute of the International Criminal Court, *supra* note 15, art. 67; *see also* Albin Eser, *For Universal Jurisdiction: Against Fletcher's Antagonism*, 39 *TULSA L. REV.*, 955, 963 (2004) ("The Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated.").

317. *See SALVATORE ZAPPALÀ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 25, 48 (2003) (emphasizing that reducing the rights of a person who has been charged with a crime is irrational and paves the way of the accused with a status of suspicion when, in fact, an individual often has more rights once recognized as an accused).

318. *See* Angela Walker, *The ICC Versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process Rights*, 18 *UCLA J. INT'L L. FOREIGN AFF.* 303, 337 (2014); Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 *COLUM. J. TRANSNAT'L L.* 635, 670 (2007).

process" thesis, albeit reservedly[319]—set such a high threshold for due process violations. In fact, it is significantly higher than the threshold customarily applied by other international criminal or regional human rights tribunals.[320]

An informal expert paper published on the Court's website[321] provides a list of indicia pointing to unwillingness or inability. Unwillingness or inability can be determined by fact-finding evidence relating to, inter alia, the legal regime of due process standards and procedures, the rights of the accused, the legal regime of access to evidence, the conditions of security for witnesses and investigators, and other matters related to the fairness of the trial proceedings.[322]

In addition, the paper provides some examples of relevant facts and evidence that may be gathered for the purposes of demonstrating unwillingness, particularly to establish that the proceedings lacked independence and impartiality, and that they were conducted in a manner inconsistent with an intent to bring the accused to justice.[323] Such examples include the degree of independence of the judiciary, patterns of political interference in the investigation and prosecution of the alleged crimes, patterns of trials reaching preordained outcomes, rapport between the authorities and the accused, and commonality of purpose between suspected perpetrators and the investigating authorities.[324]

The expert paper further provides a list of indicators that may not

319. *See* Prosecutor v. Gaddafi, Judgment on Al-Senussi Appeal, *supra* note 18, ¶¶ 220, 229 (admitting that the concept of due process is relevant to the Court's consideration of unwillingness and recognition must be given to the ideologies of Article 17(2), such as those recognized by international law regarding the conduct of proceedings; however, the Court ultimately concludes that Article 17 was not designed to make principles of human rights per se determinative of admissibility).

320. *See, e.g.*, *id.* ¶ 191 (asserting that the lack of access to a lawyer violated Mr. Al-Senussi's right to a fair trial and requirements of Libyan law but still does not meet the high threshold of requirements for the ICC to find Libya unwilling).

321. *See Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-721-Anx9, Annexe 9: Informal Expert paper: The principle of complementarity in practice, 28-31 (2003), https://www.legal-tools.org/doc/ff5cf5/pdf/.

322. *Id.*

323. *Id.* at 28-31.

324. *Id.* at 29-30.

be sufficient proof of unwillingness on their own, but may be relevant when considered in context along with other indicators. These include, inter alia, issues relating to due process, such as: an uncharacteristic hastiness to conclude the proceedings; intimidation of witnesses and victims; refusal to allow observers and trial monitors into the proceedings; and the issuance of amnesties, pardons, or grossly inadequate sentences that call into question the genuineness of the proceedings.[325]

The paper makes no reference to "egregious" or "flagrant" violations of due process rights, but appears to suggest that the more indicators of unwillingness are factually established, the more likely it is for the Court to find a case admissible.

Experts and academics have argued that, since the Appeals Chamber in the Al-Sennussi case did not completely close the door on the due process hypothesis, it is quite likely that a failure to allow the accused adequate time and/or facilities to prepare his or her defence, or the conduct of a trial in absentia, or failure to provide access to a lawyer might easily meet the threshold set by the Appeals Chamber, depending on the circumstances.[326]

VIII. ARTICLE 19(10) OF THE ROME STATUTE AND THE ROLE OF PROSECUTOR'S DISCRETION IN CHALLENGING THE ADMISSIBILITY DECISION

A. PROSECUTOR'S DISCRETION TO REVIEW THE AL-SENUSSI CASE

Article 19(10) of the Rome Statute reads as follows:

> [i]f 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 she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.[327]

The Prosecutor's option to reopen a case previously found

325. *See id.* at 30-31.
326. *See MCDERMOTT, SUPRA NOTE 315, AT* 161.
327. Rome Statute of the International Criminal Court, *supra* note 15, art. 19(10).

inadmissible has to date never been exercised, not even in the *Al-Senussi* case.[328] On March 30, 2016, I wrote a letter to the Prosecutor, Fatou Bensouda, seeking clarification from her office on the review of the *Al-Senussi* case.[329] This communication had its own challenges.

The legal framework of the ICC provides that submissions and "communications" to the OTP from external stakeholders fall under Article 15 of the Rome Statute. This Article refers specifically to information related to preliminary examinations.[330] However, there was no other avenue available to officially submit communications for purposes of review pursuant to Article 19(10) of the Rome Statute. Therefore, I submitted the letter as an Article 15 Communication.[331]

Following the Appeals Chamber decision on inadmissibility in the case against Abdullah Al-Senussi, the Pre-Trial Chamber officially closed case ICC-01/11-01/11-567 on August 7, 2014.[332] According to the Pre-Trial Chamber decision, a request for review of the

328. *See* Fatou Bensouda, ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR1970 (2011), ¶ 12 (Nov. 8, 2016), https://www.icc-cpi.int/legalAidConsultations?name=161109-otp-stat-UNSC1970 [hereinafter Bensouda Nov. 8, 2016] (confirming the position expressed her previous report of May 26, 2016, and affirming that her Office "remains of the view that no new facts have arisen which negate the basis on which the Pre-Trial Chamber found Mr. Al-Senussi's case inadmissible before the Court").

329. Letter from author to Fatou Bensouda, ICC Prosecutor (Mar. 30, 2016) (on file with author) [hereinafter Letter to Bensouda].

330. *See* Rome Statute of the International Criminal Court, *supra* note 15, art. 15 ("The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court." Furthermore, the preliminary examination and evaluation of a situation by the Office may be initiated on the basis of any information on crimes, including information sent by individuals or groups, States, intergovernmental or non-governmental organizations.).

331. *See* Letter to Bensouda, *supra* note 329.

332. *See* Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11-567, Decision following the Declaration of Inadmissibility of the Case Against Abdullah Al-Senussi Before the Court, ¶ 6 (Aug. 7, 2014).

admissibility decision can be made only via the OTP under Article 19(10) of the Rome Statute.[333] Despite the abundance of available evidence pointing to significant new developments in the domestic proceedings, the OTP was simply not willing to concede that it had erred in its assessment.

In an email dated February 26, 2016 addressed to my office, the OTP stated that:

> The OTP has continuously monitored the proceeding in the Al-Senussi case and sought out relevant information to enable it to assess whether there are new facts that may support an application for review under article 19(10). We will continue to monitor the proceedings and review new information as the case progresses.
>
> In this regard, the OTP has carefully read and analyzed Dr. Mark Ellis' report. Following our review, we have concluded that the report does not alter our position that the OTP is not fully satisfied that new facts exist which would warrant an application under article 19(10) at this time . . . [334]

The OTP's statement is disingenuous. The fact is that the Office did not "continuously" monitor the trials.[335] When I interviewed an ICC Senior Trial Lawyer, for my report,[336] he made it clear that the OTP was not monitoring the case itself but relying on UNSMIL trial observation notes as its main and possibly only source.

In a meeting with the Prosecutor and her staff, Mrs. Bensouda reiterated to me that her office was still taking a "proactive approach" and was "reviewing all available information relevant to making a 19(10) application."[337] She further stated that her office included an in-house Arabic expert and their analyses were based on consultation with relevant stakeholders involved with the trials (e.g.,

333. *See id.*

334. Letter from Stanislas Talonsti, JCCD, to the Int'l Bar Ass'n. Office (Feb. 26, 2016) (on file with author)..

335. *ELLIS, TRIAL OF THE LIBYAN REGIME, SURPA NOTE 80, AT* 18.

336. *Id.* at 9 (analyzing firsthand accounts of trial observers that were assessed and approved by legal professionals).

337. Interview with Mark S. Ellis, Exec. Dir., Int'l Bar Ass'n, in The Hague (June 29, 2016).

UNSMIL, the Prosecutor General in Libya, judges and lawyers).[338] Most extraordinary was the OTP's statement that the Prosecutor was considering travel to Libya. This was inconsistent with prior and more recent statements regarding the security situation in the country.

The Prosecutor reiterated this position in a statement dated May 2016 to the UN Security Council when speaking about the inability to investigate: "I must reiterate that until my team is able to carry out investigations in Libya, and until the issue of resources is resolved, the Office will simply be unable to advance the investigations as rapidly as desired."[339] The Prosecutor further admitted in the same statement that, "notwithstanding limited resources and the inability at the present time to conduct *in situ* investigations in Libya," her team had been able to pursue leads and other avenues of collecting evidence through their investigations.[340]

In her November 2016 address to the Security Council, the Prosecutor confirmed that continued political instability and armed conflict prevented her Office from conducting investigations within Libyan territory, in relation to both existing and potential new cases.[341] Once again, the lack of direct monitoring was an insuperable obstacle for the OTP, which was awaiting the full report of the UN Support Mission in Libya on the conduct of the domestic trial, in order to consider new potential information able to trigger an Article 19(10) review application in the *Al-Senussi* case.[342]

Most recently, in a speech given to the Security Council on May 8, 2017, the Prosecutor noted the significant deterioration of the situation in Libya.[343] She also admitted that it was still impossible for

338. *Id.*

339. Fatou Bensouda, ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), ¶ 25 (May 26, 2016), https://www.icc-cpi.int/legalAidConsultations?name=otp_statementlib26052016 [hereinafter Bensouda May 26, 2016].

340. *Id.* ¶ 9.

341. *See* Bensouda Nov. 8, 2016, supra 328, ¶18.

342. *See id.* ¶ 12.

343. *See* Fatou Bensouda, ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), ¶ 2 (May 8, 2017) [hereinafter Bensouda May 8, 2017] (indicating that Libya is at risk of returning to a state of conflict, which would deteriorate the rule of law and order

her investigators to carry out activities and collect evidence in Libya.[344] Although the OTP has explored innovative methods to gather evidence from outside of the country through state cooperation and the assistance of the Libyan Prosecutor-General,[345] the Office clearly seems to be struggling to secure investigations within the Libyan territory in a safe and secure manner, especially in light of the current alarming security situation.

Yet, the Prosecutor has failed to exercise her power under Article 19(10), effectively supporting an Appeals Chamber decision that is no longer reasonable, and indirectly galvanizing court proceedings that were clearly in violation of international law. Instead of reviewing ICC admissibility, she simply tried to encourage the Libyan government to "do the right thing." In her May 2016 statement to the Security Council, the Prosecutor stated as follows:

> While the Appeals Chamber has recognized that, in the context of admissibility proceedings, the ICC is not primarily called upon to decide whether domestic proceedings violate certain requirements of human rights or domestic law, it is incumbent upon the Government of National Accord to ensure that the highest standards for investigations and prosecutions are met.[346]

Guideline 12 of the UN Guidelines on the Role of Prosecutors provides that "[p]rosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."[347]

In this regard, as the ICC Deputy Prosecutor highlighted in a 2014 ICTR Symposium in Arusha, "the Prosecutor must diligently and effectively prosecute cases, but must do so in a manner that promotes

---

and possibly lead to widespread human rights violation against innocent citizens).

344. *See id.* ¶ 6.

345. *See id.* ¶ 7.

346. Bensouda May 26, 2016, *supra* note 339, ¶ 20.

347. Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, from 27 August to 7 September 1990, ¶12, at 3 (U.N. Doc. A/CONF.144/28/Rev.1).

fairness, in its broadest sense, *to the accused*." (emphasis added)[348]

While the Prosecutor is a party to the proceedings, she is also responsible to the accused for pursuing her case fairly.[349] Her ultimate responsibility is indeed to submit all relevant evidence in an honest way to assist the Court in its goal to discover the truth.[350]

Similar statements regarding the role of the Prosecutor can be found in the jurisprudence of the ICTY and ICTR. In *Kupreškić*, Trial Chamber II noted that the Prosecutor is not only a party to adversarial proceedings but also an organ of international criminal justice.[351] Its object, therefore, is not simply to secure a conviction but to present the case for the Prosecution, which includes both inculpatory and exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting.[352]

Recalling the *Tadić* Rule 115 Decision before the ICTY,[353] Judge Shahabuddeen of the ICTR Appeals Chamber maintained that the admission of "additional evidence" not available at trial cannot be ignored when such material is decisive to avoid a miscarriage of justice.[354] Furthermore, the ICC Code of Conduct for the Office of

348. James K. Stewart, ICC Deputy Prosecutor, Fair Trial Rights under the Rome Statute from a Prosecution Perspective 5, ICTR Symposium, Arusha, Tanzania 5 (Nov. 7, 2014) (highlighting the duty of the Prosecutor to ensure objectivity throughout the proceedings and avoid expressing any of her beliefs publicly).

349. *See id.* (discussing the most fundamental right of the defendant, the presumption of innocence, which is upheld by the Prosecutor through the successful administration of justice).

350. *See id.* (describing the Code of Conduct used by the Prosecutor to reinforce her responsibilities, which is created through the unification of multiple governing sources).

351. Prosecutor v. Kupreškić, Case No. IT-95-16, Decision on Communications Between the Parties and their Witnesses, ¶ 7(ii) (Int'l Crim. Trib. for the Former Yugoslavia Sept. 21, 1998).

352. *See id.*

353. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence (unnumbered), ¶ 35 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 15, 1998).

354. Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), Separate Opinion of Judge Shahabuddeen, ¶ 49 (Mar. 31, 2000); Semanza v. Prosecutor, Case No. ICTR-97-20-A, Decision, ¶¶ 44-45 (May 31, 2000); Gideon Boas et al., *Appeals, Reviews, and Reconsideration*, *in* *INTERNATIONAL CRIMINAL PROCEDURE, RULES AND*

the Prosecutor imposes a number of obligations on the ICC Prosecutor, key among them being the obligation to "[r]espect human rights and fundamental freedoms, the principle of equality before the law, the presumption of innocence and right to a fair trial."[355] In addition, Article 49 of the Code of Conduct stipulates that the Prosecutor shall:

> (a) conduct investigations with the goal of establishing the truth, and in the *interests of justice*; (b) consider all relevant circumstances when assessing evidence . . . ; (c) ensure that all necessary and reasonable enquiries are made and the results disclosed in accordance with the requirements of a *fair trial*, whether they point to the guilt or the innocence of the suspect (emphasis added).[356]

The Prosecutor's failure to challenge the admissibility decision of the Appeals Chamber contravenes principles of good practice and her obligations under the Code of Conduct and contradicts UN Guidelines on the Role of Prosecutors. Under the current ICC regime, the Office of the Prosecutor is the only body that can challenge admissibility decisions, as part of a duty to ensure the proper and effective administration of justice.[357] By allowing the admissibility decision to stand, the Prosecutor risks the court's credibility and communicates a dangerous message: that certain types of violations can and will be allowed to "slip through the cracks."

1. A Legitimacy Crisis Worsened: Impunity in Libya and Beyond

Considering the continuing dysfunction of the Libyan judicial system, it is clear that the goals of "positive complementarity" have not been realized in Libya.[358] The incompetence of the current

---

PRINCIPLES 939, 952 (Göran Sluiter et al. eds., 2013).

355. Int'l Crim. Ct., Code of Conduct for the Office of the Prosecutor, Introduction: Five Fundamental Rules, ¶ 4, OTP2013/024322 (Sept. 5, 2013).

356. *Id.* ¶ 49.

357. Rome Statute of the International Criminal Court, *supra* note 15, art. 19(10) (stating that the Prosecutor may request an admissibility decision review when they find that "new facts have arisen which negate the basis on which the case had previously been found inadmissible").

358. FIONA MANGAN & CHRISTINA MURTAUGH, SECURITY AND JUSTICE IN POSTREVOLUTION LIBYA 31 (Peaceworks, 2014),

Libyan judicial system is manifest in a number of ways, including: the failure to incorporate international core crimes and international human rights law into the provisions of Libya's penal law; the persistence of militia justice, legal impunity and lawlessness; the absence of security and public order; and a lack of trained judicial actors.[359] Many courts have suspended their activities due to the targeting of judges and prosecutors.[360]

The overall demise of Libya's judicial systems continues unabated today. Libya's domestic judicial system "has collapsed in several parts of the country. It is unable to provide recourse for victims of abuse."[361] Libya has fallen to an all-time low as political elites, unable to agree on even a governmental structure, deploy armed militias to control territory and economic assets.[362] The nature and seat of government continues to be contested.[363] The collapse of central government and continuing armed conflict has eliminated any appearance of law and order in many parts of the country.[364]

In February 2016, the OHCHR observed that,

> [t]he Libyan judicial system has been the target of crippling, violent attacks with actors such as judges and prosecutors being subject to

---

https://www.usip.org/sites/default/files/PW100-Security-and-Justice-in-Post-Revolution-Libya.pdf.

359. Zawati, *supra* note 17, at 248.

360. *Libya: New ICC Investigation Needed Amid Crisis*, HUM. RTS. WATCH (May 11, 2015), https://www.hrw.org/news/2015/05/11/libya-new-icc-investigation-needed-amid-crisis (noting that the breakdown in rule of law has "contributed to a culture of impunity and . . . lawlessness").

361. *Id.*

362. *The Current Situation in Libya: A USIP Fact Sheet*, U.N. INST. PEACE (May 16, 2016), https://www.usip.org/publications/the-current-situation-in-libya (describing how Libya's issues are further exacerbated by ISIS and other violent extremists "exploiting" the power vacuum to "expand operations.").

363. William Danvers, *Toward a More Perfect Union: The Struggle for Security in Libya*, CTR. AM. PROGRESS (Dec. 8, 2016), https://www.americanprogress.org/issues/security/reports/2016/12/08/294447/toward-a-more-perfect-union-the-struggle-for-security-in-libya (explaining that the internationally recognized "Government of National Accord" continues to be challenged by the "House of Representatives" and the "General National Congress" factions).

364. *Libya: Flawed Trial of Gaddafi Officials*, *supra* note 76 (describing how two rival "de facto" governments are attempting to control different sections of the country).

> killings, assaults, abductions, and threats. Such attacks have caused the system to come to a halt in many areas of Libya, in particular the eastern and central regions, and have compromised the functioning of the courts that remain open.[365]

In addition to militia intimidation and interference, the International Crisis Group described "a parallel judicial system in which independent armed groups assumed state functions, arresting, detaining and kidnapping individuals without judicial oversight or accountability."[366] The use of detention centers outside the legal framework by armed actors not accountable to the state is a particular challenge for the Libyan justice system.[367]

An additional challenge comes from the Islamic State (ISIS), which is expanding operations in Libya.[368] The continued lack of state authority in most parts of Libya has resulted in both the expansion of ISIS and a tragically deteriorating humanitarian situation.[369] The country has become a marketplace for the trafficking of human beings and the smuggling of migrants, thus leading to a significant risk that "these activities could further provide fertile ground for organised crime and terrorist networks in Libya."[370] In addition, the Prosecutor said her Office remained concerned about ongoing civilian deaths as a result of reported executions by ISIS.[371]

---

365. Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya, Human Rights Council, Office of the U.N. High Comm'r for Human Rights, U.N. Doc. A/HRC/31/CRP.3, at 55 (Feb. 15, 2016), http://www.ohchr.org/Documents/Countries/LY/A_HRC_31_47_E.pdf (discussing how "conflict-related detainees . . . remain without access to judicial review" and there is a general "lack of genuine access to justice.").

366. INTERNATIONAL COMMISSION OF JURISTS, *supra* note 158, at 20; *see also* International Crisis Group, Trial by Error: Justice in Post-Qadhafi Libya, Report No. 140 at 18 (Apr. 17, 2013), http://www.refworld.org/pdfid/57ee8f9f4.pdf.

367. Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya, *supra* note 365, at 55.

368. *The Current Situation in Libya: A USIP Fact Sheet*, *supra* note 362 (highlighting how Libya is "trapped in a spiral of deteriorating security, economic crisis, and political deadlock").

369. *Libya must have functioning government to end 'tragic' humanitarian situation, Security Council told*, UN NEWS CENTRE (June 6, 2016), www.un.org/apps/news/story.asp?NewsID=54150#.WIYWYtKLTct.

370. Bensouda May 8, 2017, *supra* note 343, ¶ 27.

371. Bensouda May 26, 2016, *supra* note 339, ¶ 21(stating that the Prosecutor's office was attempting to contribute to resolution of the Libyan conflict by

According to the United Nations Office for the Coordination of Humanitarian Affairs, violence and ongoing political instability has affected more than three million people across the country.[372] As of late 2016, an estimated 2.44 million people were classified as internally displaced, refugees, asylum-seekers, migrants, or non-displaced but conflict-affected persons in need of protection and some form of humanitarian assistance.[373]

Threat remains real and makes it increasingly difficult for Libya to emerge from conflict or for fully functioning judicial institutions to take root. In this regard, the ICC Prosecutor has recently affirmed that reports indicate that the country is at risk of returning to widespread conflict.[374] She is correct in asserting that such an outcome "will surely aggravate a climate of impunity, which could in turn lead to widespread human rights abuses and violations of international humanitarian law."[375]

IX. CONCLUSION

After years of failing to define the precise relationship between Article 17 and due process rights, the Appeals Chamber, in the *Al-Senussi* case, took a first timid step in establishing the link between complementarity and human rights. Even though the court remained consistent in its position that unwillingness generally applies to proceedings that would lead to a suspect evading justice, the Appeals Chamber—for the first time ever—accepted that there is a correlation between human rights and unwillingness under Article 17(2)(c) of the Statute.[376] Some have argued that the Appeals Chamber's judgment should be celebrated, as it demonstrates that there are certain violations of due process rights that the court simply

investigating high-level officials).

372. *Progress in Libya marred by ongoing volatile security situation and economic challenges – UN envoy to Security Council*, UN NEWS CENTRE (Sept. 13, 2016), www.un.org/apps/news/story.asp?NewsID=54913#.WIYi8NKLTcs.

373. *Id.*

374. Bensouda May 26, 2016, *supra* note 339, ¶ 3.

375. *Id.*

376. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgment on Al-Senussi Appeal, ¶¶ 17, 2, 190, 230(3).

will not tolerate.[377]

However, the Appeals Chamber was eager to limit the relationship between human rights and complementarity, by stating that violations of due process rights would only bear on findings of admissibility if they were "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect."[378] In fact, in the view of the Appeals Chamber, even if the lack of access to legal representation during the investigation stage of the proceedings violated Al-Senussi's right to a fair trial, such violations would not reach the high threshold for finding that Libya is unwilling genuinely to investigate or prosecute Al-Senussi.[379]

As demonstrated above, the terms "egregious," "flagrant," and "serious" have been used in international law to denote violations of the highest degree of seriousness.[380] Notwithstanding the abundance of legal instruments foreseeing "grave" or "gross" violations of human rights, there is no uniform understanding of what constitutes a "serious violation" and hardly any discussion in international practice with regard to the meaning and legal value of this expression.[381] International and regional bodies have not applied a coherent language in this field, but conversely have utilized the terms "gross," "grave" and "serious" interchangeably, without necessarily specifying the distinctive features of each term.[382] Furthermore,

377. *See* Ondřej Svaček, *The Human Rights Dimension of the ICC's Complementarity Regime*, 6 CZECH Y. PUB. & PR. INT'L. L. 273-88 (2015).

378. *Prosecutor v. Gaddafi*, Case No. ICC-01/11-01/11 OA 6, Judgment on Al-Senussi Appeal, ¶¶ 17, 2, 190, 230(3).

379. *Id.* ¶ 191(going onto the say that because Libya assured the Court that Al-Senussi's trial would not have commenced without legal representation for Al-Senussi, there was no intent to deny him access to a lawyer).

380. Karimova, *supra* note 284, at 6.

381. Ilia M. Siatitsa, *Serious violations of human rights: The emergence of a new legal regime?*, ANNUAL EDINBURGH POSTGRADUATE LAW CONFERENCE 2014, www.lawphdconference.ed.ac.uk/2014/11/19/serious-violations-of-human-rights-the-emergence-of-a-new-legal-regime (last visited Apr. 11, 2017) (discussing how there is "hardly any reflection in practice" regarding the meaning of "serious violation," but that "serious" indicates that a particular violation "is somehow of a greater concern" than less serious violations).

382. Karimova, *supra* note 284, at 12 (stating that the definition could be clarified reviewing "soft law instruments" such as declarations, guidelines, and

international jurisprudence shows that no systematic rule makes it possible to distinguish less serious from more serious breaches of human rights.[383] Most regional human rights tribunals have in fact rarely applied this distinction in the course of assessing the fairness of trial proceedings.[384]

Thus, the Appeals Chamber's determination sets a very high threshold of proof for establishing that a violation of due process rights amounts to unwillingness under Article 17(2)(c). There is nothing in the text of the Rome Statute, nor in the drafting history, to indicate that the relationship between human rights and complementarity is to be defined on the basis of distinguishing between "ordinary" and "egregious" violations of due process. In fact, as demonstrated above, the drafting history suggests that the threshold for any such violations—especially in the context of determining independence and impartiality—is to be established in regard to the principles of due process recognized by international law.[385]

Fair trial rights under international law have been codified under a number of human rights instruments and are considered *jus cogens* norms.[386] Issues such as limited access to counsel, insufficient time and facilities for lawyers to confer with clients, and limited access to evidence, all of which have been widely reported in the context of the national proceedings in Libya,[387] would amount to violations of

---

expert opinions).

383. *Id.* at 21 (noting that the International Court of Justice has failed to draw this distinction, while the African Court and Commission (and other regional bodies) have attempted to categorize violations).

384. *Id.* at 21-25 (comparing the African regional bodies' attempts to create distinctions in cases with "numerous systems," the European analysis of cases involving violations against individuals, and the Inter-American system's interchangeable use of adjectives when describing violations).

385. *See* Rome Statute of the International Criminal Court, *supra* note 15, art. 17(2) (stating that a violation is determined based on proceedings clearly conducted to shield the person from actual responsibility, "unjustified delay in the proceedings," and blatant partiality in the proceedings).

386. Robinson, *supra* note 259, at 10-11.

387. *See* ELLIS, TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 37 ("Trial observers reported a number of instances in which defence lawyers were not given adequate time to consult with their clients, and where such time was allotted, prison security personnel listened in on meetings. Defence lawyers complained of

due process under Article 14 of the ICCPR, without having to qualify as "egregious" or more serious than an "ordinary" breach.[388]

In addition, and as seen above, academic and expert opinion further suggests that issues relating to due process, such as a failure to allow the accused adequate time and/or facilities to prepare his or her defence, and lack of access to counsel, are relevant indicators of "unwillingness" under Article 17(2)(c).[389]

Furthermore, the Appeals Chamber accepted that the issue of legal representation in Mr. Al-Senussi's case—which was still in the early stages of exhibiting signs of concern—could amount to a violation of due process in the future.[390] The court stated, "[S]hould it later become clear that the issue of legal representation cannot be resolved, this may be a basis for the Prosecutor to seek, pursuant to Article 19(10) of the Statute, a review of the decision that the case against Mr. Al-Senussi is inadmissible."[391] It is important to note that the Appeals Chamber concentrated on the continuity of the breach.[392] This indicates that the Appeals Chamber regards the lack of access to counsel as a sufficiently "egregious" breach that it continued to be an issue throughout the proceedings. Thus, even with the high threshold set by the Appeals Chamber in its *Al-Senussi* admissibility decision, additional developments in the domestic proceedings occurring after the date of the decision highlight the need for a fresh assessment of admissibility.

However, despite the plethora of available evidence pointing to decisive new developments in the domestic proceedings, the OTP

---

this frequently, both privately and during court sessions.").

388. *Id.* at 11-12 (noting that although Article 14 lists the "'minimum guarantees of fairness,'" a hearing's fairness will be "assessed on its merits, and based on the particular circumstances of each case").

389. *See* MCDERMOTT, *supra* note 315, at 157-62 (citing scholarship on ICC "complementarity" and the necessity of "intent" to deny due process protection in domestic proceedings).

390. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled "Decision on the Admissibility of the Case Against Abdullah Al-Senussi" (Judgement on Al-Senussi Appeal), ¶ 201 (July 24, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_06755.PDF.

391. *Id.* ¶ 201.

392. *Id.*

was simply not willing to concede that it erred in its assessment.[393] The Prosecutor's responsibility to prosecute cases in a manner to promote fairness to the accused should have promptly led her to consider the new facts arising after the admissibility decision in the *Al-Senussi* case. These facts clearly negate the basis on which the case was previously found inadmissible for the purposes of Article 17 of the Rome Statute, and plainly show that domestic proceedings in Libya can no longer be regarded as being capable of providing any genuine form of justice to the accused.

This article has demonstrated that additional evidence, which became available throughout and after the conclusion of the domestic proceedings, made it abundantly clear that Mr. Al-Senussi's lack of legal representation was not resolved and, in fact, was a problem that persisted throughout the proceedings.[394] This one issue, along with others analyzed in more detail in this article, significantly undermined the fairness of the proceedings. It is true that not all the regime trial procedures failed to meet international standards.[395] My own report acknowledges that judges and lawyers actively attempted to safeguard defendants' rights, that judges made commendable efforts to ensure proceedings were handled with professionalism, and that the judges made a significant effort to promote the appearance of equality of arms during formal proceedings.[396]

However, although attempts were made to comply with international fair trial standards and impartiality, they were simply not met. If the deficiencies noted in various reports do not, as stated by the OTP, satisfy "that new facts exist which would warrant an application under Article 19(10) at this time," then what new facts would warrant such an application?[397]

In this respect, the ICC Prosecutor has lately opened a small window to the possible opportunity to determine whether new information or facts have arisen that could trigger an Article 19(10)

393. *See Libya: New ICC Investigation Needed Amid Crisis*, *supra* note 360 (reporting that despite sending a letter to OTP regarding new facts in the case, the prosecutor would only concede to continued monitoring of the case).

394. *See* ELLIS, TRIAL OF THE LIBYAN REGIME, *supra* note 80, at 38-39.

395. *Id.*

396. *Id.* at 26-27, 41-43.

397. Bensouda May 8, 2017, *supra* note 343, ¶ 22.

application for review of the *Al-Senussi* case.[398] As this article has undeniably demonstrated, and what the Prosecutor has obstinately refused to acknowledge for years, Libya has fallen short of international fair trial standards.

Now more than ever, in the face of the tangibly worsening situation in Libya that is heavily affecting the ability of the country to conduct proceedings in full respect for the rights of the accused, the Prosecutor is called upon to take action and finally let the *Al-Senussi* case fall within the ICC jurisdiction.

In spite of the complexities involved with the regime trials, the only conclusion to be reached is that international standards have been unduly compromised. There is still a danger that the OTP is being seen as trying to "whitewash" the domestic trials so as to uphold its early position on admissibility, a position that seems untenable in light of new evidence at hand.[399] In addition, by encouraging Libya's domestic proceedings, despite evidence of flaws to the legal system, the OTP dramatically contributed to the ICC's ongoing legitimacy crisis, exposing the Court to risk that it will be perceived as an institution that condones the violation of due process rights. The court's determination in the *Al-Senussi* case is inconsistent with the intentions of the original drafters of the Statute, the practice of other tribunals, and general principles of international human rights law.

In fact, the customary nature of fair trial and due process standards has been abundantly recognized in a number of human rights instruments and confirmed in various judgments and decisions of international courts and tribunals, to the extent that they have even achieved the status and imperative force of *jus cogens* norms.[400] Thus, Libya is bound to respect, protect and fulfil human rights standards within its jurisdiction, including the right to have access to legal representation and to be tried before an independent and impartial court or tribunal, the right to adequate time and facilities for the preparation of the defense, and the right to obtain the examination of witnesses on the accused's behalf and to challenge

398. *Id.*
399. *Id.* ¶¶ 3, 20-27.
400. Robinson, *supra* note 259, at 4.

witnesses testifying against him.

It seems clear that the ICC has exhibited a tendency to focus more on its role in catalyzing domestic prosecutions than it has in ensuring international standards of fairness at the domestic level. Thus, "let flawed trials be" can be the mantra of positive complementarity.[401] The ICC's endorsement of "positive complementarity" is a lofty pursuit. It nobly endeavours to enhance international assistance to national jurisdictions in order to strengthen the willingness and ability of those jurisdictions to conduct the investigation and prosecution of ICC crimes. I have personally advocated for an expansion of domestic war crimes tribunals.[402]

However, it is clear that in the case of Libya, policies for the sake of "positive complementarity" took precedence over the ICC's primary mandate to challenge impunity. Consequently, the OTP facilitated the weakening of the Libyan judicial system. The Court's incoherent approach in the admissibility decision, compounded by the continuing legitimization of the Libyan domestic trials, can only raise doubts surrounding the politics of the ICC. Even for the most avid supporters of the ICC, its involvement in Libya illustrates the ICC's severe limitations in creating positive effects for post-conflict justice and, consequently, worsens the ICC's ongoing legitimacy crisis.

Some argue that there should be a level of leniency towards due process rights, allowing "imperfect" or "flawed trials" that do not meet international standards just for the sake of sparking a national conversation about judicial reform.[403] Yet in Libya, where the trials concerned were beyond flawed, and riddled with due process violations, it is hard to argue that allowing "Libyans to try Libyans" brought any of the aforementioned satisfactory outcomes. Rather, as the former Libyan Justice Minister Salah al-Marghani, who was in

401. *See* Mégret & Samson, *supra* note 50, at 577-81.

402. *See* ELLIS, SOVEREIGNTY AND JUSTICE, *supra* note 25, at 2, 11 (discussing how domestic human rights bodies "can play an indisputable role in post-conflict reconciliation," citing Serbia and Iraq and contexts in which a stronger domestic mechanism would have served reconciliation efforts).

403. Mégret & Samson, *supra* note 50, at 578 (arguing that if Gaddafi has been tried at The Hague, the public would have perceived his trail as "preferential treatment" and not true accountability to the citizens he harmed).

power when the trial began, stated, Libyans have been "deprived of finding out the truth in a fair trial to judge an era of severe tyranny."[404] Indeed, the NGO Libyan Lawyers for Justice in Libya (LFJL) explored how the Gaddafi trial "prevented the establishment of a detailed account of the truth behind the serious human rights violations considered during the proceedings."[405] It failed "to determine individual criminal responsibility for the atrocious crimes or to substantively evidence the chain of command which enabled such acts to be committed."[406] Instead, many of the defendants were held responsible by association for crimes attributed to the Gaddafi administration, without evidencing their individual involvement with specific acts."[407]

Even top Gaddafi officials found themselves immune. According to news reports, in July 2016, the UN-backed Libyan Government granted amnesty to a number of individuals, including Saif Al-Islam Gaddafi.[408] This comes amid a wider amnesty granted to Gaddafi-era prisoners by the UN-backed government to promote reconciliation.[409] Thus, as argued by the LFJL Director, Elham Saudi:

> The lack of accountability in Libya remains a huge concern. Although human rights violations were part of the negotiations of the political dialogues led by the United Nations, amnesty laws remain on the books in Libya. The recent draft constitution also proposes further entrenchment of such measures. These amnesties are not only inconsistent with international law, but undermine efforts to transition Libya to a state

404. Rana Jawad, *Libya death sentences cast long shadow over rule of law*, BBC NEWS (Aug. 12, 2015), www.bbc.co.uk/news/world-africa-33855860.

405. *LFJL is concerned that the absence of fair trial standards during Gaddafi official trials will jeopardise the right of victims to justice*, LAWYERS FOR JUSTICE IN LIBYA, (July 28, 2015), [hereinafter Lawyers for Justice in Libya] www.libyanjustice.org/news/news/post/201-lawyers-for-justice-in-libya-lfjl-is-concerned-that-the-absence-of-fair-trial-standards-during-gaddafi-official-trials-will-jeopardise-the-right-of-victims-to-justice.

406. *Id.*

407. *Id.*

408. Chris Stephen, *Gaddafi son Saif al-Islam 'freed after death sentence quashed'*, GUARDIAN (July 7, 2017), https://www.theguardian.com/world/2016/jul/07/gaddafi-son-saif-al-islam-freed-after-death-sentence-quashed.

409. *Id.*

> where impunity is no longer tolerated.[410]

Furthermore, Libyan authorities have demonstrated their unwillingness to combat impunity for serious crimes committed by militias. Indeed, Libya's adoption of Law No. 38 of 2012 concerning procedures for the transitional period provides a blanket immunity for persons who carried out the task of toppling the Gaddafi regime.[411] Similarly, Law No. 17 of 2012 regarding the rules of national reconciliation and transitional justice limits the cases to be addressed by the Fact-Finding and Reconciliation Commission to crimes allegedly associated with the former regime, while crimes committed by insurgents, armed groups and the transitional government's agents remain unconsidered.[412] Thus, rather than improving national judicial mechanisms in Libya, the Memorandum has created an immunity gap between rebels and Gaddafi officials.

Ultimately, such a lack of accountability jeopardized the right of victims to truth, reconciliation and justice, and in consequence, neither delivered on the ICC's promise to effectively challenge the sham proceedings nor on the principles of transitional justice. As an international legal institution, the ICC's effectiveness depends on maintaining the support of states as well as providing justice. Even if the sole purpose of the ICC is to prevent impunity, this can only be done through the course of fair, independent, and impartial proceedings. In this regard, while we may allow slight imperfections, the *Al-Senussi* case was beyond flawed and requires review.

410. Lawyers for Justice in Libya, *supra* note 405.

411. Zawati, *supra* note 17, at 230 (stating that these laws are "retributive rather than constructive" and "ironically" led to the uprising against the Gaddafi regime).

412. *Id.*

* * *